
# NATIONAL PROSECUTION STANDARDS

*Second Edition*

NATIONAL DISTRICT ATTORNEYS ASSOCIATION

# National Prosecution Standards

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National District Attorneys Association
Alexandria, Virginia

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# Foreword

The second edition of the *National Prosecution Standards* is the result of a concerted effort by a wide range of individuals. The project met with success through the dedicated service of all those involved. The variety of experiences and backgrounds of those who contributed to the project gave insight into the resulting contemporary outlooks presented here.

The largest contribution to the project was made by the members of the National District Attorneys Association's Prosecution Management and Standards Committee. The Committee reviewed, scrutinized, revised, and then adopted the standards as they progressed through a series of drafts. The Association sincerely appreciates the hard work and dedication of these individuals.

Several others who offered unique insights to the project were **Lee C. Falke,** Prosecuting Attorney, Dayton, Ohio, **Andrew L. Sonner,** State's Attorney, Rockville, Maryland (both of whom served on the original *National Prosecution Standards* project in the 1970s), and **Richard M. Wintory,** Director of the National Drug Prosecution Center, a project of NDAA's affiliate, American Prosecutors Research Institute.

Additionally, the project was served by an advisory committee which carefully scrutinized draft standards from a variety of perspectives. NDAA is grateful to those who served on this committee.

The National District Attorneys Association was fortunate to have the services of two former NDAA staff members who worked on the original effort. **James P. Manak** was the original project director and served as the director of this effort. **William E. Hornsby, Jr.,** was a prosecutor analyst for NDAA on the original project and served as a consultant to the current project. Mr. Manak is a member of the faculties of Northwestern University Traffic Institute and John Marshall Law School (Chicago). Mr. Hornsby is staff counsel, American Bar Association (Chicago).

Other NDAA staff contributing in large part to the success of this revision project were **Dwight C. Price,** grant manager, and **D. Jean Holt,** liaison to the Prosecution Management and Standards Committee.

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# INTRODUCTION

## Background

The National District Attorneys Association originally initiated the development of prosecution standards in 1974. Spanning two and a half years, the project established a demographic criteria for the selection of 54 local prosecutors, divided into six task forces, meeting four times each, combining with a professional staff of over 20 and culminating in the 27-chapter volume, *National Prosecution Standards* (1977).

Not only was this the most ambitious project to establish prosecution standards ever undertaken, but it was the sole project to rely exclusively on the input of prosecutors for its direction. Unlike any other set of standards, these were standards written for prosecutors by prosecutors.

While the *National Prosecution Standards* (1977) "NPS" continue to serve as a reference source on the prosecution function, the passage of time has diminished its original intent and impact. The applicability of standards established within a system at a particular point in time is often reduced quickly when that system is as dynamic as that of criminal justice. Even though the original standards had a visionary perspective, the passage of 13 years has resulted in the natural consequence of limited direction for subsequent future changes in the criminal justice system and the prosecution function.

In numerous ways the prosecutor's office of the 1990s is only remotely similar to that of the 1970s. Consider, for example, the technological enhancements developed over the last decade. PCs, VCRs, and fax machines are now taken for granted. Yet, when the standards were first developed prosecutors debated whether to recommend electric typewriters for all support staff—as opposed to manual typewriters.

Changes in fundamental approaches to the practice of law have been profound as well. In 1983, the rules of ethics took a substantial change of direction when the American Bar Association promulgated the Model Rules of Professional Conduct, replacing the Model Code of Professional Responsibility. Additionally, the

profession elevated its focus on ethics and professionalism. Many jurisdictions have developed codes of professionalism as a method of enhancing civility in the courtroom. The quality of life of lawyers working long, hard hours in contentious, adversarial environments has emerged as an issue at the same time that the beginning salaries of new associates in major law firms have approached that of the chief prosecutor.

New social problems have emerged since the 1970s, creating a need for new prosecution standards. The battle against illegal drugs has been elevated to the status of a war, requiring new weapons such as forfeiture statutes. Caseloads have increased to a point where plea bargaining is less controversial, yet the strain on the system is magnified. Electronic monitoring of defendants and prisoners has emerged as an example of alternatives to incarceration and other traditional correctional approaches.

As case law and statutes sometimes are reflective of social change, they, too, have influenced the need to revise the standards, as well as rendered direction for that revision. Just as the landmark U.S. Supreme Court decisions of the late 1960s and early 1970s strongly influenced the original set of standards, recent decisions of impact on prosecution, such as *Town of Newton v. Rumery,* 107 S.Ct. 1187 (1987), must be considered in the development of new standards. Likewise, only contemporary standards can be used by prosecutors to demonstrate issues and serve as persuasion before courts, legislatures, and other governing bodies.

All of these circumstances combine to create the need to revise prosecution standards. While the original work is far from obsolete, its utility could only be made contemporary by thorough review, revision, and the development of new standards.

## Methodology

With funding from the State Justice Institute, the National District Attorneys Association "NDAA" initiated the revision of its National Prosecution Standards in September 1989. Through a series of seven open meetings over 13 months, the NDAA Prosecution Management and Standards Committee carried out a

process resulting in the revised standards. Preliminary to its first meeting, the Committee members reviewed the original standards as well as standards and codes of ethics from virtually every analogous standard-setting body in America.

Based on this review, the Committee reached a number of conclusions at its first meeting which cast the direction of the ultimate revision. The Committee first decided that the standards should not be limited to ethical provisions. Nor were the standards to be limited in scope or subject matter to those things under the direct control of local prosecutors. In both respects, the revision was to be consistent with the original standards, which had set out to balance a pragmatic approach with a visionary design. The revised standards were to address the problems of the prosecution function, and would necessarily include reform and revision of statutes and action of related segments of the criminal justice system.

With this perspective, the Committee undertook a thorough review of the original standards, focusing on the numerous subjects needing attention and improvement. In many areas, the standards and commentaries were too detailed, serving better as a resource for scholarly research rather than the more necessary blueprint for improvement of the prosecution function.

The organization of the standards needed improvement as well. Originally separated into three parts, the standards are now divided into five; the first focusing on the function and administration of prosecution and its relations with other entities, while the three parts entitled "pre-trial," "trial," and "post-trial" provide a procedural sequence of activities from charging to appeal. The last part, "juvenile justice," stands alone because that standard was considered separately by NDAA's Juvenile Justice Committee.

The Prosecution Management and Standards Committee also reorganized the topics to reduce any repetition by deleting topics which it found to be no longer relevant and adding new subjects.

## Results

Notwithstanding the reasons and needs for revision, the original *National Prosecution Standards* presented a good springboard to

address improvements and necessary new topics. The Committee frequently turned to the original standards for direction, ideas, and language to incorporate into revisions.

As noted, the revised standards are restructured to include five, rather than three, parts. Topics of the first and third parts of the original standards have been restructured into the first part of the revised edition. The second part of the original standards parallels the parts entitled "pre-trial," "trial," and "post-trial" of the revision.

Specific *Additions* include the following topics:

— Civil Representation
— Professionalism
— Conflicts of Interest
— Relations With Prosecutorial Entities
— Relations With the Defendant
— Relations With Funding Entities.

Many of these additions emphasize the prosecutor's responsibility to upgrade the functions of the office and his role in the criminal justice system.

Specific standards deleted from parts I and III of the original standards include:

— Legal Reform and Code Revisions
— Certification
— File Control
— The Courts
— Code of Professional Responsibility for Defense Counsel
— Indigent Defense
— Effective Representation
— Automated Legal Research
— Financial Disclosure.

While some elements of deleted standards are incorporated into revised standards, the orientation of the deletions has resulted in more of a concentration in those areas within the prosecutor's domain. For some standards the Committee retained the topic but completely or substantially revised the substance. These include:

— Relations With State Organizations
— Relations With the Court
— Relations With Defense Counsel

— Relations With Victims
— Relations With Witnesses
— Relations With the Public.

Many other standards in the first part, "functions/relations," have seen less dramatic, yet not insignificant, revisions consistent with the objectives detailed above.

The format of the parts entitled "pre-trial," "trial," and "post-trial" more closely parallels that of the original part II. However, the original standards included eleven topics listed as special problems. The Committee concluded that jurisdictional variations, priorities, and trends combine to create an environment in which standards in these areas would not effectively serve their purpose and they were deleted, except for standards on juvenile delinquency, which were retained (although completely re-written by a separate NDAA committee in 1987).

While many topics remained fundamentally unchanged, many new concepts have been incorporated into the standards. In the screening, charging, and diversion standards, the defendant's ability to waive civil liability claims is recognized as a newly-acceptable procedure. Revisions in plea bargaining note the economic advantages and permit withdrawal of the plea offer when that goal is no longer viable. Pre-trial detention recognizes the utility of electronic monitoring devices and also finds preventive detention to be a necessary tool in addressing contemporary public safety concerns. Standards on appeal bonds are modified to place the burden for obtaining release on those convicted, with an eye toward public protection and enhancement of the integrity of the trial process. A new section provides standards on forfeiture, a newly-successful tool in law enforcement, especially in the war on drugs.

Due to the self-governing nature of the legal profession, the role of these standards should be noted. While each standard is viewed by NDAA as a necessary part of an optimal system of justice, it is not the intent of NDAA that these standards serve in any way as a basis to sanction a prosecutor who has deemed it more appropriate to vary his practice from the standards. The word "should" is used in the standards to indicate the suggestive nature of the standards.

Whenever the personal pronouns "he," "him," or "they" are used in the standards and commentaries, they refer to both masculine and feminine genders.

Finally, the distinctions in the commentaries should be mentioned. In the original standards, the commentaries were frequently so long and detailed that they overshadowed the standards themselves. As a reference source, they undoubtedly were the premier comprehensive work on prosecution at the time and still serve as a valuable resource. However, in the revision, the commentaries have been rendered more readable. They serve to explain and justify the standards in a manner designed to enhance the utilization of the entire work. They also conform to the contemporary format for commentaries now used in the NDAA Juvenile Justice Standards and by other standard-setting bodies, such as the American Bar Association in the Model Rules of Professional Conduct and the current drafts of the ABA Criminal Justice Standards.

# APPLICATION

A unique feature of the original standards was the incorporation of viewpoints of prosecutors from a complete range of jurisdictional size and variation. In some of the original standards, a minority view from the task forces was presented as an alternative for offices of comparable demographics.

In the revision of the standards, the Prosecution Management and Standards Committee considered the perspectives of different sizes and types of offices and was able to promulgate unified standards on the various topics. The Committee did this with the view that the standards would be considered directional and flexible. Clearly, not every standard is applicable in every jurisdiction. Many standards can be modified to fit local needs. Prosecutors are encouraged to consider the extent to which they are applicable and to expand, modify, or alter them to reflect jurisdictional needs and realities.

In terms of application and implementation, there are two types of standards: those that can be implemented through the authority

of the prosecutor and those that require more than that authority. Prosecutors are encouraged to review the standards to make this distinction and structure plans for short-term and long-term implementation. The greatest responsibility for the prosecutor is in the effort to implement those standards beyond the authority of the prosecutor. As agents for institutional and system changes, those standards which require change by legislation, case law, or through other entities, are capable of effecting dramatic improvement in the effectiveness of prosecution. It is, therefore, the responsibility of prosecutors to urge the adoption of the concepts found in the standards by all reasonable methods.

While prosecutors are seeking change within a visionary design, caution must also be exercised in relying on standards which lack immediate authority. Indeed, some standards may be ahead of current case law, ethics opinions, or other authority. It is not the intent or purpose of NDAA to ignore or usurp such authority. Prosecutors are specifically cautioned to be aware of and comply with controlling legal authority. At the same time, prosecutors have a responsibility to work toward modifications to enhance their function. The standards themselves give direction for such modification. Beyond that, prosecutors should not hesitate to cite these standards in any persuasive manner to bar associations, legislatures, courts, budget authorities and any other entities with the ability to effectuate implementation. These standards are quite literally the voice of prosecution present and future.

# THE PROSECUTION FUNCTION

### 1.1 Primary Responsibility

The primary responsibility of prosecution is to see that justice is accomplished.

### 1.2 Civil/Criminal Jurisdiction

The prosecutor should represent the case of the people as to both civil and criminal jurisdiction. The criminal representation should be the primary responsibility. In jurisdictions where civil and criminal responsibilities are vested in the prosecutor, provisions for alternative representation in conflicts of interest must be made.

### 1.3 Societal Rights

The prosecutor should at all times be zealous in the need to protect the rights of individuals, but must place the rights of society in a paramount position in exercising prosecutorial discretion in individual cases and in the approach to the larger issues of improving the law and making the law conform to the needs of society.

### 1.4 Full-Time/Part-Time

The office of the prosecutor should be a full-time profession. The prosecutor should neither maintain nor profit from a private legal practice. In those jurisdictions unable to justify the employment of a full-time prosecutor, the prosecutor may serve part-time until the state determines that the merger of jurisdictions or growth of caseload necessitates a full-time prosecutor.

The prosecutor should devote primary effort to his office and should have no outside financial interests which could conflict with that duty.

### 1.5 Rules of Conduct

At a minimum, the prosecutor should abide by all applicable

provisions of the Rules of Professional Conduct or Code of Professional Responsibility as adopted by the state of his jurisdiction.

### 1.6 Inconsistency in Rules of Conduct

To the extent that prosecutors are bound by Rules of Professional Conduct inconsistent with these National Prosecution Standards, prosecutors should endeavor to modify the Rules of Professional conduct to make them consistent with these Standards.

## COMMENTARY

The standard recognizes that the prosecutor is primarily responsible for criminal prosecution in his jurisdiction. It is to be read in conjunction with Standards 2.1 thru 2.5, Civil Representation, which set forth the civil representation responsibilities of the prosecutor's office.

The standard recognizes that there are many part-time prosecutors in the United States, both elected prosecutors and staff attorneys. This is an economic fact of life created by the overriding benefit of local accountability and control. Where the position is part-time, it is usually because the sparse population, geographic size of the jurisdiction, budget, and caseload do not warrant that the position be approached as a full-time position. The position of the standard is that the office be approached on a full-time basis, *insofar as that is possible in any given jurisdiction.* While the standard favors the concept of a full-time position (resulting in reduced potential for conflicts of interest, greater availability, and increased accountability), the existence of the position as part-time due to the considerations enumerated, is not forbidden by the standard. The standard merely means that the concept of full-time can be considered a goal where such is not presently feasible.

Whether full-time or part-time, the position should be approached as a career and not as a stepping-stone or sideline. This means that the prosecutor is prepared to bring to his public duties an orientation of *primacy*. No matter what other activities the prosecutor is involved in, his public duties come first. The fostering of

such an attitude will not only serve the immediate public interest but also the prosecutor's professional responsibility in resolving problems that may occur where a potential conflict of interest exists.

The standard does not endorse any particular code of professional responsibility. Indeed, some prosecutors have had considerable differences of opinion over the years with the various codes and standards promulgated by the American Bar Association. These materials have often not fully addressed the special concerns of prosecutors in carrying out their public duties and responsibilities. The standard merely means that the prosecutor—as a member of the bar—is expected to abide by existing rules and codes.

This does not mean, however, that a prosecutor cannot challenge in appropriate *fora* and procedures such code provisions as are believed in good faith to be unjust or inapplicable. The existence of a code or rule does not eliminate the duty of the prosecutor to seek justice and serve the public interest. In this sense, the role of the prosecutor is not always the same as other members of the bar.

Furthermore, the prosecutor should work to modify code provisions which are not in the best interest of the prosecution function. The standards promulgated by the National District Attorneys Association may serve as a guide to assist in the identification of such inconsistent provisions.

While the standard recognizes that the prosecutor is to discharge his duties with fairness to all constituents, the standard—indeed all of the standards—recognizes that the prosecutor has a client not shared with other members of the bar, *i.e.*, society as a whole. No other member of the bar has this broad responsibility. The prosecutor must seek justice. In doing so there is a need to balance the interests of *all* members of society, but when the balance cannot be struck in an individual case, the interest of society is *paramount* for the prosecutor.

This is a principle that runs through all of the standards. Some of the individual standards that follow are couched in terms of "rules" (although not in the sense of being mandatory and sanctionable). Every such "rule" must be read and applied with reference to the underlying principle. In an individual case, application of the principle may dictate a departure from the rule;

where there is a conflict, the principle controls. The prosecutor who applies the principle in good faith—meaning in the context of objective reasonableness—should not be faulted if a "rule" must be varied.

# CIVIL REPRESENTATION

**2.1 Scope**
In jurisdictions where the prosecutor has civil representation responsibilities, he should provide civil representation to agencies and persons designated within the local governmental framework.

**2.2 Specific Assignment**
In carrying out such responsibilities, the prosecutor should, where practicable, designate a specific staff person or persons responsible for interacting with the appropriate local agencies.

**2.3 Concentration**
The prosecutor, in designating the person referred to in standard 2.2, should emphasize that civil representation is considered to be an area of concentration within his office.

**2.4 Training**
The prosecutor should, where practicable, institute an in-house training program for his staff on civil responsibilities, with emphasis on civil liability issues.

**2.5 Risk Management**
The prosecutor should, where practicable, initiate appropriate preventive programs among governmental agencies within his jurisdiction on civil liability risk avoidance. These programs should include training lectures and publications on civil liability topics.

## COMMENTARY

The standards in general concentrate on criminal prosecution, but that focus should not imply that civil representation is not an important function in jurisdictions where civil representation is a designated function. It is essential that the staff assigned to the civil arena be competent and, therefore, the standards recommend that specific staff be assigned and concentrate in these responsibilities.

Virtually all actions taken in the prosecutor's office have civil liability risks. It is essential for local government officials to be alert to the actions that could expose them to liability risks as well. It should be the prosecutor's function to initiate and maintain a civil liability risk avoidance program for his office and those agencies which the prosecutor is responsible to defend in civil litigation.

# SELECTION

### 3.1 Local Control

The prosecutor should be a locally elected official with a term of office of no less than four years.

### 3.2 Qualifications

At the time of filing for election, where applicable, and for the duration of the term of office, the prosecutor should be a member of the state's bar in good standing, a resident of the jurisdiction, and otherwise qualified to seek and hold the office under state law.

## COMMENTARY

The standards favor the election of the prosecutor at the local level. The reason for this has not diminished since it was recognized by the President's Commission on Law Enforcement and the

Administration of Justice, Task Force Report: The Courts, in 1967, when it noted at pp.73-74, that the election of prosecutors at the local level:

> . . . increases the likelihood that the prosecutor will be responsive to the dominant law enforcement views and demands of the community. Since he is not dependent on another official for reappointment, the prosecutor possesses a degree of political independence that is desirable in an officer charged with the investigation and the prosecution of charges of bribery and corruption .... The election of local prosecutors is ingrained in our political traditions. Moreover, experience in several large cities has shown that the elective process can produce dedicated career prosecutors who are highly professional and competent.

The key to election at the local level is public accountability and the need for autonomy within the local jurisdiction. Prosecutors must never be placed in positions where their accountability lies elsewhere. The prosecutor's ability, competence, and performance can and should be judged by the citizens of the jurisdiction he serves. This system also works well to control individual prosecutors in the exercise of sound discretion which is vital to the successful management of crime control.

The standard is recommended notwithstanding the negative aspects of the election process, including the costs of campaigns and of the election itself. Good lawyers who seek prosecution as a career are sometimes unseated. Nevertheless, the benefits of accountability to the local electorate prevails over such drawbacks. The standard takes note of the fact that some jurisdictions have experimented over the years with systems of appointed prosecutors, rather than locally elected. In no case has it been demonstrated that a non-elective office is superior to that of the elective office or can effectively maintain the degree of accountability that the elective office provides. There is no reason to depart from the model that predominates in the overwhelming number of jurisdictions in the United States.

The provision that the prosecutor—both elected and staff—be a member of the bar in good standing at the commencement of his duties and throughout such duties, may seem a truism. Yet, there

have been cases where individuals who were not members of the bar sought to serve on the prosecutor's staff.

It is in the public interest that any action resulting in the disbarment of a prosecutor renders him unqualified to continue in office.

# REMOVAL

**4.1 Procedure**

Each state should provide and maintain a system for removal of the prosecutor which clearly defines the conduct subject to removal and provides notice, hearing, and due process to the prosecutor.

**4.2 Replacement**

Each state should provide and maintain a system of interim or permanent replacement of the prosecutor upon removal which is consistent with that state's traditional prosecutorial selection process.

**4.3 Inappropriate Factors**

Factors which should never be considered in the removal of the prosecutor include, but are not limited to:

a. Characteristics of the prosecutor which are legally recognized to be deemed the basis of invidious discrimination, such as race, national origin, religion, age, and gender;

b. Arrest or indictment alone;

c. Actions and statements within the purview of prosecutorial discretion; and

d. Partisan activities which are legal and ethical.

# COMMENTARY

This standard addresses the removal of prosecutors. It does not address the grounds or basis for removal proceedings, but leaves

that up to the individual states. Procedural due process, however, must be accorded the prosecutor subjected to removal proceedings.

The standard *does* address a number of factors which NDAA believes should *not* be the basis of removal proceedings. Two such factors warrant comment here.

Because the office of the prosecutor may sometimes involve unpopular decisions, the prosecutor stands to be a target of allegations which could lead to arrest or indictment. While not ignoring possible legitimacy of such allegations, the prosecutor in such a situation, like anyone else, is innocent until proven guilty. The removal of an unpopular prosecutor would be too easily subject to manipulation if it could be based on mere arrest or indictment. Therefore, these factors should not be a criteria for removal. Conversely, this is an area where the prosecutor must exercise personal judgment. In some instances, the prosecutor may find the circumstances such as to make it impossible to carry out the duties of the office. A prolonged trial might create a situation in which it is not in the best interest of society for him to continue and resignation should be considered.

The standard otherwise makes it clear that the exercise of a prosecutor's discretion that is not influenced by what could be considered a corrupt motive is not to be a basis for removal, even though the prosecutor's action might be subject to criticism. The standard seeks to protect a key element of the prosecutor's office, *i.e.*, prosecutorial discretion. This element is the cornerstone of the prosecutor's office; perceived abuses of prosecutorial discretion are addressed in our society through the mechanism of the ballot box, not removal, a fact that underscores again the basis for the Selection Standard, *supra.*

# COMPENSATION

### 5.1 Responsibilities

The compensation of the prosecutor should be commensurate with the responsibilities of the office.

### 5.2 Factors to Consider

Factors in determining the compensation of the prosecutor should include, but are not limited to:

a. The benefits to the jurisdiction of encouraging highly competent persons to seek the position with a career orientation;

b. The level of compensation of persons with analogous responsibilities in the private practice of law and private industry;

c. The level of compensation of persons with analogous responsibilities in public service.

### 5.3 Salary Ranges

The salary of the full-time prosecutor should be at least that of the salary of the chief judge of general trial jurisdiction of the district of the prosecutor. The compensation of the elected prosecutor should not serve as a basis for the highest compensation of assistant prosecutors.

### 5.4 Factors Not Considered

Factors which should never be considered in determining compensation of the prosecutor include, but are not limited to:

a. Characteristics of the prosecutor which are legally recognized to be deemed the basis of invidious discrimination, such as race, national origin, religion, age, and gender;

b. Partisan political affiliation;

c. Revenues generated by the prosecution function.

### 5.5 Benefits

A program of benefits, including health and pension provisions, should be established to complement the salary of the prosecutor and be at least equal to that provided to members of the state judiciary. The prosecutor's benefits should include indemnification or insurance to pay all costs of defense against, and judgments rendered, in civil lawsuits arising from the prosecutor's performance of his official duties.

# COMMENTARY

Provision of an adequate salary is an absolute necessity if the office of prosecutor is to function at maximum efficiency. An adequate salary is essential for attracting capable candidates to the position of prosecutor. Without such compensation, capable persons who might otherwise be attracted to the prosecutor's office are diverted to private practice of law or other endeavors.

Provision for an adequate salary level is also essential to reduce the rapid turnover of local prosecutors. Turnover in prosecutors' offices across the country has been traditionally high. The primary reason for this high turnover is inadequate financial compensation. In both initial hiring and retention, the prosecutor's office competes for talented, skilled staff with law firms with rapidly-escalating financial opportunities.

Provision of adequate salaries will also act to reduce the likelihood of prosecutorial misconduct, since adequately paid, full-time prosecutors and their staffs will be less susceptible to temptations of offers of money or favors in return for accommodating individuals whose cases come before them.

The salary provided the prosecutor should be at least that of the salary of the judge of general trial jurisdiction in the district of the prosecutor. As noted by the National Advisory Commission on Criminal Justice Standards and Goals, *Courts* 230 (1973):

> For purposes of salary, the prosecutor should be considered to be on the same level as the chief judge of the highest trial court of the local criminal justice system. Both positions require the exercise of broad professional discretion in the discharge of the duties of the offices. It is therefore reasonable that the compensation for the holders of these offices have the same base.

Those jurisdictions which have part-time prosecutors should have salaries set by a professional compensation board at the state level, in order to assure uniformity within each state.

A review mechanism should be established to periodically examine and evaluate the salary of the prosecutor in light of changing economic conditions. Current practice in many jurisdic-

tions is to provide review and alteration of the prosecutor's salary only at the beginning of each term. This frequently results in an erosion of the prosecutor's salary, which is a disincentive for qualified seekers of the office. Unless statutory provision is made for periodic in-term increases in salary, a board or other mechanism should be established with authority to review and revise prosecutors' salaries in light of changing economic conditions. This periodic review of salaries is very important.

A program of benefits should also be established to complement the salary of the prosecutor and his staff. These benefits should include both health insurance coverage and provisions for accumulation of retirement benefits. A method should be established whereby a prosecutor may be provided vested retirement coverage commensurate with the length of service in office. Indemnification or insurance to pay all costs incurred by the prosecutor in defending against civil lawsuits and in paying judgments should be included in the program of benefits.

# PROFESSIONALISM

### 6.1 Standard of Professionalism

The prosecutor should conduct himself with a high level of dignity and professionalism.

### 6.2 Code Compliance

In those jurisdictions where a code of professionalism has been promulgated, all participants in the system of justice should abide by its provisions, where applicable.

### 6.3 Code Promulgation

In those jurisdictions where no code of professionalism has been promulgated or where such a code is inapplicable or insufficient, the prosecutor should provide leadership in its promulgation and should design and implement a code to be followed by the prosecutor and staff.

### 6.4 Scope of Code

A code of professionalism developed or expanded by the prosecutor should address appropriate conduct in and out of court and include all professional relationships.

### 6.5 Code Provisions

The prosecutor's code of professionalism should include, among other provisions, the following:

a. Counsel should proceed with candor, good faith, and courtesy in all relations with opposing counsel and should act with integrity in all communications, interactions, and agreements with opposing counsel.

b. Counsel should avoid the expression of personal animosity toward opposing counsel, regardless of personal opinion.

c. Counsel should at all times display proper respect and consideration for the judiciary, without foregoing the right to justifiably criticize individual members of the judiciary.

d. Counsel should be punctual in all court appearances. When absence or tardiness is unavoidable, prompt notice should be given to the court and opposing counsel.

e. Counsel should conduct himself with proper restraint and dignity throughout the course of proceedings. Disruptive conduct or argument is always improper.

f. Counsel should treat witnesses fairly and with due consideration. Counsel should take no action in taking testimony of a witness to abuse, insult, or degrade the witness. Examination of a witness's credibility should be limited to accepted impeachment procedures.

g. Counsel should avoid obstructive tactics including, but not limited to, the following:

(1) Bringing frivolous objections, including unfounded objections intended only to disrupt opposing counsel;

(2) Attempting to proceed in a manner previously barred by the court;

(3) Attempting to ask improper questions or to introduce inadmissible evidence;

(4) Using dilatory actions or tactics;

(5) Creating prejudicial or inflammatory argument or publicity.

## COMMENTARY

The prosecutor's obligation to comply with the ethical code and rules of his jurisdiction is a fundamental and minimal requirement. When the prosecutor falls below that standard, he may expect sanctions impacting on a particular case or on the individual prosecutor.

However, the dignity and honor of the profession call for compliance with a higher standard of conduct, one of professionalism. This standard requires the prosecutor to bring integrity, fairness, and courtesy into all interactions, be they with opposing counsel, the court, jurors, or defendants.

Many state and local bar associations have created codes of professionalism. Such codes are generally non-binding but strongly encouraged and used to inspire and invigorate both recently-admitted and long-standing lawyers. Codes are usually aimed at the litigation bar where emotions run highest and the adversary setting generates a competitive orientation. Combining these factors with the axiomatic concept that the prosecutor's function is to seek justice and not merely convict, the need for a code of professionalism is perhaps greater in criminal trial work than any other area of law practice.

Incorporating the elements of professionalism for both the prosecutor and staff is unquestionably beneficial. As an elected official, the prosecutor is always under public scrutiny and, at the same time, has responsibility for the conduct of his staff. A code of professionalism directs staff to expectations regarding conduct, a breach of which can be embarrassing and politically detrimental to the prosecutor. A professional orientation in the courtroom takes the judge out of the position of referee and allows him to be more attentive to the proceedings. This, too frequently, is contrary to the goal of a disruptive lawyer who may have too weak a case to be favorably decided on the merits. Defense counsel may sometimes engage in a flamboyant, theatrical, and disruptive style. If a

prosecutor allows himself to be provoked into similar tactics, he detracts from the merits of the case and serves no useful purpose.

The standards suggest that the prosecutor determine the existence of a state or local code of professionalism and adapt or adopt one if it exists or create one if it does not.

While professionalism is a word of elusive definition, the standard lists a number of types of conduct which must be considered. It is strongly recommended that wherever prosecution adopts and abides by a code of professionalism, the defense bar should reciprocate.

# CONFLICTS OF INTEREST

### 7.1 Conflict Avoidance

The prosecutor should avoid interests and activities which are likely to appear to, or in fact do, conflict with the duties and responsibilities of the prosecutor's office.

### 7.2 Conflicts with Private Practice

In those jurisdictions which do not prohibit private practice by a prosecutor:

a. The prosecutor should avoid representation in all criminal and quasi-criminal defense regardless of the jurisdiction.

b. The prosecutor should avoid any representation in which there is a reasonable belief that the subject matter will be that of a criminal investigation.

c. The prosecutor should avoid any representation of a person who is under criminal investigation, charged or indicted, and any agent or close relative of such a person.

d. The prosecutor should avoid any representation to private clients or prospective clients that the status as prosecutor is or could be an advantage in the private representation.

e. The prosecutor may not designate the status as prosecutor on any letterhead, announcements, advertising, or other communications involved in the private practice and may not in any manner

use the resources of the prosecutor's office for the purpose of such non-prosecutorial activities.

f. The prosecutor should excuse himself from the investigation and prosecution of any client of the prosecutor and should withdraw from the representation of that client.

### 7.3 Specific Conflicts

In all jurisdictions, including those prohibiting private practice by prosecutors:

a. The prosecutor should excuse himself from the investigation and prosecution of any former client involving or substantially related to the subject matter of the former representation, unless, after full disclosure, the former client makes a counseled waiver permitting the prosecutor's involvement in the investigation or prosecution.

b. The prosecutor should excuse himself from the investigation and prosecution of any matter where information known to the prosecutor by virtue of prior representation and subject to the attorney-client privilege would be pertinent to the investigation or prosecution, unless, after full disclosure, the individual makes a counseled waiver permitting the prosecutor's involvement in the investigation or prosecution.

c. The prosecutor should excuse himself from the investigation and prosecution of any person who is represented by a lawyer related to the prosecutor as a parent, child, sibling, or spouse or who has a significant financial relationship with the prosecutor.

d. The prosecutor should avoid any private interests, financial or otherwise, which may affect his professional judgment in the exercise of the duties and responsibilities of the prosecutor's office.

### 7.4 The Special Prosecutor

a. The prosecutor should have the discretion to appoint or to petition the court for an appointment of a special prosecutor in cases where actual or potential conflicts of interest exist.

b. The special prosecutor should have authority only over the case or cases for which he is appointed.

c. The special prosecutor should be a member of the state bar in good standing with appropriate experience in the subject matter of the appointment.
d. In those jurisdictions where the prosecutor does not have authority to appoint a special prosecutor, he may petition the court to assign a special prosecutor who should be selected by the presiding judge of the court of general jurisdiction with consideration given to the reciprocal appointment of local prosecutors from among those of the state.
e. The special prosecutor should be compensated from general funds at a reasonable and necessary rate as determined and ordered by the court. Jurisdictions within a state should develop a system of reciprocal appointments from other prosecution offices.

## COMMENTARY

There are few topics of ethical orientation more pervasive than conflicts of interest. Major law firms contend with conflicts searches when accepting new clients and face the withdrawal of existing clients when making collateral hires of partners.

Conflicts of interest problems are founded on the premise of the inability to serve clients which foreseeably have interests which compete or contend and the representation of one interest would therefore be to the detriment of the other.

Conflicts present themselves differently to the prosecutor, compared to the private practitioner, because the prosecutor does not initially select those subject to prosecution. Nor is there a choice of which prosecution office should proceed.

The standards dichotomize prosecution jurisdictions into those which prohibit private practice, generally considered full-time prosecutors, and those which permit private practice, those considered part-time. In recognition of geographic, demographic, and economic constraints, the standards address the problem posed by the part-time circumstance.

Notwithstanding a part-time prosecutor's right to represent criminal defendants in neighboring jurisdictions, the standard finds

this inappropriate as a conflict of interest. Furthermore, the standards indicate that it is inappropriate for a part-time prosecutor to use his status as prosecutor to represent that he can somehow provide more effective legal representation.

The standards recognize potential conflicts in all jurisdictions involving former clients or information obtained by virtue of former representation and allow the prosecutor to proceed on the case only if the individual makes a counseled waiver permitting the prosecutor's involvement.

When the prosecutor has an actual or potential conflict, it is his responsibility to seek a special prosecutor. The standards further address this circumstance.

Jurisdictions within a state should employ a system of reciprocity in which prosecutors from other jurisdictions would be available for exchange as special prosecutors. Such a system would be cost-efficient, provide independence, and assure prosecutorial competence.

# STAFFING

### 8.1 The Assistant/Deputy Prosecutor

a. Determination of Need

The prosecutor should have funds made available to hire legal staff sufficient to handle the legal responsibility of the office. Items that should be considered in determining this manpower are:

(1) The number of criminal cases that the office must deal with;

(2) The amount and types of additional, non-criminal responsibilities vested with the prosecutor's office;

(3) The number of specific crime-oriented programs being conducted in the office;

(4) The geographic size of the jurisdiction;

(5) The number of courts which the office must serve;

(6) The number of branch offices in the jurisdiction;

(7) The legal requirements for appearances by a member of the prosecutor's staff;
(8) Stages of legal process;
(9) The local speedy trial rules;
(10) The size and complexity of the staff and the need for intermediate supervisory positions; and
(11) Population of jurisdiction, including seasonal fluctuations, correctional institutional population, and other relevant considerations.

b. Utilization

Assistant prosecutors should be utilized in legal areas, for preparation of cases, screening, litigation, or advisement to other governmental bodies as prescribed by law. They should also be used as supervisory personnel to assist in directing the operations of the office.

Assistant prosecutors should not be utilized for other duties or administration activities outside the scope of the office function that would represent poor allocations of attorney time—such as clerical work.

c. Qualifications

The assistant prosecutor should have completed an accredited law school and should be a member of the state bar in good standing.

d. Selection

The assistant prosecutor should be chosen by the prosecutor and should serve at the chief prosecutor's pleasure.

e. Retention

The assistant prosecutor should be required to make a personal commitment of two years' service as a prerequisite of employment. He should serve full-time, where possible, and should not be permitted to engage in private practice. Where this is not possible, for geographic or budgetary reasons, the assistant prosecutor may serve part-time. The assistant prosecutor can be removed from office at the prosecuting attorney's discretion.

f. Compensation

The assistant prosecutor should receive salary comparable to that received by attorneys with similar terms of experience in local private firms. The assistant prosecutor should receive appropriate salary increases, as well as yearly cost-of-living increases. The

assistant prosecutor should receive fringe benefits, including annual leave, holiday leave, sick leave, insurance coverage, and retirement plans consistent with that available in the state civil service system.

**8.2 Special Assistants for Expertise**

a. Determination of Need

The prosecutor should have the discretion to hire a special assistant when there is the determination of need for legal expertise that is beyond the scope of his permanent legal staff.

b. Utilization

The special assistant should be utilized only in those areas where special expertise is required which the permanent staff does not have.

c. Qualifications

The special assistant should be an expert and in good standing before the state bar with substantial experience and expertise in the specific legal areas required or a trained technical expert.

d. Selection

The special assistant should be selected by the prosecuting attorney.

e. Retention

The special assistant should serve at the pleasure of the prosecuting attorney and should be retained only so long as the special expertise is required.

f. Compensation

Because of the specialist nature of the position, the special assistant should be adequately compensated at a rate determined and ordered by the court and agreed upon in advance, and which is commensurate with the individual's level of expertise and prevailing community rates. This compensation should be provided out of general funds provided to the prosecutor's operating budget for such purpose.

**8.3 Investigators**

a. Determination of Need

The prosecutor should have funds made available for the employment of professional investigators to handle those

responsibilities of the office. Items that should be considered in determining this manpower need and level are:

(1) The number of criminal cases that the office must deal with;

(2) The amount and types of additional, non-criminal responsibilities vested with the prosecutor;

(3) The amount and extent of other law enforcement personnel available to the prosecutor for case investigation;

(4) The degree of competency and cooperation demonstrated by existing law enforcement personnel in case investigation;

(5) The amount and level of sophistication of organized crime and corruption existing in the prosecutor's jurisdiction;

(6) The geographic size of the jurisdiction;

(7) The size and complexity of the prosecutor's staff in relation to case preparation and other relevant concerns; and

(8) The case statistics on case dismissal and cases not tried due to lack of evidence and/or pre-trial investigation.

b. Utilization

Investigators should be utilized in legal or other areas as determined necessary by the prosecutor. These would include case investigation of both existing cases and economic crime and corruption issues that are potential cases.

The investigators should be regular members of the staff and full-time where practical.

Investigators should have all the accompanying powers possessed by police officers in the prosecutor's jurisdiction.

Adequate resources and equipment should be available to the investigators for their use.

c. Qualifications

The investigators should be experts in their field, having either academic training or demonstrable experience; preferably a combination of both. Investigators should receive, at a minimum, the training comparable to that of law enforcement personnel or other competent professionals in their field of expertise.

d. Selection

Investigators should be chosen solely on the basis of merit and should be hired by the prosecutor.

e. Retention

Investigators should be retained according to local civil service or merit system regulations and should serve at the pleasure of the prosecutor. Violation of office regulations prohibiting disclosure of confidential information will constitute sufficient grounds for dismissal.

f. Compensation

Investigators should receive a salary greater than local law enforcement officers with comparable responsibility. Career ladders should be established to determine intermediate and optimum salaries. Investigators should receive yearly cost-of-living salary adjustments. Investigators should receive fringe benefits, including annual leave, holiday leave, sick leave, insurance, and retirement plans consistent with that available in state merit or civil service systems.

### 8.4 Office Manager

a. Determination of Need

Where the prosecuting attorney determines that the size and complexity of the office requires specific management expertise, the prosecutor should hire a manager to assist in the administration of the office. In large offices, the position should be mandatory and where it is non-existent, it should be created and staffed.

b. Utilization

The office manager's responsibilities should include all administrative functions (program planning, budget management, supervision of non-legal personnel, etc.) with a direct line of responsibility to the chief prosecutor.

c. Qualifications

The office manager should be specifically trained in management or have adequate experience in the management field.

d. Selection

The office manager should be selected by the prosecuting attorney.

e. Retention

The office manager should serve at the pleasure of the prosecuting attorney.

f. Compensation

The office manager should receive a salary comparable to that received by a person in private law firms with similar responsibilities and duties. The office manager should receive fringe benefits, including annual leave, holiday leave, insurance coverage, and retirement plans consistent with that available in the state civil service system or state merit system.

**8.5 Secretaries**

a. Determination of Need

The hiring of secretaries should be determined by the number required to insure adequate support to the office legal staff and to guarantee smooth and timely paper flow. There should be no less than one secretary for every two full-time attorneys in the office.

b. Utilization

Secretaries should be utilized primarily for word processing. Those with the highest competency and greatest experience should be given supervisory responsibility over other secretaries and clerical staff.

c. Qualifications

Secretaries should be selected primarily on the basis of competency in word processing, ability to follow directions, maturity in attitude, capability to make intelligent decisions, and capacity to work well under pressure.

d. Selection

Selections should be made solely on the basis of merit. The prosecuting attorney's executive secretary should be chosen by and serve at the pleasure of the chief prosecutor.

e. Retention

Career ladders and programs for retention should be established.

f. Compensation

Secretaries should receive salaries comparable to local prevailing standards. Career ladders and other criteria should be established to determine beginning and optimum salaries. Secretaries should receive yearly cost-of-living adjustments. Secretaries should receive fringe benefits, including annual leave, holiday leave,

sick leave, insurance coverage, and retirement plans consistent with that of local standards.

### 8.6 Clerical Staff

a. Determination of Need

Additional clerical staff may be required when the prosecuting attorney determines that there are additional tasks which do not necessitate the attention of a skilled secretary.

b. Utilization

Clerical staff should be utilized as receptionists, file clerks, or in other established clerical positions.

c. Qualifications

Clerical staff should be required to meet qualifications established for such positions by the state or county civil service or merit system.

d. Selection

Clerical staff should be selected solely on merit from the state or county civil service or merit system by the prosecuting attorney.

e. Retention

Clerical staff should be full-time and retained according to local civil service or merit system regulations and serve at the pleasure of the prosecutor. Violation of office regulations prohibiting disclosure of confidential information will constitute sufficient grounds for dismissal.

f. Compensation

Salaries for clerical staff should be determined by scales established by the local civil service or merit system.

### 8.7 Paralegals

a. Determination of Need

The prosecuting attorney should hire paralegals in operational and administrative functions where the direct services of a lawyer are not required.

b. Utilization

Paralegals should be utilized in tasks where professional or paraprofessional abilities are required, but where formal legal expertise is not necessary.

c. Qualifications
The paralegal must have a sufficient knowledge of the law in general and prosecution in particular, gained through either specific education, training, or through actual work experience.
d. Selection
The paralegal should be chosen by the prosecuting attorney solely on the basis of merit.
e. Retention
The paralegal should serve at the pleasure of the prosecuting attorney.
f. Compensation
The paralegal should receive a salary comparable to those similar paraprofessionals in private law practice in the jurisdiction.

**8.8 Affirmative Action**
The prosecutor's staff should be hired on the basis of merit; however, as much as possible, it should represent a cross-section of the local community and statewide legal community including racial, ethnic, and religious minority groups. In order to achieve this representation, the prosecutor should actively recruit persons for employment.

# COMMENTARY

The prosecutor's office should be considered a law firm whose client is the general public. As such, the client deserves the best possible legal representation. In addition to qualified staff, the prosecuting attorney should be funded to hire sufficient staff to adequately handle the office workload. The standard stresses the need for adequate funding, since the prosecutor cannot be faulted for having a less than adequate staff if necessary funds are not provided by the funding agency.

While the size of the jurisdiction will necessarily contribute to determining staffing resources, it should not act as a rigid constriction; the caseload, plus the workload which the existing staff bears, and the availability of outside resources should also be

considered in determining the additional need. In general, referring to assistant prosecutors, the criminal trial division of each prosecutor's office should have at least two full-time attorneys for each trial judge conducting felony trials on a full-time basis, or the equivalent part-time situations. In jurisdictions with heavy caseloads, more than two assistant prosecutors per trial judge will be required.

It is desirable for the prosecuting attorney to require a minimum commitment of at least two years service from all deputy prosecutors. This period may be lengthened within the discretion of the prosecutor if a longer requirement is feasible and in the best interests of the community. Experience shows that most deputies do not receive adequate training until at least one year has been completed. A time requirement itself, however, will not be sufficient to retain qualified and competent staff. Proper salary, benefits, and working condition incentives must be arranged so that the prosecutor's office can compete effectively with the private sector.

The office of the prosecutor must be made competitive with private firms and offer pay scales that are comparable to those offered attorneys in private law firms within the same jurisdiction. Suggestions have been made that salary scales for the prosecuting attorneys' staff lawyers be determined by the formulation of an equation based on local economic indicators. Such an equation could be based on estimating the general income levels of numerous sectors of the work force in the local area and calculating the effects of the cost of local housing, food, etc.

Similar competitive situations should be taken into consideration when establishing salary and benefit levels for other members of the prosecutor's staff. Legal secretaries who are highly skilled and trained should be compensated at the same level as legal secretaries working in local private firms.

Many managerial and clerical positions within the prosecuting attorney's office can be filled with permanent employees utilizing either the local or state civil service or state merit systems as an aid in recruiting and also as a guide to qualified individuals. The advantage of such a process is to be able to maintain trained support staff from administration to administration, and be able to

offer wages and benefits that are on the same level as those offered at other public service agencies within the state.

In large offices, the office manager should possess a high degree of skill in administration. A good office manager can analyze office systems and anticipate problem areas, make changes and forecast future needs of the office. This individual will take into consideration crime reports of the area, caseload of the courts, police arrest statistics, etc., and present them to the prosecutor so that together they can plan and allocate the necessary expenditures of both manpower and budget.

Office managers are responsible for non-lawyer personnel, file maintenance, and case flow. A complete and accessible library is also under the supervision of the office manager. The skills of a management specialist are utilized in close association with the prosecutor to initiate useful policies for an efficient organization.

Some positions, such as chief assistant prosecutors, special investigators, and personal secretaries, should serve at the pleasure of the prosecuting attorney. These positions must remain responsive to enforcing the policy decisions of the elected prosecuting attorney. In order to attract and keep the most highly qualified personnel, benefits should be comparable to those available to the judiciary and state employees.

In keeping with the affirmative duty to investigate found in these standards, it is expedient for the prosecutor to maintain a staff of professional investigators, independent of the police and responsible solely to the prosecutor's office. The actual number of full-time or part-time investigators for the particular office should be determined by the size of the office and the needs of the office. The prosecutor must estimate the continuous and seasonal fluctuation needs of the office and determine the number of full-time and part-time investigators which will best meet those needs.

It can no longer remain a distant goal but must become a necessary standard that the prosecutor who serves rural or medium-sized, as well as large metropolitan communities, have sufficient investigative resources for thorough case preparation. Of equal importance, the prosecutor, as the chief law enforcement official, has both the discretion and the responsibility to initiate and control investigations of certain areas, which, by virtue of

their complexity or sensitivity, are frequently not handled by law enforcement agencies. The prosecutor may find it necessary to initiate investigations of alleged child abuse, environmental law suits, economic crime, bias/hate crime, or public assistance fraud, for example. In those jurisdictions where state agencies or a particular department are responsible for these technical, skilled investigations, the prosecutorial investigator may assist the investigation by interpreting the scientific or empirical data in terms of the existing and applicable law. Or the particular agency may have the power to require an investigation by the prosecutor's office.

Since the investigator is to be a regular and essential feature of the prosecutor's office, the training for this role must necessarily be comprehensive and of the highest quality. The prosecutorial investigator, because of the association with an elected public official, must reflect the same standards of professional behavior.

Investigators should not be viewed as merely a supplemental police force and their training should compare to the variety of their expertise.

It is the responsibility of the prosecutor to hire staff which reflects the composition of the community, where possible. The recruitment of qualified minorities is an essential aspect of this goal and should be incorporated into the hiring practices and procedures of all prosecution offices. While it is not the responsibility of the prosecutor to meet predetermined quotas, the office benefits by strong representation that reflects the community that is served.

# TRAINING

### 9.1 Orientation

After election or appointment, but prior to assuming office, or as soon thereafter as possible, the prosecutor should participate in a formal orientation program sponsored by a state or national association or organization.

### 9.2 Prosecution Standards

Pursuant to orientation, incoming prosecutors should become familiar with the standards promulgated herein.

### 9.3 Transitional Cooperation

Where an individual has been elected or appointed prosecutor, the incumbent prosecutor should cooperate in an in-house orientation of the incoming prosecutor to allow for an effective transition consistent with principles of professional courtesy.

### 9.4 Funding

The prosecutor should establish and maintain a program of orientation for all new staff personnel which should include in-house and outside training components.

The prosecutor's budget should include a line item for training, adequate to allow both internal activities and for prosecutor attendance at programs conducted outside the office.

Funding must be provided for development and implementation of in-house training for staff and for local, state, and national level training of the prosecutor and staff.

### 9.5 Continuing Legal Education

The prosecutor and legal staff should participate in formal continuing legal education. The prosecutor and supervisory staff should include the study of management issues, such as staff relations, budget preparation, and planning principles, in continuing legal education participation.

### 9.6 CLE Exclusive to Prosecutors

States should provide continuing legal education that is available exclusively to prosecutors.

### 9.7 Mandatory CLE Compliance

The prosecutor and legal staff should be diligent in meeting or exceeding requirements of continuing legal education in those states where requirements are mandatory.

### 9.8 Support Staff Training

The prosecutor should provide for continuing training of non-legal staff to allow for their professional development and enhancement.

### 9.9 Code of Professionalism

Where the prosecutor has adopted a code of professionalism, he is responsible for the incorporation of the code into the training and orientation programs of all staff.

### 9.10 National Resources

The prosecutor should be knowledgeable of and utilize appropriate national training programs for both initial orientation and continuing legal education, for both himself and his staff.

## COMMENTARY

In addition to assuring that each prosecutor attains a level of proficiency in criminal law/trial advocacy, there is a need to provide professional personnel with specific knowledge of the policies and procedures of the individual office to which they are assigned. Furthermore, it is increasingly necessary to assure that the level of competence achieved through training programs is maintained through awareness of changes in the law. The standard addresses the need for training programs for both legal and non-legal staff.

Conceptually, staff training can be divided into two broad categories. The first, which might be termed "orientation," would seek to provide new assistants or deputies, as well as chief prosecutors, with an understanding of their responsibilities in the criminal justice system, and with the technical skills they will be required to utilize. Orientation for the chief prosecutor should center on office management skills, especially for larger jurisdictions. A basic orientation package for assistants could include familiarization with office structure, procedures, and polices; the local court system; the operation of local police agencies; and training in ethics, professional conduct, courtroom decorum, and relations with the court and the defense bar. A second aspect of

training which should be included in each prosecutor's training program is continuing education. Much continuing education is traditionally provided within prosecutors' offices, particularly larger offices which can justify employment of training officers and development of a formal array of lectures. Most common of these would be labeled "refresher" training—providing maintenance of existing proficiency by seminars and discussions on basic topics such as the impact of recent court decisions or statutory change on substantive law, search and seizure, rules of evidence, etc. Similar programs on trial practice might be held. Another target of continuing education could be the broadening of the scope of the prosecutor's knowledge of the entire criminal justice system; both review of functions traditionally exercised by prosecution, as well as a consideration of new areas of endeavor.

The standard calls for the allocation of funds specifically through a line item in the budget. This may help to emphasize the essential role of training in assuring efficient and effective performance of duties—and disabuse those who have the notion that training is a frill, an extra to be cut at the first sign of any pressure on the budget. Justification of the budget, of course, imposes certain duties on the prosecutor. He must continually re-evaluate the cost-effectiveness of training activities. Training *per se* is neither good nor bad—its value comes from the extent to which it responds to the needs of the prosecution function.

Continuing legal education is usually provided within the prosecutor's office, especially in large offices where special training, personnel, and additional budget allocations are easier to justify. Such programs can play a useful role whenever they are possible. While in most states a range of continuing education courses is currently available, NDAA does not believe that mere availability of programs will suffice. Therefore, it is suggested that each jurisdiction establish a minimum level of training which each prosecutor and assistant would be required to participate in annually. Programs of continuing education that are designed for prosecutors and their staffs need not be open to non-prosecutors, *i.e.*, defense attorneys. To do so may well defeat the purpose of such training programs.

The concern for training in the standard has focused primarily on programs for legal personnel—the prosecutor and assistants. In general, legal positions require the greatest amount of specialized expertise. However, there is no intention to slight programs which would prepare paralegal personnel to fulfill roles in intake review, diversion, mediation of citizen complaints, consumer fraud enforcement, non-support, spouse and child abuse investigation, etc., or for continued upgrading of investigative, secretarial, and clerical personnel in relevant skills.

It is important not to overlook the benefits of training at the national level. Both litigation and management skills have many features in common regardless of local practice rules. Prosecutors from all demographics stand to gain substantial insight and skill through the use of such resources.

# OFFICE MANUALS

### 10.1 Policies and Procedures

To the extent merited by the size of the office, each prosecutor's office should develop statements of general policies and procedures of the office. The objectives of these policies and procedures are to establish the office as a place for the fair, efficient, and effective enforcement of the criminal law. The policies and procedures should give guidance in the exercise of prosecutorial discretion and should provide information necessary for the performance of the duties of the staff.

### 10.2 Manual Development and Maintenance

In the interest of continuity and clarity, such statements of policies and procedures should be maintained in a manual of internal policies of the office. In addition, the office manual should be periodically updated to assure accuracy and completeness.

### 10.3 Manual Availability

Each office manual should contain policies which define the acceptability of public access, or access of other criminal justice

agencies, to particular portions of the document. Certain portions may be established as confidential, while others should be subject to access by the general public and/or law enforcement agencies or the defense bar. In the alternative, the prosecutor may develop separate manuals for internal use and for external availability.

## COMMENTARY

A primary benefit of drafting written policies and placing them in an office manual is uniformity. The prosecutorial discretion that has been recognized in many of the standards most correctly belongs to the chief prosecutor only, being the elected official ultimately responsible to the community for the performance of the prosecution function. In promoting uniformity, the emphasis is on assuring that assistant prosecutors and other personnel perform in a manner consistent with the policy of the chief prosecutor. Given that the individual assistants must be delegated the authority to apply their best judgment to the facts of particular cases, there is yet little justification for victim or accused to receive substantially different treatment because the case was assigned to one individual in the office and not to another.

NDAA recognizes a distinction between the operation of small and large offices. In a small office, the long personal association of a prosecutor's staff will have created a completely shared understanding of the tenets of each prosecutor's individual policies. In those cases, the written policy may serve as no more than a cross-reference and as a guard against any misunderstanding. Thus, it may not always be necessary for the office manual of a small office to be as detailed as that of a large office. However, in a larger office, where there is frequent staff turnover and a variety of staff positions or where assistants serve part-time and operate in widely separated locales within the jurisdiction, the office manual should represent an enormous stride toward uniformity and continuity in the execution of prosecutorial discretion.

Another benefit in the adoption of office policies and procedures will be a more effective orientation and training of new staff. A new attorney, paralegal, clerical employee, or intern may bring to

the job little or no experience in the operations of a prosecutor's office. No matter what the size of the office, existing staff may be already overburdened, with little or no time to devote to thorough training of new employees. Even when time is taken to explain to an individual his duties, the amount of information conveyed can generally not be fully assimilated. Written explanation of policy and office procedure can serve as an extremely valuable reinforcement to oral instruction and as a constant guide and reference to an individual during employment in the office.

An additional benefit to be derived from the adoption of an office manual will be improvement of the knowledge and technical proficiency of staff members in performing the various tasks required in the prosecutor's office. A portion of the manual primarily, but not exclusively, aimed at clerical staff, should explain how and when various office forms are to be utilized and give instruction on the operation of office filing and statistical systems. Items of more relevance to professional legal personnel would detail the steps to be followed in approving a warrant, interviewing a witness, filing a motion, etc. Other sections of a manual might even give precise directions as to how to conduct a *voir dire,* jury trial, grand jury proceeding, or preliminary hearing. Even where information is already available in one format in the office, such as state criminal codes or reported court decisions, this information can be reorganized or restructured in manual or handbook form for easier access and practical use.

Lastly, the standard recognizes the confidential aspect of the prosecutor's office manual. This may quite properly lead the prosecutor to conclude that not all portions of the manual should be accessible to the public, or that separate works be available—one for internal management and another for public information. This approach is fully justified by the nature of the prosecution function, which in large part deals with confidential matters.

Standard 16.1, *infra,* recommends that state prosecutors' associations draft model office manuals. Prosecutors without manuals should consult with their association and other prosecution offices to lessen the burden of the initial manual development.

# FUNCTIONAL OFFICE DIVISIONS

### 11.1 Features of Divisions

Prosecuting attorneys may find that a particular function or program conducted by their office is of sufficient importance and generates enough volume to constitute a distinct unit or division within the office. In those cases, the division(s) should have the following characteristics:

a. Staff members should be specifically assigned to the division, on a full-time basis if possible;

b. The division should have an identifiable figure of authority and lines of responsibility should be clearly distinguished;

c. The division should be assigned permanent secretaries and support staff. One clerical person should be designated to serve as the central communication point for the division; and

d. All members of the division's legal staff should receive formal training upon assignment to the division and be required to attend courses in that specialty at least once each year.

## COMMENTARY

The larger the size of the prosecution office, in terms of caseload and staff, the greater the need for areas to which the creation of a separate functional office division is appropriate. The smallest prosecution offices are not likely to possess either a sufficient volume of complaints or a sufficient number of assistant prosecutors to warrant distinct office divisions.

Where functional office divisions or units are created, they should be established as miniature prosecution offices within the parent prosecution facilities. The division should possess a separate managerial person. Where possible, separate physical facilities in the office should be provided for the division. To facilitate planning and operation, the division should develop and manage its internal budget arrangements.

Since a primary justification for the establishment of a separate office unit is the need for special expertise in a given area, each

office division should be assigned permanent legal and support staff, on a full-time basis where appropriate. These staff members should receive special training upon assignment to the division and should be required to continue acquiring and updating competence in that area. Such training is particularly essential where the office division or unit is concerned with a particular subject orientation. To make full use of this expertise, policies should be implemented which mandate the referral of all developing cases to the office division having responsibility for that area.

# PLANNING, MONITORING, AND EVALUATION

### 12.1 In-House Capacity

Prosecutors should have the in-house capability to plan, monitor, and evaluate the operation of their offices and overall function.

### 12.2 Setting Goals

Both long- and short-range goals should be periodically established. Quantifiable objectives should be set to achieve those goals.

Evaluation as to progress should be made consistent with the time frame and other measurable quantities of the objectives.

### 12.3 Monitoring

The day-to-day operation of the prosecutorial function should be monitored with pre-set evaluative criteria. Where possible, this monitoring should be congruous with the statistical system.

### 12.4 Status and Projection

Through the planning, monitoring, and evaluation function, the human resources, budget, personnel assignments, intake and screening, office physical layout, and other factors should be known at any given time, along with the additional capability of projection.

### 12.5 Staff Responsibility

Where possible, one individual should be assigned the responsibility for these tasks. Where human resources are limited, the prosecutor should assume these responsibilities.

### 12.6 Budget Category

A separate budget category should be established within the prosecutor's overall budget to adequately cover the expected and necessary expenditures to achieve this function.

## COMMENTARY

Prosecutors are, in effect, administrators of a business. Prosecutors' offices operate on a budget, utilize manpower, and have to report to other levels of authority for economic and manpower allocations. Because of their public accountability, prosecutors also have to be concerned with intake levels, case backlogs, file systems, statistical tabulation and collection systems, etc. When reviewed closely, prosecutors are in need of planning, monitoring, and evaluation techniques to a greater extent than most private concerns.

Planning, monitoring, and evaluation are interrelated concepts. Though they can be defined separately, they must be considered together if they are to be properly applied.

Planning involves three activities. First, goals have to be established. A clear idea of the objectives must be formed and a definite purpose must be established before work can proceed. Second, an estimate of the available resources must be made and plans to secure any other needed resources must be formulated. "Resources" include both manpower and physical facilities. Third, these resources must be efficiently organized and directed in such a way as to expedite the completion of the plan.

Monitoring is an ongoing activity performed concurrently with the work itself, which assures that any given project or operating system pursues its identified objectives and adheres to its agenda of tasks and activities.

Evaluation is a technique which attempts to assess the extent to which an organization has accomplished the goals it has set for itself. Further, evaluation is intended to analyze the varying contributions of planned accomplishments, rather than unanticipated occurrences. Also, it seeks to interpret and categorize phenomena which may be detrimental to success so as to remove possible causes of failure and thus avoid future low benefit/high cost activities.

When an organization is faced with limited resources and multiple objectives, the proper use of planning, monitoring, and evaluation can be an effective tool. Those prosecutors with limited resources at their disposal and whose operations encompass a wide range of legal and administrative tasks will find these techniques helpful.

At the same time, NDAA recognizes that this important office function is frequently neglected for the simple reason that performance of the function has not been budgeted into anyone's responsibilities within the prosecutor's office. To the extent office size makes it necessary and feasible, this should be addressed by a separate and distinct budget line item.

# STATISTICAL SYSTEMS

### 13.1 Prosecution Data Base

The prosecutor's office should maintain sufficient data to evaluate and monitor the performance of the office. This may include the following elements:

a. The number of complaints referred by the police.
b. The number of complaints referred by private citizens.
c. The number of cases filed by the prosecutors in each court.
d. The number of convictions on the first court charge, listed by each prosecuting attorney and judge.
e. The number of cases disposed through negotiated pleas, listed by each prosecuting attorney and judge.
f. The number of cases where conviction was obtained on a reduced charge, listed by each prosecuting attorney and judge.

g. The number of cases resulting in a disposition of *nolle prosequi,* listed by each prosecuting attorney and judge.

h. The number of cases dismissed by the court, listed by each prosecuting attorney and judge:

(1) For lack of evidence;
(2) For failure to adhere to speedy trial requirements;
(3) For inadmissible evidence;
(4) At the request of victims;
(5) At the request of law enforcement;
(6) Failure in evidence subsequent to charging;
(7) For other reasons as may be pertinent to the prosecutor's evaluation needs.

i. The number of cases resulting in acquittal, listed by each prosecuting attorney and judge.

j. The number of charges filed for each type of crime, felony, and misdemeanor (*e.g.*, number of homicides, number of first degree assaults, number of DUIs etc.) listed by prosecuting attorney.

## COMMENTARY

The development and use of a good office statistical system has benefits for both the prosecutor and for the criminal justice system as a whole. One of the problems of the criminal justice system has been its traditional inability to generate and maintain records on its processes. This inability is especially evident in those processes between arrest and incarceration. Good statistical recordkeeping can supply the information needed for a better understanding of the system as a whole and for needed innovation in attempting to fight crime more efficiently.

The prosecutor can utilize a statistical system for the improvement of his own operation. Receiving regular reports on the functioning of the prosecutor's office gives the prosecutor a more accurate picture of what is happening in the community in the area of crime and an idea of how well the prosecutor's office is responding. It allows for the best allocation of present available resources, as well as providing a basis for requesting additional

resources and making plans to meet future needs.

Statistical analysis can also provide a look at the comparative functions of different aspects of the operation. Statistical methods that have been developed for both public and private sectors allow the prosecuting attorney to pinpoint bottlenecks in the prosecutorial system accurately, identifying areas for corrective action within a generally viable system.

Good recordkeeping is essential to an effective public relations program. The prosecutor should utilize office statistics to keep the community informed of the trends in local crime and with the efforts of the prosecutor's office to combat crime.

Effective statistics are essential for the prosecutor when dealing with funding boards or agencies. They are crucial in any attempt to rally public support to the maintenance of an effective criminal justice program.

There is a key relationship between good filing practices and a useful statistical system. A statistical system can be generated more easily in an office which has an orderly and methodical approach to maintaining its case files. The use of innovative management tools such as the model case jacket, or efficient case numbering systems, makes it possible for the prosecutor to collect statistics about the flow of cases through the prosecutor's office.

The only efficient way to manage and effectively use a sound statistical system is through computerization. It is the hallmark of a professional office, no matter what size, to have and use the best technical resources available. The range of computer hardware and software available today provides reasonably priced systems which can be highly effective in impacting criminal activity. Funding agencies should make automation of the prosecutor's office a high priority where it does not exist or is outmoded or inadequate.

NDAA recognizes that the prosecutor does not always have the expertise or the manpower available to develop these systems. National programs are available through such organizations as the American Prosecutors Research Institute in assisting the local prosecutor to generate these capabilities. Local government should make necessary funds available so that the prosecuting attorney can improve the management efficiency and capability of the office in these two key areas.

Finally, it must be noted that the standard provides a shopping list to guide the prosecutor. In some jurisdictions, some items listed in the standard may not be pertinent. Statistics are not an end in themselves. Their use is the critical issue. Therefore, prosecutors should make individual determinations of those specific statistics to maintain and put to use.

# FACILITIES

### 14.1 Planner/Architect—General Considerations

a. Whenever a facility for a prosecutor is designed, the architect should contact the prosecutor for guidance and information.

b. When a prosecutor's facility is designed, the following considerations should be taken into account:

(1) Location of the prosecutor's office in relation to the courts, police, public defense counsel;

(2) Accessibility to and by police, judiciary, defense counsel, corrections, and the general public;

(3) Flow of people into and through the prosecutor's office;

(4) Both internal and external paper flow of office;

(5) Interworkings of the judicial system and the role of the prosecutor within the system;

(6) Function of the prosecutors and staff personnel within the office; and

(7) The special needs of physically handicapped persons who will use the facility.

### 14.2 Location of Prosecutor's Office

a. The criminal prosecutor's office should, to the extent possible, be located in a criminal justice complex that also houses the courts, police, and jail facility.

b. Where a criminal justice complex is not in existence or planned, the prosecutor's office should be located as close to the courts as possible.

c. The prosecutor's office and furnishings should be provided by the state or local unit of government.

### 14.3 Entrance and Reception Area

a. The office of the prosecutor should have only one entrance accessible by the public. It should be clearly visible and identifiable for users.

b. Each office should have a general reception area with the following characteristics:

(1) Located eight to ten feet inside the entrance to the office;

(2) Staffed during all normal working hours;

(3) Receptionist work space of 80 to 100 square feet;

(4) Waiting area of ten square feet for each visitor expected to be present at any given time;

(5) Secretary's desk and chair;

(6) Occasional chairs and/or lounge located around the perimeter of the room;

(7) Visual and acoustical baffling from other areas of the office; and

(8) Decorated with variable lighting, appropriate colors, information displays, and an overall image of dignity and professionalism.

c. The receptionist should be able to perform the following functions:

(1) Observe the entire reception area and entrance as well as travel routes to secondary waiting areas and individual offices;

(2) Contact other staff members by way of inter-office telephone/intercom system;

(3) Access files;

(4) Type, receive incoming telephone calls, and other clerical duties; and

(5) Screen and refer to appropriate area all individuals entering office.

d. If the traffic volume is high, or if telephone calls are frequent, the incoming calls should be assigned to a separate individual located elsewhere in the office and a switchboard provided to adequately handle the load at peak periods.

e. If traffic volume is high, secondary reception areas should be provided that are directly accessible from the central reception area and should have the characteristics of the central reception area discussed above.

### 14.4 Secretarial and Clerical Facilities

a. Efficient work flow operations are dependent on adequate, competent secretarial and clerical staff. This staff's operation is dependent to a great extent upon a work environment conducive to the preparation of legal documents and maintenance of case files and records system. Prosecutors should strive to provide this type of environment.

b. Each secretary should have:

(1) A work area from 50 to 125 square feet;

(2) A work surface of 16 to 18 square feet with a separate platform for typewriters or personal computers three inches lower than normal work surface height;

(3) A swivel, height-adjusted chair;

(4) Automatic and word-processing typewriters or personal computers. Typewriters, computerized word-processing equipment, and computer printers should be provided with sound insulating covers;

(5) Quick and easy access to files;

(6) Inter-office communication device;

(7) Telephone;

(8) Access to a centrally-located facsimile machine, dictating and transcribing equipment; and

(9) Visual and acoustical privacy, achieved by either individual secretarial offices or through the use of defining the work area of each individual on at least one and a maximum of three sides by partition.

c. Other clerical staff should have:

(1) A work area of 50 to 125 square feet;

(2) Visual and acoustical privacy with either private office or defined on one to three sides;

(3) A work surface of 12.5 to 18 square feet; and

(4) A swivel chair.

d. The office should have access to a photocopying machine. If one is kept in the prosecutor's office, it should be well sound insulated and, if possible, placed in a separate room. Each office should have access to a facsimile machine. Depending on the size of staff, there should be more than one such machine.

e. In larger offices, secretarial and clerical staff should be centralized. These centralized groups should be limited to six to nine staff members each.

f. The secretarial area should be located far enough from the trial, research, and other staff attorneys so that noise does not interrupt concentration.

g. Illumination should be direct and of the overhead type. Desk lamps are not recommended. Colors and overall decoration should be bright, but strong contrasting patterns should be avoided.

### 14.5 Records Storage/File Systems Facilities

a. A centralized records storage and file system area should be established. If possible, a separate room should be so designated.

b. The records storage and file system area should have the following characteristics:

(1) Located adjacent to secretarial/clerical area and nearby investigative and paralegal staff;

(2) Legal size file storage cabinets that are lockable, fire-proof, not exceeding five feet in height, and of the double-suspension type. Open shelf cabinets are recommended over vertical files;

(3) Arranged so that small collections of cabinets are placed against the wall and large collections placed back-to-back;

(4) A clerical work area of 80 to 100 square feet;

(5) Entrance control points monitored by security measures;

(6) Document transfer point to distribute and return files and records;

(7) Noise insulation; and

(8) Direct overhead lighting.

c. Files and records should be arranged in consecutive order from top to bottom and left to right.

d. A master index of all files and records should be established and maintained on a day-to-day status.

e. The filing system should be either color coded, numerical, or alphabetical with old and new file divisions and pre- and post-trial categories.

f. At the point of intake into the prosecutor's office of a case,

a case jacket should be created, and original documents placed in this jacket. The case jacket should be legal sized and have provisions for the following information:

(1) Defendant's name;
(2) Case number;
(3) Defendant's date of birth;
(4) Defendant's known address and phone number;
(5) Police identification or case number;
(6) Court identification or case number;
(7) Charges;
(8) Date of arrest;
(9) Date of charging;
(10) Trial dates;
(11) Co-defendant and/or related cases;
(12) Defense counsel's name, address, telephone;
(13) Police officer;
(14) Complaining witness;
(15) Release decision;
(16) Requisite notice to defendant--confession/identification/discovery/other;
(17) Table of: action date/next court date/action and reason/judge/defense/assistant/court reporter/instructions or notice of motions/notes;
(18) Final disposition of case;
(19) Appellate action taken;
(20) Checklist of items needed and/or in file, *e.g.*, autopsy, ballistics, chain of evidence list, chemical report, DNA test report, confession, contraband, damages listed, evidence, indictments, investigation reports, motions, newspaper articles, office memorandum, photographs, police reports, rap sheet, research material, registration made, trial memorandum, weapons, witness list, witness statements, etc.; and
(21) A space for confidential notes.

g. If microfilm or microfiche is used, 40 square feet per microfilm/fiche station plus a swivel chair should be provided.

### 14.6 Police-Legal Advisor Facilities

a. If a police-legal advisor and/or police liaison position exists

within the prosecutor's office, space should be provided for this individual within the prosecutor's office, whether or not the individual has a permanent assignment to the prosecutor's office.

b. The facility for this position should have the following characteristics:

(1) Private office with lockable door;
(2) One hundred fifty square feet minimum;
(3) Four to six occasional chairs;
(4) Standard desk and swivel chair;
(5) Inter-office communication device;
(6) Telephone and facsimile machine;
(7) Dictation equipment;
(8) Legal file and shelf space;
(9) Legal references used daily;
(10) A small work table;
(11) Insulated from both visual and acoustical distraction;
(12) Overhead lighting plus desk lamp; and
(13) Secondary reception/waiting area just outside office.

c. If the individual is in the prosecutor's office on a periodic, other than full-time, basis, appropriate log-in/log-out and security procedures should be adopted.

### 14.7 Library Facilities

a. The prosecutor's office should have its own library facility that is capable of satisfying the research needs of the office.

b. Each staff attorney should have in their offices those reference documents that are needed for day-to-day operation.

c. Large offices should have a master library within the overall office complex. Smaller offices should have direct access to such facilities. Where possible, a comprehensive library should be located so as to service the needs of the prosecutor, the courts, and defense counsel within a criminal justice complex.

d. The library facility should be designed with future expansion potential.

e. The library facility should be accessible, but located far enough away from the main work areas, to eliminate interruptions. Sound and visual insulation are required.

f. There should be a master card index system for all documents

within the library as well as provision for check-in/check-out of documents.

g. Document stack areas, reading areas, and general research areas must be provided within the facility.

(1) Stack areas should be open, adjacent to the card catalog, and non-circular but contiguous in utilization/layout;

(2) Frequently used volumes should be stored 30 to 84 inches off the floor and infrequently used volumes stored below and above this space;

(3) Shelves should be adjustable for height. If non-adjustable shelves are used, shelves should be eight to ten inches in height spacing. Number of shelves and total shelf length should be determined by using the average of four to five volumes per lineal foot; and

(4) Strength capabilities of bookcases/shelves and also flooring should be determined by using the average of ten pounds per square foot of books.

h. Reading/research areas should be provided within the library facility. Carrels, lounge chairs, and table/chair configurations may be utilized:

(1) Carrels should be from 30 to 35 square feet per person, have individual lighting, a bookshelf, a work surface at least nine square feet and 30 inches high, low wall partitions of 52 inches high on three sides, and a chair;

(2) Lounge or occasional chairs should allow 10 to 15 square feet per individual occupant and should be arranged so as not to foster conversation; and

(3) Tables should be from 30 to 34 inches high and have a surface area of at least 36 square feet (8 feet x 4 feet 6 inches). Each table should be provided with at least four non-adjustable chairs.

i. If microfilm or microfiche machines or computer terminals for automated legal research are provided, they should have:

(1) Separation from the normal reading/research area;

(2) Forty square feet of space each;

(3) Adjustable low illumination overhead lighting;

(4) Humidity and air temperature control capabilities;

(5) Tray-type storage racks (for roll film) approximately 84 inches high;
(6) Shelving and storage space;
(7) Typewriter or personal computer; and
(8) Access to a facsimile machine.

j. The basic library should contain at a minimum the following documents; and all materials must be kept up-to-date by supplementation.

(1) Federal materials:
(a) *United States Code Annotated.* Federal Rules of Appellate Procedure, Rules of Supreme Court
OR
*Federal Code Annotated;*
(b) *Supreme Court Reporter*
OR
*United States Supreme Court Reports;*
(c) *Shepard's United States Citations;*
(d) *Shepard's Federal Citations;*
(e) Rules of local federal district courts;
(f) *Moore's Federal Practice.*

(2) General materials:
(a) *Ballentine's Law Dictionary*
OR
*Black's Law Dictionary;*
(b) *Criminal Law Dictionary;*
(c) *The Prosecutor*, the journal of the National District Attorneys Association, and other publications of NDAA, NCDA, and state prosecutors' associations, including all current and back issues of *Case Commentaries and Briefs* (1965 to present);
(d) A good medical dictionary;
(e) A good psychiatric dictionary;
(f) Unabridged Dictionary of the English language.

(3) State materials:
(a) Reports of highest and intermediate appellate courts of state, 1960 to present;
(b) State statutes compilation;
(c) State digest of court decisions;

(d) Shepard's Citations for state;
(e) Treatise covering state criminal practice and procedure;
(f) Volume containing rules of state courts, if available, otherwise, rules obtainable free from clerks of some state courts.
(4) A system of computer-assisted research.

### 14.8 Assistant/Deputy Prosecutor Facilities

a. Assistant/deputy prosecutors should have private offices:
(1) Secure from interruption;
(2) Located away from high noise area, *e.g.*, typing area;
(3) Have between 120 and 180 square feet of floor space;
(4) Standard desk and swivel chair;
(5) Three to four occasional chairs;
(6) Legal file and storage space;
(7) Bookcase;
(8) Telephone;
(9) Dictation Equipment;
(10) Overhead lighting plus floor or desk lamp;
(11) A coatrack;
(12) Inter-office communications device; and
(13) Visually and acoustically insulated.

b. Research and other legal documents used on a daily basis should be in each individual's office.

c. There should be easy access to library facilities and central records/file system.

d. Overall the office should be furnished so as to reflect the dignity and professionalism that is the hallmark of prosecution.

### 14.9 The Prosecutor's Office

a. The chief prosecutor's physical setting should represent the importance of the office, plus the dignity of the profession.

b. The office should be capable of allowing the prosecutor to perform the following three separate functions:
(1) The administration and overall management of the entire office;
(2) Receive small groups, visitors, media, etc.; and
(3) The actual prosecutorial duties of the office.

c. The prosecutor's office should be conducive for the prosecutor to perform the following basic activities:

(1) Writing, reading, researching, telephoning, facsimile transmission, dictating, and other activities relating to the overall operation;

(2) Entertaining visitors and guests;

(3) Conducting immediate conferences when necessary;

(4) Holding small staff meetings;

(5) Interviewing outside personnel;

(6) Conducting press and media conferences; and

(7) Actual transaction of legal work relating to the prosecutor's role.

d. The office should:

(1) Be located in a remote part of the overall office complex;

(2) Have immediate and direct access to a conference area without going through a public area;

(3) Have a separate entrance/exit to the outside of the building;

(4) Have a work area of 180 to 300 square feet;

(5) Furnishings consisting of an executive-type desk, credenza, bookcases or shelves, executive swivel chair, three or more occasional chairs located around the desk, a sofa or lounge chairs, a low coffee table, a coat closet or coatrack, telephone including speaker equipment, inter-office communication equipment, dictation equipment, personal computer, facsimile machine, desk and/or standing lamps plus overhead lighting; and

(6) Be visually and acoustically private.

e. Where provision for an adjacent conference room is possible, that area should:

(1) Be able to accommodate four to five individuals;

(2) Have from 100 to 150 square feet;

(3) Have a table of at least 18 square feet surface area;

(4) Have four or five conference chairs; and

(5) Be sound insulated and private.

f. If the demands of the prosecutor's function include frequent involvement with the media, the following should be provided:

(1) An overhead bank of floodlights;

(2) A backdrop that is either portable or can be rolled down from the ceiling;
(3) Both 110 and 220 volt electrical outlets; and
(4) Conduit cables for audio equipment and cables for video units.

**14.10 Administrative and Management Staff Facilities**

a. In large urban offices, administration and management are an essential aspect of the overall prosecutorial operation. In smaller offices, these duties would be handled by the prosecutor. This staff may include an office manager, personnel manager, administrative assistant, related secretarial/clerical aids, etc.

b. The office manager/administrative assistant's facilities should consist of the following:

(1) An office area of 150 to 180 square feet;
(2) Be both visually and acoustically private;
(3) A standard desk and swivel chair;
(4) Four to five occasional chairs;
(5) Bookcase/shelves and credenza;
(6) One or more legal file cabinets;
(7) Inter-office communications device;
(8) Telephone;
(9) Facsimile machine;
(10) Photocopy machine;
(11) Dictation equipment;
(12) Overhead lighting plus desk/floor lamp; and
(13) Small work table.

c. If associate staff, researchers, programmers, or other administrative assistants are employed, they should either have individual offices or alcove-type work space.

(1) Offices can be shared, but no more than four people should occupy one office;
(2) Work area from 80 to 120 square feet per person;
(3) Standard desk and swivel chair;
(4) Book shelving and filing area;
(5) Access to telephones, facsimile machine, dictation equipment, inter-office communication device, and typewriter or personal computer; and

(6) Overhead lighting plus desk/floor lamp.

d. A separate secretarial area should be provided, conforming to those related standards.

e. If work load demands it, a small waiting area adjacent to the secretarial area should be provided.

f. For computers located within the office there should be:

(1) Security measures for access;
(2) Electrical outlets of both 110 and 220 volts;
(3) Direct overhead lighting;
(4) Scientifically designed chairs and work station.

**14.11 Investigators, Paralegals, and Interns**

a. Wherever possible staff investigators, paralegals, and interns should be located within the prosecutor's office.

b. The investigator should be provided with:

(1) A private office;
(2) Work area of 100 to 150 square feet;
(3) A standard desk and swivel chair;
(4) Three to four lounge chairs;
(5) Small work table;
(6) Telephone;
(7) Facsimile machine;
(8) Portable computer;
(9) Access to a police report transmission machine in the facility;
(10) Dictation equipment;
(11) Inter-office communication device;
(12) Legal file cabinet; and
(13) Book shelving.

c. If private office facilities are not possible for the investigator, a separate interview area should be established:

(1) Located near actual work area;
(2) Insulated both visually and acoustically;
(3) Each interview booth should have at least three chairs and a small work table; and
(4) Minimum space of 40 square feet.

d. The paralegals' and interns' facilities should:

(1) Be private offices if possible;

(2) Be located near staff attorney or unit that individual is doing work for;
(3) Have work area of 80 to 120 square feet for paralegals and 60 to 100 square feet for interns;
(4) A standard desk and swivel chair; and
(5) Have access to telephone, facsimile machine, computers, dictation equipment, and inter-office communication device.

e. If private offices are not possible, up to four individuals can occupy one office. The size of that collective office would be at a minimum the total minimum individual work space (see d(3), *supra*) multiplied by the number of people to occupy the office, plus an additional ten square feet per person as buffer space.

f. If private or collective use offices are not possible, individual alcoves or cubicles can be utilized. These must be defined on at least one side by partitions with tackable surfaces ranging in height from 52 to 62 inches. Work space should be both visually and acoustically buffered to give a degree of privacy. The degree of privacy would need to be higher for investigators' facilities.

g. Overall, the work areas should reflect the diverse work the positions require while retaining the overall tone of professionalism and dignity attributed to the prosecutor's office complex.

**14.12 Staff Service Facilities**

a. The prosecutor's office should provide a lounge area for use by all staff members. The lounge area should be designed so as to be an integral part of the office layout. Non-smoking as well as smoking facilities may be provided, but state law requirements on this subject should be adhered to. The facilities should be designed to be accessible to employees with physical handicaps.

b. The lounge area should be acoustically insulted from other areas of the office and not located near the entrance and reception area of the office.

c. The lounge area should be able to accommodate individuals and groups in the following activities:
(1) Coffee and lunch breaks;
(2) Informal small group discussions;
(3) Individual reading, writing, and quiet thought; and
(4) Viewing and/or listening to media devices.

d. The overall size of a lounge will depend upon the staff size, but a minimum of 125 square feet should be provided.
e. Where possible, a small kitchenette should be located in the lounge area with facilities such as a refrigerator, sink, and microwave oven. Rest rooms should be readily accessible but not open directly into the lounge. If vending machines are provided, they should be located either in a recessed alcove or just outside the lounge.
f. The lounge area should provide visual relief by the use of exterior views or bright colors, paintings, photographs, and other wall hangings. Color and lighting should be warm, and the area should be furnished with sofas, lounge chairs, and large tables.
g. Separate smoking and non-smoking lounge areas may be provided, but state law requirements on this subject should be adhered to.

**14.13 Intake and Screening/Diversion Facilities**

a. If the volume of cases and office staff is sufficient, the prosecutor should have a separate intake and screening/diversion unit with appropriate facilities.
b. A secondary reception/waiting area, quickly accessible from the central reception area should be established:
(1) Four or more lounge chairs provided in the reception area;
(2) A receptionist should be available if traffic flow is sufficient:
(a) Receptionist work area of 80 square feet;
(b) Standard secretary's desk and chair;
(c) Telephone, facsimile machine, typewriter, inter-office communication device, personal computer, files, etc.
(3) Reception area should allow ten square feet of space for each visitor;
(4) Depending upon the volume of cases in relationship to source of complaints, a separate reception/waiting area may be provided for law enforcement officers as well as private citizens. If separate areas are utilized, the area for police should also house two or more small work tables;

(5) A convenient traffic corridor should be provided between this secondary reception/waiting area and the staff offices of the screening and diversion units;

(6) Sound and visual insulation from actual work areas; and

(7) Security measures.

c. If the intake and screening/diversion unit is a 24-hour operation, or if it normally operates before and after regular office hours, a separate entrance both to the unit and through the building will be necessary.

d. The location of this/these units must be in close proximity to the other functions of the prosecutor's office.

e. The central records storage area should be adjacent to these facilities.

f. Separate entrance and exits should be provided.

g. The screening/diversion unit itself should provide private offices for staff:

(1) Offices should be insulated both visually and acoustically;

(2) Work area of 80 to 150 square feet;

(3) Be provided with a standard desk and swivel chair, telephone, facsimile machine, inter-office communication device, personal computers, dictation equipment, four or more occasional chairs, filing cabinets, book shelving, reference books used on a daily basis;

(4) Have direct access to typing and other clerical services; and be

(5) Directly adjacent to office facilities of police-legal advisor.

h. There should be a separate master file area for both the screening and diversion units:

(1) File area should be easily accessible by staff;

(2) Secure from public usage.

i. Overall sound insulation should be provided as well as direct overhead lighting. Decor should be in tune with professional image of office.

### 14.14 Education and Training Facilities

a. In-state training facilities should be established on two levels:

those that accommodate state-wide training and those that accommodate in-office and regional training.

b. The state-wide facilities should be of two types: auditorium style seating and conference style seating.

(1) Auditorium should be able to seat 100 to 500 people in rows that face a stage.

(2) Conference style would include:

(a) Seating capacity for 12 to 20;

(b) Area of 150 to 450 square feet;

(c) Either oval or elliptical table at least 15 feet in diameter or 20 feet x 7 feet in size.

c. In-office training facilities should provide for:

(1) Seating of 12 or more people;

(2) Area of 200 to 350 square feet;

(3) A round or elliptical table at least 8 feet in diameter or 13 feet x 5 feet in size;

(4) A separate doorway to allow chief prosecutor access to the training room without going through public areas of office.

d. All training facility rooms should:

(1) Be well ventilated;

(2) Have adjustable lighting;

(3) Provide for the presentation of slides, movies, and video tapes;

(4) Have a blackboard;

(5) Have provisions for hanging drawings, charts, maps, etc.;

(6) Have access to a facsimile machine;

(7) Have personal computers;

(8) Have a rollaway screen;

(9) Be capable to hold mock trials and interviews;

(10) Have storage space/shelves;

(11) Allow an average of 2 feet 6 inches between chairs; and

(12) Have swivel, non-adjustable chairs of a minimum of 21 inches seat width.

e. In all training facilities, the participants should be able to:

(1) Hear at a normal conversation level;

(2) See each other's facial expressions;

(3) Exchange documents, papers, and other objects;

(4) Sit for long periods of time without feeling cramped or uncomfortable;

(5) Take notes and place notebooks, coffee cups, etc., on a horizontal surface next to their seating position;

(6) Use visual aids to supplement the discussion; and

(7) Hang and/or store coats, hats, brief cases, and other objects.

f. If an audio/visual room is provided, it should:

(1) Be located along one edge of the training facility, just off the entrance;

(2) Be soundproofed;

(3) Have both 110 and 220 volt electrical outlets;

(4) Have storage shelves and closets;

(5) Be well ventilated;

(6) Have master control switches for all room lights; and

(7) Have a minimum area of 40 square feet.

g. Whenever a full-time staff position exists for a training officer, an office should be provided that:

(1) Is located adjacent to the training room;

(2) Has a minimum of 100 square feet;

(3) Has a standard desk and swivel chair, two or more occasional chairs, storage shelves, storage closet, file space, drafting or small work table;

(4) Allows easy access to telephone, facsimile machine, dictation equipment, personal computers, inter-office communications device, typing and other clerical services; and has

(5) Direct overhead lighting plus desk lamp/drafting lamp.

### 14.15 Evidence Storage Facility

a. Prosecutors' offices should have in-house capability to store evidence collected in the course of case preparation, investigation, and trial.

b. The area should not be accessible to the public, and entrance/exit to the area should be monitored by specifically-designated staff.

c. The size of the evidence storage facilities should depend upon the volume of material gathered and used. However, a minimum area of 50 square feet should be provided.

d. A record of all items incoming, in storage, or temporarily out of storage for case use should be kept. Also, a record should be maintained on all items that are disposed of. There should also be a location identification system for all items in relation to location status.

e. The evidence storage area should be designed so as not to admit exterior light, or at a minimum, separate sealable cabinets should be available.

f. Within the storage area there should be:

(1) Open bins allowing for vertical expansion and having a base of at least three feet in width should be provided along at least one wall;

(2) Storage cabinets with lockable doors or drawers. Cartons of various sizes are recommended for bulky items;

(3) A large table or desk plus a chair and/or stool; and

(4) Various sizes of bags and other containers, tape, writing/marking devices, and labeling materials.

**14.16 Forensic Service Facilities**

a. Prosecutors may elect to have the capability to process, test, and store evidence apart from the normal utilization of police or state criminalistic services. Large metropolitan offices should have sophisticated capabilities to do all of their own evidence processing.

b. Competent, trained staff should be retained to work in the forensic services area and may include individuals with expertise in laboratory techniques, investigation, photography, chemistry, DNA material processing, engineering, biology, and physics.

c. In addition to laboratory personnel, a clerical person will be needed to maintain records and process reports.

d. Individual office space is not recommended for any of these staff individuals, except where a large forensic facility is established. The division head of that facility or unit should be provided an office comparable to those of other unit or division heads.

e. The forensic services facility should have the following areas:

(1) Laboratory—processing and testing;

(2) Equipment storage—placement of mobile investigative tools;

(3) Evidence storage—placement of items currently being analyzed;

(4) Office area—paperwork flow.

f. The laboratory area should have, at a minimum, the following:

(1) Technician/chemist work station of 250 square feet;

(2) Storage for chemicals and glassware of 200 square feet;

(3) Photographic dark room of 200 square feet;

(4) Office/paperwork area of 125 square feet;

(5) Laboratory bench with ten linear feet of space per technician/chemist;

(6) Table sinks;

(7) Stools and/or chairs;

(8) Writing surfaces;

(9) Files;

(10) Storage shelves;

(11) Facsimile machine;

(12) Personal computers;

(13) Humidity and temperature controls;

(14) Electrical connections of 110 and 220 volts;

(15) Hot and cold running water;

(16) Natural gas jets and/or self-contained gas containers;

(17) Sound and visual insulation;

(18) Adequate ventilation;

(19) No exterior views; and be

(20) Secure and not accessible by the public.

g. The evidence storage area should have, at a minimum, the following:

(1) Storage area of 75 to 125 square feet;

(2) Storage cabinets, bins, and shelves; and

(3) Other provisions as listed in standards on evidence storage facility.

h. The equipment storage area should have, at a minimum, the following:

(1) Floor space of 100 square feet;

(2) Storage cabinets, bins, and **shelves; and**

(3) Work surface for repairing and readying equipment.

i. The selection of scientific equipment will depend upon the range of services performed by the facility.

(1) General purpose equipment would include the following:

(a) Personal computers;
(b) Balances;
(c) Ultraviolet lamp;
(d) Clocks and timers;
(e) Hot plates;
(f) Glassware;
(g) Fume hood with blower/suction exhaust;
(h) Centrifuge;
(i) Drying oven;
(j) Vacuum pump;
(k) Emergency shower with eyewash;
(l) Refrigeration unit;
(m) Bunsen burner;
(n) Photographic enlarger;
(o) Film development cans;
(p) Print development trays (or automatic print processor);
(q) Print washer;
(r) Print dryer;
(s) Chemicals (both general lab use and photo);
(t) Miscellaneous small tools to complement the major equipment.

(2) In addition to these basic equipment items, there are major types of instruments considered essential for the operation of a forensic laboratory and may include the following:

(a) Comparison microscope;
(b) Polarizing microscope;
(c) Stereo microscope;
(d) X-ray diffractometer;
(e) Emission spectrograph;
(f) Densitometer;
(g) Infrared spectrophotometer;
(h) Ultraviolet spectrophotometer;
(i) Analytical gas chromatograph;
(j) Facsimile machine.

### 14.17 Grand Jury Facilities

a. In those jurisdictions where the prosecutor extensively uses the grand jury, the location of the grand jury facilities should ideally be adjacent to the prosecutor's offices. Where this is not possible, the facilities should be as quickly and easily accessible as possible.

b. The physical plant of the grand jury facilities should consist of five distinct areas:

(1) Reception area;
(2) Grand jury room;
(3) Grand jury lounge;
(4) Witness waiting room;
(5) Lawyer-client conference room.

c. All five areas should include the following features:

(1) Carpeting and acoustical ceiling tile for soundproofing;
(2) Controlled access doors;
(3) Security from visual encroachment;
(4) Easy access to bathroom.

d. The grand jury area should be arranged so:

(1) The complex is accessible from the outside only through the reception area;
(2) The grand jury room is centrally located in the complex;
(3) Controlled accesses are provided from all areas to the grand jury room.

e. The grand jury reception area design should include the following features:

(1) Working area of 100 to 125 square feet for the receptionist with:
  (a) A secretarial desk;
  (b) A telephone;
  (c) Personal computer.
(2) A reception waiting area of 80 to 100 square feet with:
  (a) Lounge furniture;
  (b) Small table;
  (c) Hangings, plants, or other decor.
(3) Soft, indirect lighting;
(4) Bright wall colors;
(5) A secure door leading to other grand jury areas.

f. The grand jury room design should include the following features:

(1) Secure doors to all areas;

(2) Area of 15 to 20 square feet per user (depending upon size of grand jury panel);

(3) Swivel chairs for each grand juror;

(4) Writing surface for jurors;

(5) Desk or table for jury foreman;

(6) Table and accompanying chair for the prosecuting attorney;

(7) Chair for the witness;

(8) Tape player, movie screen, chalkboard, facsimile machine, and personal computer;

(9) Writing surface and chair for the court reporter;

(10) Indirect illumination;

(11) Warm color combinations.

g. The grand jury lounge room, provided for the grand jury panel members, should include the following features:

(1) Area of 20 to 25 square feet per user;

(2) Indirect illumination;

(3) Warm color combinations;

(4) Lounge chairs, sofas, occasional chairs, etc.;

(5) Coffee and dinette tables;

(6) Drinking fountain;

(7) Refreshment area—either kitchenette, vending area, or similar arrangement.

h. The witness waiting area should be designed to include:

(1) Area of 10 to 15 square feet per user;

(2) Indirect illumination;

(3) Warm, relaxing color scheme;

(4) Occasional chairs, lounge chairs, sofas, end-tables, magazine racks, coat storage;

(5) Wall surfaces with paintings, prints, or other materials.

i. The attorney-client conference room should have the following features:

(1) Area of 15 to 20 feet per user;

(2) Indirect illumination;

(3) Bright color scheme;

(4) Conference table for four to five persons;
(5) Four to five occasional chairs.

## COMMENTARY

To provide the necessary services, proper facilities must be provided. It does little good to employ a full staff complement if the needed space is not available. Likewise, the needed tools to complete any given task must be available.

Rural and small offices have different needs from large and urban offices. But there are universal needs in all types and sizes of offices. These standards take this into account and differentiate where necessary, but are also specific enough to give guidelines for facility and space optimum utilization.

These standards are guidelines and must include two notes of caution. First, whenever there is a description of size, *e.g.*, "x square feet," this is intended to serve as a minimum need for that space utilization. Second, as national guides, these standards do not take into account local zoning and building code regulations. Obviously, such regulations must always be taken into account when initiating facility planning. Special laws, *e.g.*, no smoking regulations, handicap accessibility, etc., must also be followed.

General considerations to be made are location of office in relation to service clientele and frequently visited external agencies, accessibility, foot traffic flow patterns through the office, paper flow through the office, security, and specific location of ancillary services.

The office complex must be conducive to both the function of prosecution and to the judicial hallmark that the image of prosecution deserves. The facility must be designed so that future expansion is possible. Often new equipment and refurbishing will suffice, but sometimes a totally new complex may be the sole solution. Also, as new modes of equipment become commonly available, such as facsimile communication and personal computers have in the last 20 years, such items should be considered necessary adjuncts to the prosecutor's facilities.

Large urban offices are best located near or in criminal justice complexes. Practicality may preclude this in small office situations. However, even one-person offices should have facilities designed for the demands of prosecution. All offices should be publicly financed and devoted exclusively to prosecution. Many rural prosecutors are still expected to use their personal, private law offices for prosecution facilities; this practice is unwarranted and demeaning to the profession. As with support staff and other components of prosecution, public agencies controlling funds must be cognizant of realistic facility needs and allocate the required monies.

These standards address those items and issues that affect the prosecutor's working environment. They range in scope from office configuration and location through basic equipment for internal operations.

The proper plan and design is not the only answer to maximizing the efficiency within a prosecutor's office. However, it will definitely enhance the capabilities of the prosecutor and all related activities. The role of the prosecutor in modern society, office activities which meet and do not meet the eye, and ability to discern the separate but often inter-related transactions occurring within and outside the office, must be taken into account.

For example, location of the office is critical in relation to other participants of the judicial system. The same applies to people flow—large numbers of people enter the office for various reasons, ranging in position from police officers, citizens, legal counsel, social workers, corrections personnel, etc.; and they usually visit the office on a temporary basis which can result in work disruption and security problems if poor planning occurs. Again, the operation of the prosecutor's office depends to a great degree on the movement of paper—the formal proceeding, notices and correspondence which comprise the heart of cases. Paper flow is often invisible to the casual observer and makes planning tedious at best. Too often the paper flow is ignored.

When planning, prosecutors' offices can be categorized into three general types based upon size and workload. First are those that will be utilized by part-time prosecutors in rural jurisdictions. Second are those utilized by full-time prosecutors with or without

support staff in urban or metropolitan areas. Third are facilities utilized by prosecutors in jurisdictions that have a central office and branch offices, such as those found in sprawling metropolitan areas.

No two offices' requirements are exactly alike, just as no two large metropolitan areas or rural towns are alike. As these differences become apparent in planing the prosecutor's office, it likewise becomes apparent that no single planning solution exists. One must look to the unique circumstances in each jurisdiction and design facilities to expedite work demands. However, there are sufficient general requirements that apply to all prosecutorial services to make "standards" for the basic operational needs both possible and warranted.

The National Clearinghouse for Criminal Justice Planning and Architecture, University of Illinois at Urbana-Champaign, and their document *Guidelines for the Planning and Design of State Court Programs and Facilities: Prosecution Planning Concepts* (1976) were used extensively in developing these and the predecessor NPS standards on Facilities.

# RELATIONS WITH LOCAL CRIMINAL JUSTICE ORGANIZATIONS

### 15.1 Prosecutor's Involvement

The prosecutor should be involved in local entities established and maintained for the enhancement of the effectiveness, efficiency, and fairness of the administration of justice in that jurisdiction.

### 15.2 Information Input

The prosecutor should provide such entities with information, advice, and data pertinent to the solution of problems identified in the jurisdiction and should consider the implementation of proposals designed to address and resolve such problems.

### 15.3 Organization Establishment

In those jurisdictions where there are no local inter-agency entities established for the enhancement of the effective, efficient, and fair administration of justice, the prosecutor should determine the potential benefits of such an organization and provide leadership in its establishment, if deemed beneficial.

### 15.4 Enhancing Prosecution

The prosecutor should participate in local bar associations for the purpose of enhancing and advancing the goals of the prosecution function.

*Commentary follows standards on page 75.*

# RELATIONS WITH STATE CRIMINAL JUSTICE ORGANIZATIONS

### 16.1 Need for State Association

Each state should have a professional association of prosecuting attorneys for the purpose of serving and responding to the needs of its membership and enhancing the prosecution function.

The prosecutor should be an active member of his state association.

Each state association should provide services that are most conducive to development at the state-wide level, including, but not limited to, the following:

a. Continuing legal education;
b. Training of newly-elected prosecutors and their staff;
c. Management training;
d. Support for in-house training programs;
e. Information dissemination (newsletters, bulletins, etc.);
f. Technical assistance in planning, management, litigation, and appeals;
g. Promulgating model office manuals;

h. Coordinating resources not otherwise available or frequently used;
i. Monitoring legislative developments and drafting model legislation;
j. Maintaining liaisons; and
k. Developing innovative programs;
l. Developing and monitoring computer systems.

### 16.2 Enhancing Prosecution

The prosecutor should participate in other state-wide entities, such as state bar associations, for the purpose of enhancing and advancing the goals of the prosecution function.

### 16.3 Fulfillment of Obligations

The obligations a prosecutor undertakes on behalf of state organizations should extend only to those which he can fulfill in a diligent and competent manner.

### 16.4 Prosecutorial Input

State organizations should take all reasonable measures to include the involvement and view of incumbent local prosecutors in the research of studies and promulgation of standards, rules, and the like (disciplinary, aspirational, or otherwise) which impact on the prosecutor and the prosecution function.

*Commentary follows standards on page 75.*

# RELATIONS WITH NATIONAL CRIMINAL JUSTICE ORGANIZATIONS

### 17.1 Enhancing Prosecution

The prosecutor should take an active role in national level organizations for the purpose of enhancing and advancing the goals of the prosecution function. The obligations a prosecutor under-

takes on behalf of national organizations should extend only to those which he can fulfill in a diligent and competent manner.

**17.2 Prosecutorial Input**
National organizations should undertake all reasonable measures to include the involvement and views of incumbent local prosecutors in the research of studies and promulgation of standards, rules, and the like (disciplinary, aspirational, or otherwise), which impact on the prosecutor and the prosecution function.

## COMMENTARY

The prosecutor should participate in local, state, and national affairs for the improvement of the criminal justice system. Activities which the prosecutor might undertake include provisions of information and advice to governmental bodies and citizens' groups, review and consideration of pending state and national legislation, and participation in criminal justice-related programs or projects. A good prosecutor is a good attorney and would be expected to be active in his local and state bar associations.

The standards recognize the rapid growth in community organizations in the last 20 years devoted to specific interests, such as DUI enforcement, rape prevention/counseling programs, spousal and child abuse prevention, drug education programs, neighborhood watch programs, to name just a few. An interested and informed citizenry can be a valuable partner in law enforcement. The standards encourage prosecutors in communities lacking such grass-roots organizations to consider appropriate ways and means whereby citizen interest in their formation can be stimulated.

Because the office of the prosecutor is a local one, the responsibilities placed on this office are probably more diverse than those at any other level of government, which may have the capacities for specialization. For example, citizen complaints may range from how to cope with a neighbor's children to how to collect on a bad check. Expectations from law enforcement agencies and the courts are equally diverse and more demanding. In many jurisdictions, the prosecutor is also the attorney for his county. This responsibili-

ty may demand an expertise in taxation, school law, zoning, property law, employee disciplinary law, health law, environmental law, and labor relations.

If every prosecutor's office were designed on a level of specialization necessary to address each area it is responsible for, it would not only be a tremendous (and no doubt prohibitive) financial burden, but also an enormous duplication of effort on a county-by-county or district-by-district basis. On the other hand, local initiative, flexibility, and accountability are essential factors which must be maintained in prosecution. Thus, one method of alleviating this problem is through a state-wide association of prosecuting attorneys, a concept that NDAA has long fostered.

Such an association should be made up of all local prosecutors in a state and should have a full-time staff. This organization must be responsive to the needs of its members. As a result, the various functions will differ. However, those areas of concentration may include: training, information dissemination, technical assistance, resource provisions, legislative development, review and liaison, support of innovative programs, and informal professional conduct review.

Because the purpose of such an association is to serve prosecutors, it is imperative that they be involved and support the operation of the association. Membership should be the responsibility of all prosecuting attorneys, and dues should be paid through the prosecutor's budget. Membership should not be limited to elected prosecutors but rather be open to other interested parties such as assistants, former prosecutors, state attorney general staff members, investigation staff, and law students.

In addition, prosecutors who recognize the value of the functions of their state bar associations and prosecutors' associations should be willing to commit time in volunteer support, such as serving on committees.

Likewise, the locally-elected prosecutor and his staff should participate in and support their national organization for the advancement of the interests of effective law enforcement. The organization provides a forum for the local prosecutor that no other organization can, and an effective voice in national legislative and policy-making activities. The programs of training,

publications, technical assistance, and focused activities (such as drug enforcement, child abuse enforcement, environmental law enforcement, etc.), provide the local prosecutor with a perspective that reaches beyond the state level. The failure of local prosecutors to be active in local, state, and national associations will result in the advancement of competing entities. At the same time, it is important that prosecutors not volunteer their time unrealistically and are able to meet the demands of their undertakings.

# RELATIONS WITH OTHER PROSECUTORIAL ENTITIES

### 18.1 Prosecutorial Cooperation

In recognition of the common goal of serving the interest of justice, the prosecutor should cooperate with all applicable federal, state, and local prosecutorial entities in the investigation, charging, dismissal, or prosecution of cases which may be of concern to such entities.

### 18.2 Coordination Mechanisms

The prosecutor should establish and maintain mechanisms for determining the possibility of other prosecution which would avoid double jeopardy defense claims and avoid detriment to prosecution resulting from a grant of immunity.

### 18.3 Resource Sharing

The prosecutor should share resources and investigative information with other prosecutorial entities commensurate with the fullest attainment of the interests of justice.

### 18.4 Non-Partisan Relations

All relations with other prosecutorial entities should be maintained on a non-partisan basis.

### 18.5 Duty to Report Misconduct

When the prosecutor has knowledge of misconduct or incompetency in another entity of prosecution, he should report that information to the supervisory authority and take such other actions necessary to sanction the misconduct and remedy the incompetence.

### 18.6 Furtherance of Justice

The office of the prosecutor and the office of the state attorney general, where separate and distinct entities, should cooperate in the furtherance of justice.

### 18.7 Intervention on Request

The state attorney general should intervene in or assist in local prosecutions at the request, and only at the request, of the local prosecutor.

### 18.8 Availability of Resources

The state attorney general should make the resources of his office available to assist the local prosecutor.

## COMMENTARY

Relations between the local prosecutor, attorney general, special prosecutors, and other prosecutorial agencies having overlapping jurisdictions, vary considerably from state to state and have not always been smooth.

While the standard counsels that cooperation among agencies is the key to effective law enforcement, it does not diminish the position that the individual with primary responsibility and authority to make decisions and take action on local crime problems is the locally-elected prosecutor. The prosecutor is in the best position to make correct decisions regarding local crime problems, reform of local court procedures, and the allocation of local resources to effectively fight crime.

State and federal authorities should recognize the primacy of the locally-elected prosecutor. Intervention which is not requested is

not likely to foster necessary, positive working relations. The standard recommends that intervention by the state attorney general be only at the request of the local prosecutor. The major burden of law enforcement in America falls upon local law enforcement, and it is to the locally-elected prosecutor that such agencies turn for the prosecution of their cases and the initiation of investigations.

# POLICE LIAISON

### 19.1 Law Enforcement Communications

The prosecutor should provide liaison and actively seek to improve communication with law enforcement agencies. The prosecutor should prepare and encourage the use of standard police reporting forms by all law enforcement agencies within the jurisdiction.

### 19.2 Case Status Advisement

When it is practical to do so, the prosecutor should keep local police agencies informed of cases in which they were involved and provide communications on those cases in order to aid the police in the performance of their duties.

*Commentary follows standards on page 81.*

# POLICE LEGAL ADVICE AND TRAINING

### 20.1 Law Enforcement Training

The prosecutor should encourage, cooperate with, and, where possible, assist in law enforcement training. The prosecutor should urge local law enforcement officers to participate in national, state, and regional training courses.

### 20.2 Prosecution Assistance in Training

The prosecutor's office should develop a system, formal or informal, of assisting in the on-going training of officers by conducting periodic classes, discussions, or seminars, to acquaint law enforcement agencies with recent court decisions and procedural changes in the law.

*Commentary follows standards on page 81.*

# POLICE LIAISON OFFICER

### 21.1 Liaison Assignment

Each major law enforcement agency should assign at least one officer specifically to the prosecutor's office when there is mutual consent of the agency and prosecutor to do so.This officer should serve as a liaison between offices and be available to perform the duty of informing concerned officers of the progress and disposition of criminal cases.

*Commentary follows standards on page 81.*

# POLICE LEGAL ADVISOR

### 22.1 Advice on Legal Compliance

Prosecution should provide legal advice to the local law enforcement agencies concerning sufficiency of evidence, warrants, and similar matters relating to investigation of criminal cases. The prosecution should serve in an advisory capacity to insure the legality of documents and procedures in pursuing criminal cases. The prosecutor should encourage the police to seek this advice as early as possible in the investigation of a case.

# COMMENTARY

The maintenance of good relations between the prosecuting attorney and the law enforcement agencies within the community is essential for the smooth functioning of the criminal justice system. Both parties have the burden of fostering, maintaining, and improving their working relationship, and developing an atmosphere conducive to a positive exchange of ideas and information.

The criminal justice system, of which the police are only one element, is a structure of law. Many times this structure suffers from seemingly contradictory court decisions, public pressure, and the problems that arise in trying to balance effective law enforcement and the protection of the rights of individuals. The police face many of these problems. To alleviate these problems, the prosecutor could educate the police in the area of pre-trial criminal procedure, including search and seizure law, the arrest process, the use of force and interrogation. In particular, with respect to the various exclusionary rules pertaining to the admissibility of evidence, the prosecutor has a responsibility to educate the police on the effect of court decisions in general and their application in specific cases where evidence was suppressed by a trial court.

The prosecutor has a large stake in the training and professionalization of local law enforcement. Their handling of a case is often crucial to the prosecutor's success. Therefore, the prosecutor should encourage the local police to participate to the fullest extent possible in training programs operated on state, regional, and national levels. If such a program does not exist or is not available to police in the jurisdiction, it is in the prosecutor's best interest to promote the development of such a program. Such training should result in more successful prosecutions. Besides the face value effectiveness of police training, it is an excellent opportunity to establish personal rapport and communications with individual police officers.

The prosecutor should advise the police on the legal aspects of criminal investigations. This advisory function pertains only to criminal matters and should not be confused with the function of police in-house counsel. Assuming the role of an advisor to any

member of the police department on civil or personal matters is beyond the scope of the duties of the office of prosecuting attorney. In many cases, such a role would place the prosecutor in a position of possible conflict of interest with other duties prosecution is obliged to perform.

Furthermore, the prosecuting attorney may be restricted from any active participation in the police function by the threatened loss of immunity to civil damages in instances where participation is beyond the scope of advisor and, therefore, not an integral part of the judicial process. The prosecutor must always be cognizant that his quasi-judicial immunity afforded by the courts in civil liability suits is limited to actions taken in advancement of the traditional prosecution function.

The responsibility for sound communications between the prosecutor and law enforcement agencies is mutual. It is a goal of the prosecutor to keep police informed of developments in investigations, trials, and related matters. Both entities must seek to develop and implement systems and procedures which facilitate and enhance communications. One method of providing a consistent flow of information about all criminal matters is the development and use of a uniform police report. The prosecutor has the expertise to design a form that will fit both the needs of prosecution and those of local law enforcement. The police should file a complete copy with the prosecuting attorney as soon as possible after the investigation of an alleged crime. The uniform report has dual purposes. First, it expedites the processing of cases for the prosecuting attorney which is of benefit to both the prosecutor and the police. Secondly, it insures that all information necessary for a successful prosecution is available for each case. Model forms have been developed by various state and national law enforcement professional associations and training facilities. In addition to forms, other uniform reporting systems have been developed that achieve the overall goal sought here, as well as decreasing the time required to prepare the forms and aiding in the eventual case preparation by prosecution by giving instant reference to interviews and evidence at the scene of the crime.

The prosecuting attorney should also be prepared to speak out on behalf of local police on the subject of adequate funding. Prosecu-

tion represents the best interests of the electorate when seeking appropriate avenues and forums for insisting that the police are properly paid, equipped, and trained. The prosecutor should stand ready to assist local law enforcement in seeking additional funds from local, state, or federal funding agencies if prosecution feels that such a request is justified.

# RELATIONS WITH THE COURT

### 23.1 Judicial Respect

Proper respect for the judicial system and appropriate respect for the court should be maintained at all times.

### 23.2 Respect in the Courtroom

While counsel is entitled to vigorously pursue all proper avenues of argument, such action must be undertaken in a fashion that does not undermine respect for the judicial function.

### 23.3 Improper Influence

Counsel should not seek to unfairly influence the proper course of justice by any relationship, communication, or pressure upon the court.

### 23.4 Respect From the Court

The court should display appropriate respect for the prosecution and defense. The court should not express or demonstrate any personal preferences or opinions.

### 23.5 Limitations of Resources/Abolition of Trial *De Novo*

The prosecutor should recognize the limitations of the resources of the courts and avoid all dilatory action inconsistent with such limitations. It is recommended that all trial *de novo,* whereby appellate review of a lower court verdict is systematically conducted in the form of a new trial before a higher court, be abolished.

### 23.6 Suspicion of Misconduct

When a prosecutor has reasonable suspicion of misconduct by a member of the judiciary, the prosecutor has a responsibility to take such action necessary to substantiate or dispel such suspicions.

### 23.7 Responsibility to Report Misconduct

When a prosecutor has knowledge of misconduct or unfitness to serve by a member of the judiciary, the prosecutor has the responsibility to report that knowledge to the appropriate authority and take such other action as is necessary to remedy the misconduct.

### 23.8 Application for Recusal

When a prosecutor has a sound basis to believe that a judge is unfit or unqualified to sit on a particular case, the prosecutor may properly seek that judge's recusal.

## COMMENTARY

The prosecutor is an officer of the court, a public official accountable to those of his jurisdiction and a hub of the criminal justice system. All of these dimensions influence the prosecutor's relations with the court.

The standard recognizes that judges, like all figures in the criminal justice system, are individuals of diverse talents, skills, and temperaments. While some are of superior character, others suffer from human frailties not uncommon in our society. Thus, while the prosecutor needs to have proper respect for the institution of the judiciary, he, at the same time, has a responsibility to guard against the infrequent abuses from those who fail to honor their responsibilities while serving on the bench.

While this approach may require a delicate balance, it is necessary both inside and out of the courtroom. As is true of all National Prosecution Standards, effective justice is the paramount issue. Therefore, the prosecutor should neither undermine respect for the judicial function nor in any manner attempt to unfairly

influence the court. In these respects, the prosecutor has the right to expect nothing less from the court.

Nevertheless, the prosecutor must assume the role of guardian against injustice and corruption. It is unacceptable to turn a deaf ear to suspicions of misconduct. The standard places a duty on the prosecutor to follow through when there is reasonable suspicion of misconduct by a member of the judiciary. When judicial scandals are uncovered, they become an indictment of the entire criminal justice system, creating a public perception that all those involved in the system are corrupt. Because of the prosecutor's close contact with the judiciary, he has the best opportunity to observe suspicious patterns of behavior. Because of the prosecutor's role in the criminal justice system, he has the obligation to investigate and address the misconduct with at least the vigor and resources of any other allegations of corruption within the jurisdiction.

The standards make it clear that the prosecutor has responsibilities not only when misconduct is at the level of criminal activity, but also when a judge demonstrates the inability to carry out his duties with a minimal level of competence.

# RELATIONS WITH THE DEFENDANT

### 24.1 Communications with Defendants

In most instances involving felonies or serious misdemeanors, it is desirable that a prosecutor communicate with a defendant through counsel; however, even in felonies or serious misdemeanors, there are occasions when it is in the best interest of justice that a prosecutor communicate with a defendant not represented by counsel or whose counsel is not present.

### 24.2 Disclosure

When a prosecutor communicates with a defendant not represented by counsel or whose counsel is not present, the prosecutor should make certain that the defendant is treated with honesty, fairness,

and full disclosure of his liabilities in the matter under discussion. If legally required, under the circumstances, the prosecutor should advise the defendant of his rights. If the prosecutor contemplates using statements made by the defendant against him, the prosecutor should advise the defendant to that effect.

### 24.3 Unsolicited Communications

When a defendant is represented by counsel, but requests to communicate with a prosecutor out of the presence of his counsel, the prosecutor should ascertain if there is a valid reason to allow such communication and allow the communication only if a valid reason exists. The prosecutor has a right to receive unsolicited communications from defendants, of which he has no advance notice, without the duty of ascertaining whether or not there is a valid reason for the communication.

### 24.4 Safeguards

If a prosecutor enters into a plea negotiation with a defendant not represented by counsel or whose counsel is not present, he should make certain that the defendant understands his rights, duties, and liabilities under the agreement. When possible, the agreement should be reduced to writing and a copy provided to the defendant. The prosecutor should never take unfair advantage of an unrepresented defendant.

### 24.5 Right to Counsel

If a prosecutor is engaged in communications with a defendant not represented by counsel or whose counsel is not present, and the defendant changes his mind and expresses a desire to obtain counsel or to have counsel present (when represented by counsel), the prosecutor should allow him to obtain counsel or secure the presence of counsel and, when necessary, give him advice on obtaining appointed counsel.

### 24.6 Communications with Represented Defendants During Investigations

A prosecutor performing his duty to investigate should neither be intimidated nor discouraged from communicating with a defendant

in the absence of counsel when the communication is "authorized by law." Such communication is allowed. A prosecutor who communicates with a witness who is also charged as a defendant in an unrelated matter, is not communicating about the subject of the representation, so long as the prosecutor keeps that matter entirely separate from the investigation or prosecution which the prosecutor is conducting. Similarly, nothing prohibits a prosecutor from advising or authorizing a police officer to engage in communications with an uncharged, represented suspect in the absence of the suspect's counsel provided such a communication is "authorized by law."

## COMMENTARY

Relations with defendants is a sensitive area of a prosecutor's function. There must be a balancing of the general desirability to have defendants represented by counsel in their dealings with prosecutors and the right of defendants to represent themselves in traffic cases and minor misdemeanors, and even in felonies or serious misdemeanors under certain circumstances. It must be recognized that even defendants represented by counsel may have the right under certain circumstances to communicate with a prosecutor without the prior knowledge or presence of his attorney.

The standard provides that prosecutors communicating with unrepresented defendants should be certain that they are treated fairly and that defendants be made aware of what could happen to them as the result of whatever actions are taken. For example, suppose a defendant wishes to become a witness for the state in return for a recommendation by the prosecutor that he receive a suspended sentence. The prosecutor must make it known that he cannot guarantee the desired sentence but can only make a recommendation (if that be the case) and that the defendant might indeed be sentenced to a jail term, even with his cooperation on behalf of the state. If local rules or the legal circumstances require *Miranda*-type warnings be given, the prosecutor should so advise the defendant before any conversation. The standard assumes that a prosecutor will tell a defendant if he intends to use the communi-

cations against him. There are circumstances in which a prosecutor will agree to receive information from a defendant but not use it against him. However, to ensure fairness to an unrepresented defendant, it is felt that he should not be subjected to the liability of incriminating statements without a prior warning and waiver of rights.

The standard recognizes that prosecutors are sometimes contacted by defendants without the knowledge of their counsel and given good reasons for their direct communications with the prosecutor. For example, a defendant may express that his attorney was hired by another person with an interest in keeping him quiet, to his legal detriment. In drug cases where couriers are caught transporting large amounts of drugs or cash, defendants may have attorneys appear, bail them out, and begin representation without the express authority of the defendant. Defendants complain that these attorneys are working for other interests, but they are afraid to discharge them because of actual or assumed danger. Similarly, a defendant may be the officer, employee, or agent of a corporation and face individual charges in addition to those against the corporation, where counsel for the corporation represents that he is also counsel for the individual. This situation may exist without the individual's knowledge or without the knowledge of an inherent conflict of interest in the representation. In these and other circumstances, prosecutors and defendants should have a right to communicate as long as legal and fairness requirements are met. Prosecutors also often receive unsolicited telephone calls and letters from defendants. They should have the right to receive them and use them in any legal manner.

The standard recognizes that many defendants wish to negotiate a plea with the prosecutor without representation. Many such defendants are experienced with the system or do not wish the expense of representation. In these circumstances, the prosecutor is held to full disclosure of the defendant's liabilities and a standard of fairness. The prosecutor should make certain that a defendant receives as favorable a disposition as he would have had had he been represented in the circumstances. The desirability of written plea agreements is also noted.

The standard recognizes the general legal requirement of fulfilling a defendant's desire for counsel, even if he originally expressed a desire not to be represented or to have counsel present and assisting him, or to obtain counsel if he cannot afford to pay for representation. The defendant's wishes in this regard are recognized as paramount. The prosecutor should make a record of any communications with represented defendants which take place in the absence of counsel.

Prosecutors have a duty to investigate criminal activity. This may involve communicating with witnesses who are also defendants or suspects in unrelated cases. Ordinarily such communications must be made with the approval of the witness/defendant's counsel because the witness is seeking some benefits in the "subject matter of the representation." Whenever a witness/defendant seeks any benefit in his own case, the communication does involve the "subject matter of the representation" and counsel must be included. In circumstances which remain completely unrelated to the witness/defendant's case (the subject of the representation), a communication may be "authorized by law" even though counsel was not consulted. In circumstances involving "undercover" investigations of an uncharged but represented suspect, a prosecutor can advise police officers to communicate with the suspect so long as the communication is specifically "authorized by law."

*In some jurisdictions, these standards may be inconsistent with case precedent and/or rules of professional conduct. The prosecutor must proceed with caution and seek to avoid any action that would jeopardize the case or result in misconduct under applicable rules.*

# RELATIONS WITH DEFENSE COUNSEL

### 25.1 Standards of Professionalism

The prosecutor should comply with the provisions of professionalism as identified in Standard 6.5, in his relations with

defense counsel, regardless of prior relations or animosity and should maintain uniformity of fairness among different defense counsel.

**25.2 Propriety of Relations**
In all contacts with members of the defense bar, the prosecutor should strive to preserve the appearance and reality of proper relations.

**25.3 Cooperation to Assure Justice**
The prosecutor should cooperate with defense counsel at all stages of the criminal process to assure the attainment of justice and the most appropriate disposition of each case.

**25.4 Disclosure of Exculpatory Evidence**
The prosecutor should disclose the existence or nature of exculpatory evidence pertinent to the defense.

**25.5 Pursuit of Misconduct**
When a prosecutor has reasonable suspicion of misconduct by defense counsel, the prosecutor has a responsibility to take such action necessary to substantiate or dispel such suspicion.

**25.6 Responsibility to Report Misconduct**
When a prosecutor has knowledge of misconduct by defense counsel, the prosecutor has the responsibility to report that knowledge to the appropriate authority and take such other actions necessary to sanction the misconduct.

# COMMENTARY

As with the judiciary, appropriate prosecutorial consideration is due opposing counsel, and all actions directed at opposing counsel and all deliberations with opposing counsel should be conducted with candor and fairness and should be presented without any express or implied animosity or disrespect.

Underlying the whole area of trial decorum is the question of trial ethics and the philosophical role of the prosecution and defense. It has long been recognized that the responsibility of the prosecutor goes beyond simply seeking indictment and conviction. The duty of the prosecutor is to seek justice, not merely to obtain a conviction. This same type of standard also applies to defense counsel as noted many years ago by Bress, "Professional Ethics in Criminal Trials," 64 *Mich. L. Rev.* 1493, 1494 (1966):

> A defense attorney does not promote the attainment of justice when he secures his client's freedom through illegal or improper means. Rather, by the use of such methods, he breaches the public trust reposed in him by virtue of his oath of office . . . Neither the presumption of the defendant's innocence nor the government's burden of proof demands that the defense attorney act with anything other than honor and fairness.

The maintenance of this obligation by both sides mandates the fair, impartial, and decorous conduct of all trial proceedings and all relations with opposing counsel, opposing parties, and all officers of the court.

Of course, this admonition would be hollow if the prosecutor did not assume a responsibility to report misconduct of defense counsel to the appropriate professional and judicial authorities. If the prosecutor has a substantial basis for believing that misconduct exists, he should in all cases report that information to the appropriate authorities, at the same time being careful not to take action that would prejudice a defendant's right to a fair trial or precipitate a mistrial of the case. The timing of such report, therefore, may be an important element in a balanced approach to carrying out this responsibility.

One continuing myth that pervades the judicial process is the misconception that the defense attorney should be allowed greater leeway in the presentation of his case than the prosecutor. This leeway is often sought to be justified on the grounds that it is necessary to counter-balance the more prolific resources of the state brought to bear upon a single individual. Such reasoning is fallacious, however, when viewed in relation to the purpose of the adversary proceeding and the safeguards already provided therein. The courtroom is not a stage but a forum, and uniformity of trial

decorum by defense and prosecuting attorneys should be maintained by the court to prevent undue influence on judge and jury which might result from theatrical behavior. The prosecutor should be able to bring to the court's attention the failure to maintain such uniformity and should himself maintain the high standards of conduct befitting a professional advocate in public service.

# RELATIONS WITH VICTIMS

### 26.1 Information Conveyed to Victims

Victims of violent crimes, serious felonies, or any actions where it is likely the victim may be the object of physical retaliation, should be informed of all initial stages in the criminal justice proceedings to the extent feasible, including, but not limited to, the following:

a. Acceptance or rejection of a case by the prosecution's screening unit, the return of an indictment, or the filing of criminal charges;
b. A determination of pre-trial release of the defendant;
c. Any pre-trial disposition;
d. The date and results of trial;
e. The date and results of sentencing;
f. Any proceeding within the knowledge of the prosecutor which does or may result in the defendant no longer being incarcerated, including appellate reversal, parole, release, and escape; and
g. Any other event within the knowledge of the prosecutor which may put the victim at risk of harm or harassment.

### 26.2 Victim Orientation

To the extent feasible and when it is deemed appropriate by the prosecutor, the prosecution should provide an orientation to the criminal justice process for victims of crime and should explain prosecutorial decisions, including the rationale used to reach their decisions. Special orientation should be given to child and spousal abuse victims and their families.

### 26.3 Victim Assistance Provisions

To the extent feasible, the prosecution should develop policies and procedures for providing the following services to victims of crimes, including, but not limited to the following:

a. Assistance in obtaining the return of property held in evidence;
b. Assistance in applying for witness fees;
c. Assistance in obtaining restitution orders at the sentencing;
d. Assistance in appropriate employer intervention concerning required court appearance;
e. Assistance with transportation and lodging arrangements;
f. Assistance in reducing the time the victim has to wait for any court appearance to a minimum; and
g. Assistance in reducing overall inconvenience whenever possible and appropriate.

### 26.4 Cooperative Assistance

The prosecution should work with other law enforcement agencies to:

a. Cooperate with victim advocates for the benefit of providing direct and referral services to victims of crime; and
b. Assist in the protection of a victim's right to privacy regarding a victim's address and telephone number, place of employment, name when the victim is a minor, or any other personal information unless a court finds it necessary to that proceeding.

### 26.5 Facilities

Victims should have a secure and comfortable waiting area which avoids the possibility of their making contact with the defendants or friends and families of the defendants.

### 26.6 Victim Compensation Program

Each state should establish and maintain a victim compensation program. The prosecution should be knowledgeable of the criteria for compensation and should inform victims with potential compensable claims of the existence of such programs.

### 26.7 Victim Assistance Program

To the extent feasible, the prosecutor should develop and maintain a victim/witness assistance program within the staffing structure of the office to provide services and give assistance to victims of, and witnesses to, crimes.

### 26.8 Victim Protection

Law enforcement agencies should provide protection from intimidation and harm arising from victims' cooperation with such agencies and the prosecution.

*Commentary follows standards on page 95.*

# RELATIONS WITH WITNESSES

### 27.1 Information Conveyed to Witnesses

The prosecution should keep witnesses informed of:

a. Notification of all pre-trial hearings which the witnesses may be required to attend; and

b. Notification of trial dates and the scheduling of that witness's appearance.

### 27.2 Witness Assistance Provisions

To the extent feasible, the prosecution should develop policies and procedures for providing the following services to witnesses of crimes including, but not limited to, the following:

a. Assistance in applying for witness fees;

b. Assistance in appropriate employer intervention concerning required court appearance;

c. Assistance in transportation and lodging arrangements;

d. Assistance in minimizing the time the witness has to wait for any court appearance; and

e. Assistance in reducing overall inconvenience whenever possible and appropriate.

### 27.3 Witness Protection

Law enforcement agencies should provide protection from intimidation and harm arising from the witness's cooperation with such agencies and prosecution.

### 27.4 Facilities

Witnesses should have a secure and comfortable waiting area which is away from the possibility of the witnesses making contact with defendants or the families and friends of defendants.

### 27.5 Protection Enforcement

The prosecutor should assign a high priority to the investigation and prosecution of any type of witness intimidation, harassment, coercion, or retaliation, including any such conduct or threatened conduct against family members or friends.

## COMMENTARY

Effective prosecution includes a sound understanding of the value of victims and witnesses within the criminal justice system. The necessity of individuals reporting crimes and following through with identifications, statements, and testimony is self-evident. The standard, however, identifies obligations of the prosecutor and others to facilitate the relationship with victims and witnesses.

Both victims and witnesses need notice of developments in criminal cases. Witnesses need to make arrangements in order to be available to testify, while victims may be more concerned with release decisions, in apprehension of their personal safety and the safety of their families.

Prosecution should not assume that victims or witnesses are familiar with the terminology, procedures, or even location of the courts. At a minimum, prosecutors should be sensitive to this. Ideally, there should be a formal orientation program available to all victims and witnesses.

Such an orientation program should be part of a number of services provided. Prosecutors should have a leading role in the development and maintenance of victim/witness assistance

programs. The standard suggests the type of assistance that should be available, such as employer intervention and reduction in inconvenience.

In addition to a program of assistance, the standard calls for appropriate facilities for victims and witnesses. They should avoid the possibility of contact with the defendant or his friends and family.

As central a figure as the prosecutor is to relations with victims and witnesses, he is certainly not the sole source to accommodate the needs of victims and witnesses. These needs should be a cooperative effort. For example, one of the greatest needs of victims and witnesses is the assurance of their safety. They are most vulnerable to threats, harassment, and intimidation. Their protection is primarily a law enforcement function. While prosecution should work with the police to minimize this, it is essentially a cooperative effort.

# PROBATION

### 28.1 Role in Pre-Sentence

The prosecutor should take an active role in the process of development and submission of the pre-sentence report, including the following:

a. The office of the prosecutor should develop a rapport with the probation department to encourage consultation on pre-sentence reports;

b. The office of the prosecutor should be available as a source of information to the probation department concerning an offender's background when developing pre-sentence reports;

c. The office of the prosecutor should review pre-sentence reports prior to or upon submission of such reports to the bench;

d. Upon denoting any information within a pre-sentence report which conflicts with information known to the prosecutor, it is the duty of the prosecutor to notify the appropriate parties of such conflicting information;

e. The office of the prosecutor should make efforts to insure that the pre-sentence report includes only relevant information as mandated by the function of such a report;
f. The office of the prosecutor should assist the probation department in assuring the confidentiality of individuals providing information for pre-sentence reports.

**28.2 Prosecutorial Resource**
The office of the prosecutor should be available as a source of information to the probation department for ex-offenders under supervision.

**28.3 Notice**
The office of the prosecutor should be notified of, and has the right to appear at, probation revocation and termination hearings and should be notified of the outcome of such proceedings within the jurisdiction.

*Commentary follows standards on page 100.*

# COMMUNITY-BASED PROGRAMS

**29.1 Knowledge of Programs**
The prosecutor should be cognizant of and familiar with all community-based programs to which offenders may be sentenced, referred as a condition of probation, or referred as a diversionary disposition.

**29.2 Need for Programs**
In jurisdictions where community agencies providing services—such as employment, education, family counseling, and substance abuse counseling—are needed but not provided, the prosecutor should encourage their development. The prosecutor should be available as a source of information for community-based agencies.

### 29.3 Notice
The prosecutor and the police should be notified of individuals participating in work-release programs in their jurisdiction.

*Commentary follows standards on page 100.*

# PRISONS

### 30.1 Knowledge of Facilities
The prosecutor should be cognizant of, and familiar with, all prison facilities and services to which offenders prosecuted in the jurisdiction may be sentenced.

### 30.2 Improvement of Institutions
The prosecutor should make efforts to upgrade correctional institutions within the state, including the avoidance of prison overcrowding. Adequate and additional facilities, new construction of prison facilities, and the enlargement of existing facilities, services, and trained staff should be primary goals of such upgrading.

### 30.3 Prosecutor as Resource
The prosecutor should be available as a source of information for prisons and their intake divisions.

### 30.4 Career Offender Identification
The prosecutor should assist in the identification of multiple and career offenders.

### 30.5 Appropriate Sentencing
The prosecutor should cooperate with the prison system to assure that realistic sentences are carried out.

### 30.6 Innovative Improvements
The prosecutor should encourage innovative experimentation which would improve the penal system.

### 30.7 Notice
Any institution holding an offender should notify both the prosecutor and law enforcement agencies at the time of an escape, prior to any temporary or final release, and prior to parole consideration.

### 30.8 Corrections Advisory Committee
The prosecutor should encourage the establishment of a state-wide correctional advisory committee involving representatives from all components of the criminal justice system and responsible members of the public.

*Commentary follows standards on page 100.*

# PAROLE/EARLY RELEASE

### 31.1 Prosecution as Resource
The prosecutor should be available as a source of information for the parole board and supervisory agency.

### 31.2 Information System
Where the prosecutor deems it appropriate, he should assist in the development and maintenance of an information system to keep the prosecutor's office informed of parole decisions concerning individuals from, or planning to reside in, the jurisdiction.

### 31.3 Parole Board Discretion
The prosecutor should be cognizant of the parole board's discretion and address abuses of the discretion.

### 31.4 Right to Appear
The prosecutor should have the opportunity to appear at hearings for parole, pardon, commutation, and grant of executive clemency, and should be notified sufficiently in advance of all such hearings.

### 31.5 Early Release

The prosecutor should oppose the early release of offenders where the release decision is made by correctional authorities solely or primarily on the basis of overcrowding of the correctional facility. The prosecutor should encourage the adoption of legislation preventing early release programs based on overcrowding of such facilities.

### 31.6 Notice

The prosecutor and appropriate law enforcement agencies should be notified of all parole, pardon, commutation, or grant of executive clemency concerning individuals from, or planning to reside in, the jurisdiction.

## COMMENTARY

In most jurisdictions, probation has two basic functions: pre-sentence investigations and supervision. Pre-sentence investigations lead to reports which are social histories of the convicted offender awaiting sentencing. While the qualifications of probation officers who develop these reports have increased in recent years, the investigations may be inadequate in various jurisdictions because of manpower shortages and time limits. Such inadequacies could include erroneous and/or irrelevant information. In addition, such reports could omit valuable information.

Cooperation between probation and prosecution will not alone resolve the inadequacies of pre-sentence reports; but if prosecution makes itself available and is viewed as a resource by probation, such investigations may be more accurate and may be developed more efficiently. Because the prosecutor and his staff have worked closely on individual cases, they have an insight into the background of the offender prior to the initiation of pre-sentence investigation. Thus, it would be to the advantage of the probation department and ultimately to the community to consult the prosecutor during the development of this report.

In addition, it may prove beneficial for the prosecutor to review the pre-sentence report upon its completion and submission to the

court in order to denote any information which may conflict with that known to the prosecutor. In those jurisdictions where the prosecutor is not given the opportunity to review the pre-sentence report, confidentiality of individuals supplying information is generally the rationale. However, there should be means available to probation officers to assure this confidentiality and permit limited release of the information to the prosecution. Omitting personal references could accomplish this purpose and still retain the necessary information. The prosecutor should not consider his input into the pre-sentence report as a burden or out of the limits of the prosecutorial function. It should be the duty of the prosecutor to notify the appropriate parties of any information contained within the pre-sentence report which conflicts with information known to the prosecutor from other sources.

The prosecutor's role in the pre-sentence report may go further than specific input and review on an individual case basis. The prosecutor may wish to address the format of the report. For example, if prosecution believes that irrelevant data is consistently added, the prosecutor should make these concerns known and provide constructive criticism to the appropriate agency.

A major function of probation is supervision of offenders sentenced to probation. Here the insight of the prosecutor may merit an active role, particularly in the initial stages of such supervision. As the probation officer strives to develop a relationship with clients, it is important for the officer to have a thorough knowledge of the individual's background and behavior. Therefore, it is to the advantage of the probation department to consult with the prosecutor in this area.

On the other hand, it is to the advantage of the prosecutor to be aware of revocation hearings of those individuals under probation supervision. In many jurisdictions the prosecutor will be present at such hearings. If not present, the prosecutor should be notified of the outcome of these proceedings. Thus, communication is needed at this level.

Another facet of the correctional component where lines of communication and coordination must be developed and enhanced with the prosecutor's office is that of community-based agencies. Such programs represent a wide spectrum of services, including

both residential and non-residential facilities. These agencies specialize in meeting such needs as employment, education, family relations, and substance abuse problems.

It is recognized that community-based programs represent viable alternatives to traditional institutions for less-serious offenders. In addition, the concept of supplementing incarceration with community-based services has been advanced in recent years. The responsibilities placed upon community-based agencies mandates an increasing need for coordination and communication with the prosecutor. The degree of the prosecutor's input into such agencies may have as wide a spectrum as those programs do themselves. At the most basic level, the prosecutor must be cognizant of all community services which offenders in the jurisdiction may be sentenced to, referred to as a condition of probation, or referred to as part of a diversionary program. In addition, it is important for the prosecutor to be available as a resource to these services. Prosecution should be in a position to supply these agencies with information concerning clients whom the prosecutor has had contact with.

Some prosecutors have chosen to play an active role in community-based operations. Developing and implementing programs under the auspices of the office has been initiated on a wide scale in recent years. Diversionary and citizen volunteer programs are examples of the input the prosecutor's office may have. In addition, prosecutors are active in local, regional, and state-wide planning boards with an emphasis on developing such programs. Where basic community services such as employment, adult education, family counseling, and substance abuse counseling are not provided or are inadequate, the prosecutor should consider having input in their development or upgrading. The prosecutor's involvement in such planning and advisory boards is important because of his position as the chief local law enforcement official.

It must be recognized that there is a need for the prosecutor's involvement in the prisons and their programs. At its most basic level, the prosecutor must be cognizant of detention facilities and the services they offer to which offenders in the jurisdiction may be sentenced. Also, just as for probation and community agencies, the prosecutor's insight into the background and behavior of

individuals should be viewed as a resource by officials in this area. Correctional systems may employ an elaborate intake formula without utilizing all previously developed background information concerning offenders. In this situation, prosecution must make itself available as a resource both to offer initial information and to verify facts derived from other sources.

There are other areas where prosecutors could profitably have input into the prison system, if not because of their positions as prosecutors, then because of their positions as concerned leaders in the criminal justice system. In general, correctional institutions in America need upgrading. The prosecutor should strive for better facilities and services within the prison setting, as well as better trained staff. Since prison overcrowding is a problem that affects the entire criminal justice system, it is natural to expect that the prosecutor will be involved in legislative efforts to build new facilities and enlarge existing ones. The ability of the prosecutor to have valid input on upgrading facilities, as well as pre-sentence information, is dependent on his knowledge of the prison facilities within his state. The prosecutor, therefore, must be knowledgeable about the conditions of such facilities.

At a basic level, the prosecutor can also assist in the identification of multiple offenders. The prosecutor should also cooperate with prison systems to assure that realistic prison sentences are carried out. The prosecutor should encourage and support experimental efforts in regard to sentencing practices. Concepts such as mandatory prison sentences for multiple offenders of certain crimes should be closely examined.

As with all the other components discussed here, the prosecutor must urge cooperation. The prosecutor must be considered a resource to both parole boards and supervisory personnel. In addition, the prosecutor should receive information concerning individuals from, or planning to reside in, the jurisdiction who have been approved for release from institutions. And fundamental to the protective function of the prosecutor, he must have an opportunity to oppose parole release decisions that are not in the best interest of the community.

A phenomenon that has arisen since the original promulgation of the NPS standards in the 1970s is that of early release programs

that have as their primary motivation the alleviation of overcrowding in detention facilities. Often such programs are a reaction to jail litigation attacking conditions of confinement. Such litigation has greatly proliferated in the 1980s and 1990s. Conditions of incarceration, however, are an improper basis for release of offenders and the standard takes an unequivocal position against it. The solution for prison overcrowding and related problems lies with the appropriate legislative bodies but is not to be found in simply releasing offenders. The prosecutor should support legislative proposals that solve this problem in the appropriate manner by allocating additional public funds for the construction and maintenance of needed facilities, as firmly as the prosecutor should oppose every program of early release based primarily on the problems facing our correctional system. Inappropriate release of offenders undermines every advance achieved in improving the criminal justice system.

# RELATIONS WITH LAW SCHOOLS AND LAW STUDENTS

### 32.1 Law School Resources

The prosecutor should make regular and efficient use of law students and law schools primarily to foster and encourage interest in the prosecutorial field as a career choice and, secondarily, as a supplement to the resources of his own office.

### 32.2 Law School Clinics

The prosecutor should actively cooperate with law school clinical programs for prosecution where they exist and actively promote their creation where they do not.

### 32.3 Internships

The prosecutor should structure and coordinate, through liaison with law schools, an internship program to employ law students in his office. Financial compensation or academic credit should be

given to interns in return for their services. The program should be available to all qualified law students and to any accredited and approved law school. Such a program should permit student participation in a variety of practical functions and real life situations. Appearances in court by legal interns should be only under the supervision of the prosecutor.

**32.4 Facilities**
The prosecutor should make arrangements for the use of law school facilities, especially law libraries, in order to maximize the research tools available to his office.

**32.5 Faculty**
Where appropriate, the prosecutor should consult those members of the law school faculty who may have expertise in a field of particular relevance to criminal prosecution.

**32.6 Ethics**
Legal ethics as taught in law schools should address the practical problems and realistic considerations confronting the prosecutor.

**32.7 Recruitment**
The prosecutor should maintain close and regular contact with law school placement divisions to encourage an informed consideration of prosecutorial work as a career service.

**32.8 Prosecutors as Lecturers**
Prosecutors and staff should be available as special lecturers and instructors for relevant law school classes.

**32.9 Faculty as Interns**
Law professors should be encouraged to intern in prosecutors' offices to develop practical expertise and expand their knowledge.

# COMMENTARY

Among other things, the standards recommend that the use of law students be optimized by a program geared to the handling of practical problems grounded in the circumstances of an actual prosecution. The appropriate student practice rule of the jurisdiction should include prosecutorial programs. A properly conducted student intern program can provide not only a stimulus for recruitment of law school graduates but also a method of evaluating aspiring applicants.

With respect to the use of law school facilities, the need for such arrangements is more evident among prosecutors whose jurisdictions lack the adequate availability of research tools. Although prosecutors are well advised to maintain a basic library in their offices, it is only realistic to recognize that complete legal research materials are essential to successful and efficient prosecution. While law school libraries will vary in the amount and nature of their research materials, such facilities generally provide a welcome supplement to prosecutors. Appropriate arrangements with the law school administration should not prove difficult. Then, too, prosecutors should also consider possible consultation with various faculty members who may possess expertise in a field of particular relevance to criminal prosecution (*e.g.*, criminal procedure, scientific evidence). Very often law school faculty members would be receptive to assisting a local prosecutor's office but have never been approached to do so because of an assumption that such faculties are defense-oriented. The assumption may or may not be true in general, but the existence of faculty members who would individually be interested in assisting a prosecutor's office in various capacities cannot be doubted. The prosecutor who does not seek to add these individuals as a resource to his office may be overlooking a valuable resource.

Courses in legal ethics are having a resurgence, driven in large part by the ethical improprieties of members of the profession that have become major public scandals in government and related fields. Unfortunately such courses seldom include the special ethical problems of prosecutors. Prosecutors should seek to remedy

it by offering assistance in providing curriculum materials and adjunct faculty services to law schools within their jurisdiction and encouraging the pervasive incorporation of ethics in the law school curriculum.

# PROTECTION OF RIGHTS OF ACCUSED AND PUBLIC

### 33.1 Balancing Interests

The prosecutor should strive to protect both the rights of the individual accused of a crime and the right of the public to know in criminal cases. The prosecutor should provide sufficient information so the public is aware that the alleged perpetrator of a crime has been arrested and that there exists sufficient competent evidence with which to proceed with prosecution. Additional information may be released by the prosecution if such release will aid the law enforcement process, promote public safety, dispel widespread rumor or unrest, or promote confidence in the criminal justice system.

### 33.2 Media Relations

The prosecutor should seek to maintain a relationship with the media that will facilitate the appropriate flow of information necessary to educate the public.

# PROSECUTORS AND THE MEDIA

### 34.1 Information Appropriate for Media Dissemination by Prosecutors

Prior to and during a criminal trial the prosecutor may comment on the following matters.

a. The accused's name, age, residence, occupation, family status, and citizenship;

b. The substance or text of the charge such as complaint, indictment, information, and where appropriate, the identity of the complainant;

c. The existence of probable cause to believe that the accused committed the offense charged;

d. The identity of the investigating and arresting agency, the length and scope of the investigation, the thoroughness of the investigative procedures, and the diligence and professionalism of the law enforcement personnel in identifying and apprehending the accused;

e. The circumstances immediately surrounding the arrest, including the time and place of arrest, the identity of the arresting officer or agency, resistance, pursuit, possession and use of weapons, and a description of items seized at the time of arrest or pursuant to a search warrant; and

f. Matters which are of public record, the disclosure of which could serve the public interest, including correction and /or clarification of any misstatements, or misrepresentations of any record by other persons.

**34.2 Restraints on Information**

Prior to and during a criminal trial the prosecutor should only release the following information when the prosecutor believes that dissemination of such information is necessary to fulfill his obligations under 33.1 or under 34.3:

a. statements as to the character or reputation of an accused person or a prospective witness;

b. admissions, confessions, or the contents of a statement or alibi attributable to an accused person;

c. the performance or results of tests or the refusal of the accused to take a test;

d. statements concerning the credibility or anticipated testimony of prospective witnesses;

e. the possibility of a plea of guilty to the offense charged or to a lesser offense or other disposition;

f. information about tactics, strategies or arguments that will be used at trial.

**34.3 Public Responses**

Nothing in these standards should be deemed to preclude the prosecutor from making reasonable and fair response to comments of defense counsel or others.

**34.4 Law Enforcement Policy on Information**

Upon requests from local law enforcement agencies, the prosecutor should inform said agencies of the state, court, constitutional and case law provisions, as well as professional codes and standards, concerning fair trial/free press issues, and the prosecutor should encourage local law enforcement agencies to adopt policies which will protect both the rights of the individual and the ability of the prosecution to proceed.

# MEDIA COMMENTS—JUDICIAL DECISIONS, JURY VERDICTS AND CONDUCT

### 35.1 Judicial Decisions

The prosecutor has the authority to inform the public of judicial decisions that are contrary to law, fact or public interest. The prosecutor should not criticize judicial decisions through malice, politics or any other reason extraneous to the proper role of prosecutor.

### 35.2 Jury Verdicts and Juror Conduct

The prosecutor has the authority to inform the public of jury verdicts that are clearly contrary to the law and the evidence. The prosecutor also has the authority to inform the public of juror conduct that is plainly contrary to the sworn duties of jurors, such as verdicts that were clearly rendered on the basis of bias, prejudice or sympathy, rather than the law and evidence of a case. The prosecutor should not criticize jury verdicts or jury conduct through malice, politics or any other reason extraneous to the proper role of prosecutor.

# COMMENTARY

Fairness in the pursuit of justice governs the conduct of the prosecuting attorney who is charged with representing the people in the community. Professional conduct is expected not only before trial and during the course of the trial but at all times that the prosecution function is being executed. In performing each prosecutorial duty, the prosecuting attorney must conform to the highest standards of justice. These standards were written to guide the prosecutor in public and media relations.

The standards deal with pre-trial and trial statements, post-trial positions, comments on judicial decisions, jury verdicts and juror conduct. The prosecutor has an affirmative duty to maintain and improve the criminal justice system. As an adjunct to this duty, the prosecutor should be allowed to criticize those aspects of a criminal proceeding that warrant improvement. There should be no prohibition on public statements that detract from the prosecutor's representative role. The appropriate public comments fol-

lowing a criminal proceeding where the highest standards of justice have not been satisfied should be determined according to the prosecutor's own conscience. If such statement is not permitted, the public is denied the most knowledgeable voice regarding the facts and circumstances of the proceeding. Unless the prosecutor has the rights under Standard 35.2, Judicial Decisions, the judiciary becomes immune from public censure and evaluation through insulation provided by arbitrary rules that are contrary to rights of free speech preferred in a democracy. Unless the prosecutor has the rights under Standard 35.3, Jury Verdicts and Juror Conduct, juries and jurors become immune from public censure and evaluation necessary for reform. The prosecuting attorney is responsible to his constituency, the general public. When the public should be made cognizant of a particular criminal proceeding, which may involve criticism of a verdict and/or a sentence, the prosecutor should respond only in the capacity as representative of the people. In addition, a response to charges of misconduct during trial which have been leveled against the prosecutor is appropriate.

The standards address the proper role of the prosecutor with respect to statements made by the police. As the chief law enforcement officer in his jurisdiction, the prosecutor has the authority to advise the police to adopt and implement policies on the subject of media comments that are fair to victims, witnesses, defendants and the public. The prosecutor, however, has neither the responsibility nor authority to monitor and discipline the police for improper statements, nor can the prosecutor be culpable for such unauthorized statements. To the extent that such responsibility is imposed on the prosecutor in the ABA Model Rules of Professional Conduct, it is rejected here.

Notwithstanding the specific direction of the standards, and limitations they impose to protect a fair trial, the prosecutor must recognize the value of an informed public. Therefore, the prosecutor has the responsibility of exercising sound judgment after balancing the interests involved and including what information is appropriate for release under all the circumstances.

# RELATIONS WITH FUNDING ENTITY

### 36.1 Necessary Resources

It is the responsibility of the prosecutor's funding authority to provide all resources necessary for fulfillment of the prosecution function and the protection and safety of the public.

### 36.2 Funds for Standards Compliance

Funding of the prosecutor and other segments of the law enforcement and criminal justice systems must be sufficient for the implementation of compliance with the standards presented herein.

### 36.3 Assessment of Need

The prosecutor should cooperate with the funding entity in providing an assessment of need to effectively administer the duties of the office.

### 36.4 Independent Revenue

The budget for prosecution should be independent of and unrelated to revenues resulting from law enforcement and criminal justice activities, such as fines and forfeitures.

## COMMENTARY

The basic premise of this standard is adequate funding. Little can happen in the way of system improvements in general, and the prosecutor's office in particular, without adequate funding. In a very real sense, virtually every provision in the National Prosecution Standards is addressed, at least in part, to the prosecutor's funding source. Without sufficient funding, few of these standards are attainable; and this standard in particular draws attention to this crucial fact.

There are a number of books, materials, and training programs available through the National District Attorneys Association dealing with management, budgeting, and fiscal topics. The

prosecutor who does not avail himself of such assistance can hardly blame the funding source for a less than adequate response to a less than adequate request for appropriations and facilities. The prosecutor must be foremost a manager and these are largely skills not taught in law school. Therefore, the newly-elected or appointed head of office must make the acquisition of such skills a priority upon assuming the duties of prosecutor.

An expectation persists among funding bodies that funds for law enforcement can be generated from fines and forfeitures. The latter aspect, in particular, is the result of misconceptions concerning the potential for revenue-generation that have grown up along with the relatively recent state and federal forfeiture statutes. Such remedies were never intended to be primary sources of revenue, and the notion that they can be "budgeted" into criminal justice agencies is totally misguided. To the extent that such remedies provide *some* funds for law enforcement agencies, this benefit is at best collateral to their primary purpose. Such revenues are not predictable; and, therefore, it is doubly wrong for funding sources to rely upon them when considering budget requests from prosecutors.

# RELATIONS WITH THE PUBLIC

### 37.1 Community Organizations

The prosecutor should encourage the formation and growth of community-based organizations interested in aspects of the criminal justice system and crime prevention.

### 37.2 Staff Liaison

With respect to such organizations and to the extent that the prosecutor has the resources to do so, the prosecutor should assign an appropriate staff member to act as liaison to such organizations and should, in any case, provide qualified speakers from the prosecutor's office to address and appear before such groups on matters of common interest.

### 37.3 Public Education

The prosecutor should use all available resources to encourage citizen involvement in the support of law enforcement and prosecution programs and issues. The prosecutor should educate the public about the programs, policies, and goals of his office and alert the public to the ways in which the public may be involved and benefit from those programs, policies, and goals.

### 37.4 Advisory Role

Because the prosecutor has the responsibility of exercising discretion and making ultimate decisions, the role of public interest and citizen groups must be understood to be advisory only.

## COMMENTARY

Responses to the problem of increasing crime have, to date, been relatively ineffective. Fear of crime has pressed many individuals to assume residence in the suburbs. For those remaining in the cities, many are forced to barricade themselves behind barred windows and locked doors to avoid being victimized by the criminal behavior of others. Community leaders, although recognizing the seriousness of the crime problem, often delegate responsibility for crime prevention to the police force and to government agencies which too frequently seem unable to keep up with crime prevention needs. As a result of this delegation, policies with respect to crime prevention are controlled by political and administrative bodies that are far removed from the local communities where crime originates.

Only when local citizens assume responsibility for crime prevention within their own communities will some progress be made in reducing crime rates across the country. Citizens must develop and support programs such as community action councils, block clubs, substance abuse clinics, legal advisory councils, youth service bureaus, domestic violence councils, rape prevention organizations, drunk driving prevention programs, and new educational opportunities focusing their efforts upon individuals who presently commit the majority of crimes in the United States. Since

the prosecutor's work is intimately involved with crime in the community, the prosecutor can contribute significantly to crime prevention by lending personal support, and that of the prosecutor's office, to existing community crime prevention programs. Further, the prosecutor can lend expertise to criminologists, city planners and others as they make plans for the growth and development of the community in a way best suited to deter criminal activity. The standard has been developed to serve as a guide to prosecutors in implementing their role in community crime prevention. It recognizes the need for the prosecutor to not only interact with community crime prevention and social service organizations that are community-based, but also to take a hand in the formation of such citizen groups where they presently do not exist.

In order to assure that available government services do, in fact, reach the people for whom they are designed, positive public information programs should include continuous dissemination of information on available benefits so that individuals can learn how and if they qualify to receive the benefits. Use of local radio and television public service announcements should provide continuous publicity of these programs for the benefit of the community. In addition, neighborhood facilities should be established to facilitate the dispensing of local services by assisting citizens in obtaining the benefits they deserve. By providing a local office location for citizens to apply for government services, the problem of penetrating the bureaucratic system would be alleviated for many who presently are unable to obtain the available benefits. Additionally, the prosecutor should not overlook the schools as an important part of the public. His outreach programs should make the schools a regular part of community crime prevention.

At the same time that governments are bringing services to more citizens, their decision-making processes should become more open. The prosecutor, as a citizen of the community, should contribute to the success of public information programs by lending his personal support to the programs. Further, since the prosecutor is perhaps more familiar than most individuals with government and its function in the community, he should take the lead in publicizing the prosecutor's programs and related commu-

nity crime prevention programs.

A successful program to reduce crime rates in the United States will require the cooperation of every resident in each community. Prosecutors, however, should assume a particularly active role in community crime prevention since their job brings them into daily contact with those in the criminal justice system. With expertise in the system, prosecutors should support and participate in any program that will reduce the opportunity for crime, quicken the apprehension of offenders, speed the processing of criminal matters, and reinforce community sanctions against crime.

Notwithstanding the benefits of public interest groups, the prosecutor has the ultimate responsibility for decision-making and the exercise of discretion. Citizen groups must understand these respective roles and operate within these limitations.

# PROSECUTORIAL IMMUNITY

### 38.1 Scope of Immunity

When acting as a quasi-judicial officer, the prosecutor should have the same immunity from civil liability as that of the judiciary.

### 38.2 Good Faith Defense

In any civil litigation arising from administrative or investigative activities, the prosecutor should have an absolute defense in good faith and probable cause.

### 38.3 Coverage of Defense Costs

All costs, including attorneys' fees and judgments, associated with suits claiming civil liability against the prosecutor and staff arising from the performance of their duties, should be provided by the prosecutor's funding entity.

### 38.4 Coverage of Judgment

The cost of insuring the prosecutor and staff against judgments from civil liability arising from the performance of their duties should be borne by the funding entity.

**38.5 Personal Indemnity**

Self-insured funding entities should indemnify the prosecutor and staff from direct loses due to civil liability.

# COMMENTARY

In *Imbler v. Pachtman,* 424 U.S. 408 (1976), the U.S. Supreme Court ruled that prosecutors enjoy absolute immunity from Civil Rights Actions brought under Section 1983, 42 U.S.C., when acting within the scope of their duties in initiating and pursuing a criminal prosecution and in presenting the state's case. The Court noted that although such immunity leaves the genuinely wronged criminal defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty, the alternative of qualifying a prosecutor's immunity would outweigh the broader public interest in that it would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.

The Court did not extend such absolute immunity to actions taken by a prosecutor outside of the scope of his duties as aforesaid. Thus, *Imbler* did not change pre-existing law with respect to the performance of duties that traditionally are viewed as investigative duties falling primarily within the police function.

Although there has been a multitude of case law subsequent to *Imbler* discussing the prosecutor's immunity for "administrative" and "investigative" duties, the issue has not been finally resolved by the U.S. Supreme Court (as of April 1991).

Some lower courts have extended only a qualified defense to the prosecutor for such activities. The standard rejects this (as it did in the original 1977 version) and says that the prosecutor should be accorded an absolute defense "in good faith and probable cause" for administrative and investigative prosecutorial duties. As in 1977, the present standard recognizes that anything less than this will not adequately protect the prosecutor and will, in effect, hobble the office.

The revised standard carries forth the admonition that the prosecutor's funding source should provide the "costs" of defend-

ing civil suits against the prosecutor and his staff. It adds that such "costs" include the cost of initial insurance premiums or risk management plans to cover civil claims. No prosecutor should be expected to function without full insurance coverage or a risk management plan covering intentional and non-intentional torts and all civil rights actions. The standard also implicitly recognizes that insurance costs in general for municipal agencies have greatly increased in the last 20 years; this, however, is not a reason for the funding source to provide anything less than full coverage to the prosecutor and staff or a fully adequate risk management plan.

## Pre-Trial

# INVESTIGATIONS

### 39.1 Need for Investigators

In fulfillment of the prosecutor's duty to investigate, and according to the volume and scope of duties of the prosecution function within the jurisdiction, funds should be provided for the maintenance of an investigative staff comprised of trained, confidential, professional investigators to be utilized at the prosecutor's discretion, to assist in case preparation, supplement law enforcement investigations, conduct original investigations, and fulfill other duties as assigned by the prosecutor.

### 39.2 Prosecutor's Need to Know

Prosecutors must exercise the greatest control and discretion in this area. No special investigators should be operative without the prosecutor's knowledge. The prosecutor should be constantly briefed on all investigations.

# COMMENTARY

The standard takes the position that the presence of an investigator in a prosecutor's office will, where warranted by the volume and scope of duties of the prosecutor, facilitate the fulfillment of other prosecutorial duties. Logically, and perhaps obviously, accurate and sufficient information is germane to the prosecutor's obligation to detect and arrest, as well as to obtain indictments and prosecute them. An investigation is the primary means for determining whether prosecution should be commenced. The lack of an in-house supportive service of an investigative staff should never endanger or minimize the prosecutor's ability to act as the chief law enforcement official of his jurisdiction.

Moreover, the broad discretion given to a prosecutor necessitates that the greatest effort be made to see that this power is used fairly and uniformly. The prosecutor's power of discretion rests upon the

dictates of his own judgment and conscience uncontrolled by the judgment and conscience of any other person. At the very least, the prosecutor's judgment and conscience should be tempered and guided by accurate, careful, thorough and pertinent evidence. Regrettably, this is not always the case when a prosecutor lacks the capacity to conduct his own investigation of the facts.

Since the prosecutor's discretion is so broad, it is apparent that he should know all of the facts in the case he is handling. Many attorneys feel that they are "only as good as their information." If the factual information presented at a hearing or trial is to be relied upon, any support or service which insured its accuracy and credibility should be utilized. Since most cases turn on the presentation of evidence and not on legal argument, the facts are the elements which will control the progress of the case. The facts are the prosecutor's most important assets and the investigation is the instrument for getting the facts. An investigator would assure, if not guarantee, the necessary, high quality information.

Since investigation is primarily a police function, the question naturally arises concerning the prosecution investigator's relationship with the police, the main agency upon which the prosecutor relies for investigative work. A professional investigator, responsible only to the prosecutor's office and a confidential employee of that office, should not duplicate police investigative work but should supplement and support it while remaining autonomous and independent of police officials.

Although the information and evidence which the police gather is useful to the prosecutor, the difference in purpose between police and prosecutorial investigation should be noted; while the police gather evidence for the purpose of arrest, the prosecutor's sights are geared toward conviction. A professional investigative staff of the prosecutor's office would insure a high level of accuracy as a result of specific focus and expertise. The chief advantage of having an independent investigator under the prosecutor's control is increased efficiency: because of the investigator's singular objective, there will be a corresponding decrease of extraneous and irrelevant material.

The autonomy of a prosecutorial investigator would preclude any conflict which might arise from the prosecutor's continuous direc-

tions to the police regarding the logistics of an investigation. Furthermore, situations may arise in which the police, either due to neglect or the constraints of time, fail to investigate. Then it is not only the prosecutor's right, but also his duty to take the initiative and to act independent of citizen complaints or police activity. The strongest arguments in favor of prosecutorial investigation are the need for efficient prosecutions, the informed use of prosecutorial discretion, and the fulfillment of the prosecutor's affirmative duty to investigate in appropriate cases. Moreover, most prosecutors have expressed a willingness to accept this responsibility, provided they have adequate investigative resources.

To avoid duplicative investigations, it is important that each governmental entity with investigative responsibilities, be they local law enforcement or others, advise the prosecutor of investigations in the jurisdiction.

# WARRANT REVIEW

### 40.1 Search Warrant Review

The office of the prosecutor should review and approve all applications for search warrants within the prosecutor's jurisdiction, whenever practical.

### 40.2 Arrest Warrant Review

The office of the prosecutor should review and approve all applications for arrest warrants in the prosecutor's jurisdiction prior to submission to a court, whenever practical.

### 40.3 Electronic Surveillance Review

The office of the prosecutor should review and approve the use of all electronic surveillance by law enforcement entities within the prosecutor's jurisdiction.

### 40.4 Police Training

The office of the prosecutor should assist in insuring that law enforcement personnel in his jurisdiction are adequately trained in

the law applicable to the issuance and execution of search warrants and arrest warrants.

### 40.5 Uniform Warrants

The office of the prosecutor should provide all law enforcement entities within the prosecutor's jurisdiction with model, uniform formats for arrest warrants and search warrants.

### 40.6 Review Mechanism

Wherever practical, the prosecutor should establish a mechanism for warrant review on a 24-hour basis and should advise law enforcement agencies of this procedure.

## COMMENTARY

As judicial constraints yearly impose more legal technicalities upon the police in the issuance of arrest, search, and surveillance warrants, the role of the prosecutor in providing legal assistance to police agencies becomes more critical. The standard suggests the prosecutor's review and approval of arrest warrants, search warrants, and applications for electronic surveillance, whenever practical. This is not designed to add a layer of bureaucratic compliance, but rather to assure propriety which will enhance conviction of the guilty.

Justice is enhanced by a review of warrant applications whenever practicable, as well as engaging in police training on technical requirements and the design of uniform forms. While the standard does not require that the prosecutor's office be available 24 hours a day for this purpose, this is the ideal that the standard strives for within the practical limitations of staffing of the prosecutor's office.

# SUBPOENA POWER AND GRANTS OF IMMUNITY

### 41.1 Subpoena Power

The prosecutor should be granted authority, by statute and subject to appropriate safeguards, to subpoena individuals for questioning in criminal investigations.

### 41.2 Subpoena *Duces Tecum*

The prosecutor should be granted authority, by statute and subject to appropriate safeguards, to issue subpoena *duces tecum* requiring the production of specified documents.

### 41.3 Contempt Sanctions

Contempt penalties should be available for an individual's failure to comply with any such subpoena by failing to appear, failing to respond to questions, or failing to produce specified documents.

### 41.4 Subpoena Prior to Charging

The prosecutor's authority to issue such subpoenas should be available prior to, as well as after, the filing of specific charges before the court.

### 41.5 Grants of Immunity

The prosecutor should be granted the authority to petition the court to grant immunity to potential witnesses for testimony taken pursuant to subpoena, under oath and of record. The prosecutor should have the discretion to determine the type of immunity to be granted.

### 41.6 Safeguards

Procedural safeguards should be available to aggrieved parties through motions to quash for cause shown. Judicial review should be afforded prior to questioning if the aggrieved party avails himself of the procedural safeguards.

# COMMENTARY

The investigative subpoena power provides law enforcement officials with the authority to compel witnesses to appear and to testify on matters that potentially could lead to criminal litigation. The ability to so compel witnesses to submit to questioning is, in many cases, essential to the discovery of the facts of the case being investigated and highly important in establishing probable cause and in making the charging decision. An investigative subpoena can also be useful in acquiring documents and records which can also be instrumental to an investigation. Because of this, the investigative subpoena has long been associated with the grand jury. The grand jury, in many states, is the body charged with investigating crime, ascertaining probable cause and returning indictments against those suspected of crime. For an active, functioning grand jury, the subpoena is an effective and necessary tool, without which the indictment system could not reasonably operate.

The ability of the prosecutor to determine the facts of the case before filing an information is severely curtailed in some states because of the lack of a parallel apparatus that would allow him to question witnesses under oath as can be done in grand jury situations. Some states have recognized this need and have passed statutes which empower the prosecutor to issue "office" subpoenas, carrying with it the threat of contempt citation for non-appearance or refusal to testify. Relief is usually available on a motion to quash for cause shown. Judicial review of the process is provided either at an intervening stage or subsequent to the service of the subpoena. Where these procedural devices are not presently available to the prosecutor, they should be instituted.

The advantages of the office subpoena are obvious. The proper use of this quasi-judicial tool allows the prosecutor to question witnesses and review records whenever necessary to make a determination prior to the filing of criminal action. The grand jury in many states offers the same results but is much more time consuming, inconvenient, and costly. More and more, the public has come to realize that the protections that traditionally were

thought to be inherent in the grand jury system are much better protected by appropriate due process in the courts in reviewing the actions of the executive branch.

The use of the office subpoena for investigatory purposes in all states, both those with a grand jury system and those without, will allow the prosecutor to proceed on a more informed basis in cases where previously he had little hard facts. It will allow the prosecutor to call witnesses and examine documents at a time and place convenient to all concerned and, therefore, save time and money.

An essential part of the subpoena power for the prosecutor is the ability to secure broad immunity for potential witnesses. Without this necessary power, the subpoena will frequently be ineffective in producing useful testimony and evidence. Broad immunity not only is effective in securing the cooperation of witnesses, but also will protect innocent parties from prosecution and, most importantly from their standpoint, the threat of prosecutions.

# SCREENING

### 42.1 Prosecutorial Discretion

The decision to initiate or pursue criminal charges should be within the discretion of the prosecutor.

### 42.2 Guidelines

The prosecutor should establish, maintain, and follow guidelines in the exercise of the discretion in screening criminal charges.

### 42.3 Factors to Consider

The prosecutor should exercise discretion in screening for the purpose of eliminating matters from the criminal justice system in which prosecution is not justified or not in the public interest. Factors which may be considered in this decision include:

a. Doubt as to the accused's guilt;
b. Insufficiency of admissible evidence to support a conviction;
c. Reluctance of a victim to cooperate in the prosecution;
d. Possible improper motives of a victim or witness;

e. The availability of adequate civil remedies;
f. The availability of suitable diversion and rehabilitative programs;
g. Provisions for restitution;
h. Likelihood of prosecution by another criminal justice authority;
i. Aid to other prosecution goals through non-prosecution;
j. The age of the case;
k. The attitude and mental status of the accused;
l. Undue hardship caused to the accused;
m. A history of non-enforcement of the applicable violation;
n. Failure of law enforcement agencies to perform necessary duties or investigation;
o. The expressed desire of an accused to release potential civil claims against victims, witnesses, law enforcement agencies and their personnel, and the prosecutor and his personnel, where such desire is expressed after the opportunity to obtain advice from counsel and is knowing and voluntary;
p. Any mitigating circumstances.

### 42.4 Factors Not to Consider

Factors which should not be considered in this decision include:
a. The prosecutor's rate of conviction;
b. Personal advantages which prosecution may bring to the prosecutor;
c. Political advantages which prosecution may bring to the prosecutor;
d. Factors of the accused legally recognized to be deemed invidious discrimination insofar as those factors are not pertinent to the elements of the crime.

### 42.5 Information Sharing

The prosecutor should have for his consideration all relevant information that would aid in rendering a sound decision as to screening. Other government and law enforcement agencies should cooperate in providing the prosecutor with such information.

### 42.6 Reconsideration of New Information

In the event previously unobtained information is provided to the prosecutor, he should review the screening decision based on the new information.

### 42.7 Record of Decision

A record of the screening decision and reasons for the screening disposition of each matter should be retained by the prosecutor.

### 42.8 Defense of Decision

The prosecutor should promptly respond to inquiries from those who feel aggrieved by the screening procedure and decision.

### 42.9 Explanation of Screening Program

The prosecutor should provide adequate explanations and information regarding the purposes and operation of any screening programs to victims, witnesses, and law enforcement officials in the jurisdiction.

## COMMENTARY

The exercise of prosecutorial discretion in the screening, charging, and diversion decisions are not only integral parts of the American criminal justice system but are also the most important aspect of the prosecutorial function. The prosecutor commonly and normally screens potential violations and selects those which he finds warrant investigation and prosecution. Such discretionary action is induced by scarcity of investigative and prosecutorial resources, by legislative over-generalization, and by low enforcement priority of some violations. Screening by the prosecutor provides a mechanism by which individual treatment may be accorded all violations, and decisions may be rendered which meet the individual variations and complexities of each circumstance. Law enforcement agencies must be encouraged to pursue aspects of investigations in a speedy manner when additional information is needed to exercise sound screening decisions. Records of screening decisions should be retained for office files only. However, to

ensure continued cooperation and to enhance the communication process involved, general information relating to the decision and the rationale of that decision should be conveyed to the appropriate law enforcement agency as well as to victims and possible witnesses of the alleged offense. Such information, however, should be made available *after* the prosecutor has made a screening decision.

This standard, as is true for the standards on Charging, Diversion, and Plea Negotiations, *infra*, includes provision to the effect that a defendant who is willing to waive (release) potential civil liability claims against law enforcement personnel broadly, where such willingness is voluntary and counseled, may be considered in part for this reason as a fit subject for screening out of the system. The following discussion of this issue applies not only to Screening, but also to the Charging, Diversion, and Plea Negotiations standards, *infra*, (and will not be repeated in the commentary to those standards since the rationale is the same for all mentioned standards).

NDAA recognizes that the use of waivers of the right to sue in these contexts may be controversial to some. In *Town of Newton v. Rumery*, 480 U.S. 386 (1987), the United States Supreme Court held that a covenant not to sue public officials for alleged violations of an arrestee's constitutional rights, given in exchange for their promise not to prosecute him on criminal charges, was not *per se* void as against public policy and, therefore, could be enforced to bar a civil rights action based on alleged police misconduct in connection with the arrest. The Court noted that a criminal defendant waives constitutional rights in entering a guilty plea in a plea bargain, "yet this has not been found to be inherently coercive," and there was no reason to believe "that release dismissal agreements pose a more coercive choice . . ." The Court reasoned that Rumery had been represented by an experienced attorney, was not in jail, had time to consider the agreement for several days, and was a sophisticated businessman. "In many cases a defendant's choice to enter into a release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action," the opinion said.

It was possible in some cases, the Court agreed, that the availability of such agreements might "tempt prosecutors to bring frivolous charges, or to dismiss meritorious charges, to protect the interests of other officials." But a *per se* rule of automatically invalidating such agreements both "improperly assumes prosecutorial misconduct" and "fails to credit other relevant public interests[.]" Many Section 1983 suits are marginal and some even frivolous, the Court analyzed, yet the burden of defending such lawsuits may be great. "To the extent release-dismissal agreements protect public officials from the burdens of defending such unjust claims, they further this important public interest."

What the Court adopted was a case-by-case approach for assessing the propriety of such agreements, as utilized by lower courts in such cases as *Bushnell v. Rossetti,* 750 F.2d 298 (4th Cir. 1984), and *Jones v. Taber,* 648 F.2d 1201 (9th Cir. 1981). NDAA supports the ruling of the Court and has made it an integral part not only of this standard but also, as noted, of the Charging, Diversion, and Plea Negotiations standards, *infra.* While the ruling of the Court was in the context of plea negotiations, the Court's rationale is equally applicable in the prosecutor's screening, charging, and diversion functions. To the extent that the revised Standards for Criminal Justice of the American Bar Association refuse to follow the U.S. Supreme Court ruling in *Town of Newton v. Rumery,* they are expressly rejected by the NDAA standards.

# CHARGING

### 43.1 Prosecutorial Discretion

In the exercise of the discretion to prosecute, the prosecutor should determine which charges should be filed and how charges should be presented before a grand jury or court.

### 43.2 Propriety of Charges

The prosecutor should file charges which adequately encompass the offense or offenses believed to have been committed by the accused.

### 43.3 Charges Substantiated by Evidence

The prosecutor should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial.

### 43.4 Inappropriate Leveraging

The prosecutor should not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges.

### 43.5 Civil Liability

The prosecutor should not file charges for the purpose of obtaining from a defendant a release of potential civil claims against victims, witnesses, law enforcement agencies and their personnel, or the prosecutor and his personnel.

### 43.6 Factors to Consider

The prosecutor should exercise his discretion to file only those charges which he considers to be consistent with the interests of justice. Factors which may be considered in this decision include:

a. The probability of conviction;
b. The nature of the offense;
c. The characteristics of the offender;
d. Possible deterrent value of prosecution to the offender and society in general;
e. Likelihood of prosecution by another criminal justice authority;
f. The willingness of the offender to cooperate with law enforcement;
g. Aid to other criminal justice goals through non-prosecution;
h. The interests of the victim;
i. Possible improper motives of a victim or witness;
j. The availability of adequate civil remedies;
k. The age of the offense;
l. Undue hardship caused to the accused;
m. A history of non-enforcement of a statute;
n. Excessive cost of prosecution in relation to the seriousness of the offense;
o. Recommendations of the involved law enforcement agency;

p. The expressed desire of an offender to release potential civil claims against victims, witnesses, law enforcement agencies and their personnel, and the prosecutor and his personnel, where such desire is expressed after the opportunity to obtain advice from counsel and is knowing and voluntary; and

q. Any mitigating circumstances.

## COMMENTARY

The charging function of the prosecutor is the decision as to what charges are to be brought against an offender, once the determination has been made that criminal proceedings are to be instituted. The charging decision entails determination of the following issues:

1. What possible charges are appropriate to the offense or offenses; and
2. What charge or charges would best serve the interests of justice?

Determination of these issues is the prerogative and responsibility of the prosecutor. Application of the prosecutor's determination to any specific situation involves a complex charging decision. The selection of a particular charge by the prosecutor will have an important bearing upon the conduct of the criminal proceedings. The charging decision is not an exact science, since the prosecutor, in deciding what he feels to be the maximum charge supported by the available evidence, necessarily operates with less than total knowledge of the facts and possible trial situation. As a result, the initial charging decision may have to be modified and reduced to a lesser charge as the prosecutor gains additional information about the offense and offender.

In reaching the charging decision, acting within the parameters of then-available information, the prosecutor should seek to make a charging determination which appropriately reflects both the offense and the offender. The charge(s) selected should be supported by probable cause and should be supported by the available admissible evidence. Where possible, the penalty or sentence for the charge should reflect the severity of the offense.

The means by which a prosecutor elects to implement charging decisions is closely related to the mechanism utilized in reaching screening decisions; indeed, the two functions may be appropriately combined in a single individual or office division.

Diversion participation should only be done at the prosecutor's discretion, and the prosecutor should not yield to external pressures in either selecting a charge or deciding if diversion alternatives are a proper course of action. Diversion may be done at any stage of the proceeding but with the option of continued prosecution. That does not preclude diversion alternatives after a formal charge, and at this stage the threat of criminal prosecution is even greater to the accused and thus positive participation in diversion alternatives and favorable results may be more likely.

Initial standards or guidelines for charging will be established by the prosecutor only. In the one-person office, the prosecutor will also act as the agent for implementing these guidelines. Larger offices may find it convenient, particularly in respect to minor offenses, to delegate much of the responsibility for charging to selected individuals or to establish a separate office division for intake procedures. The designated individuals or office division should be responsible for reaching initial charging decisions, subject to review and approval by the prosecutor.

The prosecutor should establish guidelines by which charging decisions may be implemented. For the one-person office this formulation process will provide consistency of operation and an incentive to develop and articulate specific policies. The same holds true for other size offices.

Some prosecution offices employ vertical prosecution with great success, making the use of guidelines important for consistent application.

For an analysis of civil liability issues in the charging function, see the commentary to Standard 42, Screening.

# DIVERSION

### 44.1 Prosecutorial Discretion

The decision to divert cases from the criminal justice system should be the responsibility of the prosecutor. The prosecutor should, within the exercise of his discretion, determine whether diversion of an offender to a treatment alternative best serves the interests of justice. The determination of the prosecutor of whether or not to divert a particular defendant should not be subject to judicial review.

### 44.2 Alternative Diversion Programs

As a central figure in the diversion process, the prosecutor should be aware and informed of the scope and availability of all alternative diversion programs. It is recommended that all programs which may be non-criminal disposition alternatives maintain close liaison and the fullest flow of information with the prosecutor's office.

### 44.3 Information Gathering

The prosecutor should have all relevant investigative information, personal data, case records, and criminal history information necessary to render sound and reasonable decisions on diversion of individuals from the criminal justice system. Legislation and court rules should enable the prosecutor to obtain relevant information from appropriate agencies for this purpose.

### 44.4 Factors to Consider

The prosecutor should exercise discretion to divert individuals from the criminal justice system when he considers it to be in the interest of justice and beneficial to both the community and the individual. Factors which may be considered in this decision include:

a. The nature and severity of the offense;
b. Any special characteristics or difficulties of the offender;
c. Whether the defendant is a first-time offender;

d. Whether there is a probability that the defendant will cooperate with and benefit from the diversion program;
e. Whether an available program is appropriate to the needs of the offender;
f. The impact of diversion upon the community;
g. Recommendations of the involved law enforcement agency;
h. Whether the defendant is likely to recidivate;
i. Consideration for the opinion of the victim;
j. Provisions for restitution; and
k. Any mitigating circumstances.

### 44.5 Diversion Provisions

The use of non-criminal disposition should incorporate procedures which include the following provisions:

a. A signed agreement identifying all requirements of the accused;
b. A signed waiver of speedy trial requirements;
c. The right of the prosecutor, for a designated time period, to proceed with the criminal case when, in his judgment, such action would be in the interest of justice;
d. A signed release by the accused of any potential civil claims against victims, witnesses, law enforcement agencies and their personnel, the prosecutor and his personnel, after the accused has had the opportunity to confer with counsel; and
e. Appropriate mechanisms to safeguard the prosecution of the case, such as admissions of guilt, stipulations of facts, and dispositions of witnesses.

### 44.6 Record of Decision

A record of the non-criminal disposition, including reasons for the decision, should be created for each case and made a part of the accused's criminal history record.

### 44.7 Explanation of Decision

The prosecutor should provide adequate explanations of the non-criminal disposition to victims, witnesses, and law enforcement officials.

**44.8 Need for Programs**

In jurisdictions where diversion programs are insufficient, the prosecutor should urge the establishment, maintenance, and enhancement of such programs as may be necessary.

# COMMENTARY

An alternative available to prosecutors in the processing of a criminal complaint is that of diversion, the channeling of criminal defendants and even potential defendants, into programs that may not involve incarceration. The purposes of diversion programs include:

1. Unburdening court dockets and conserving judicial resources for more serious cases;
2. Reducing the incidence of offender recidivism by providing an alternative to incarceration—community-based rehabilitation—which would be more effective and less costly than incarceration; and
3. Benefiting society by the training and placement of previously unemployed or underemployed persons.

The prosecutor is an integral part of any diversion system; indeed, he should be the central figure in such a system. The prosecutor commonly makes the decision to introduce an offender into alternative treatment and is ultimately responsible for determining the success of that alternative treatment.

The authority of the prosecutor to institute diversion proceedings is an incident of the prosecutor's discretionary authority in screening and charging. The authority of the prosecutor to control the diversion decision prior to arraignment or indictment is well substantiated. Prosecutorial authority in post-charging diversion is also clear.

Multiple factors may legitimately be considered by the prosecutor in making the diversion decision, including the willingness of a defendant to waive potential civil claims against law enforcement personnel. Basically, these factors concern the character of the defendant, the type of offense, the availability of suitable treatment or educational facilities, and the particular relation of the case to

other criminal justice goals. Determination of the appropriateness of diversion in a specified case will involve a subjective determination that, after consideration of all circumstances, the offender and the community will both benefit more by diversion than by prosecution.

The size and type of mechanism established by the prosecutor to make diversion decisions will vary with differences in prosecution offices. General comments, however, may be made about any diversion system.

In the smallest prosecution office almost all decisions are made directly by the prosecutor. As jurisdiction sizes increase, there arises the necessity for delegation of authority and specialization of function. Large prosecutorial systems will establish intake departments which perform the initial actions of prosecution: screening, charging, and diversion. Smaller offices will perform the same functions through a less-structured procedure.

To assist those responsible for the diversion decision, the prosecutor should promulgate guidelines outlining the approach and criteria under which he wishes diversion determinations to be made. These guidelines will aid in providing a policy which is both uniform and in accordance with the intentions of the prosecutor.

All diversion mechanisms will require information sufficient to make an accurate assessment of the character and potential of the offender. Close liaison must be maintained between the prosecutor's office and the diversion authority, to facilitate evaluation of the progress of the offender through counseling and rehabilitation. The prosecutor should be provided prompt notification by the diversion authority of any difficulties or special circumstances which indicate a less than satisfactory performance by the offender.

Finally, each diversion mechanism will require a recordkeeping apparatus sufficient to allow accurate tracking of the progress and disposition of each case. Accurate records will also provide a method for the prosecutor to determine if his instituted procedures and guidelines for diversion are being adequately followed. The records made of the diversion decision should be available only for the prosecutor's staff review and use.

In order for a diversion program to be beneficial both for the defendant and for the prosecution, certain safeguards must exist for each party. To adequately provide for protection of defendants' rights, the following safeguards might be considered by prosecutors in addition to those specified in the standard:

1. The right of the defendant, at any point, to insist on criminal prosecution;
2. The presence of a reviewing judge to determine if there is sufficient factual basis for a charge;
3. The presence of a reviewing judge to determine whether any pressure put on the defendant to accept noncriminal disposition constituted overwhelming inducement to surrender the right to trial;
4. The presence of counsel.

Equally important as protecting the rights of the individual is the necessity to protect the interests of society. It must be remembered that the individual involved in the diversion process is accused of having committed a criminal act and is avoiding prosecution only because an alternative procedure is thought to be more appropriate and more beneficial. The right of the prosecutor to successfully reinitiate prosecution should be considered and protected. Prosecution following deferment to a diversion program that has failed to produce satisfactory results faces serious problems, since the time delay raises the possibility that witnesses and other evidence will disappear, thus compromising the prosecutor's ability to obtain a conviction if treatment fails.

To protect the rights of the prosecutor, the following safeguards might be considered:

1. The right of the prosecutor at any point to insist upon criminal prosecution;
2. Waiver of speedy trial requirements;
3. The inclusion in the diversion agreement of admissions by the defendant, stipulation of facts or depositions of witnesses, and an agreement by the defendant to cooperate with law enforcement;
4. Waiver of applicable statute of limitations.

The right of the prosecutor to terminate an offender's participation in a diversion program is essential. Only by retaining this option can the prosecutor guarantee continued protection of the

rights of the community. If the prosecutor does not have this authority, the diversion program itself will suffer since the prosecutor will gravitate toward prosecution of questionable cases, rather than release of the offender from his supervision.

The diversion alternative to prosecution is an increasingly utilized and effective mechanism for dealing with offenders. Since the promulgation of the original standards in 1977, diversion has been adopted in almost every jurisdiction in the United States. The prosecutor plays the central role in the diversion process—he initiates the movement into diversion and must judge the efficaciousness of diversionary treatment. To maximize the effectiveness of the prosecutor's role, it is important that these responsibilities be recognized and be allowed to function efficiently.

For an analysis of civil liability issues in diversion, see the commentary to Standard 42, Screening.

# PRE-TRIAL RELEASE

**45.1 a. Policy Favoring Release**

The law favors the release of defendants pending determination of guilt or innocence, consistent with the protection of the public interest.

Detention may be resorted to in very special circumstances including capital cases where proof is evident, and cases in which there is compelling evidence presented at a judicial hearing that the defendant is a poor risk to appear for trial when ordered, or would result in private or public harm if released (preventive detention). The utilization of a number of types of release alternatives should be considered so that the widest protection of interests—both individual rights and societal interest—is accomplished.

b. Definitions for this Standard

(1) Citation

A written order issued by a law enforcement officer requiring a person accused of violating the law to appear in a designated court or governmental office at a specified date and time. The

form should require the signature of the person to whom it is issued.

(2) Summons

An order issued by a court requiring a person against whom a criminal charge has been filed to appear in a designated court at a specified date and time.

(3) Order to Appear

An order issued by the court at or after the defendant's first appearance releasing the defendant from custody or continuing the defendant at large pending disposition of the case, requiring the defendant to appear in court or in some other place at appropriate times.

(4) Alternative Release

The release of a defendant without bail upon the defendant's promise to appear at all appropriate times, sometimes referred to as "personal or own recognizance," and subject to supervision by the court.

(5) Release on Bail

The release of a defendant upon the execution of a bond, with or without sureties, which may or may not be secured by the pledge of money or property.

c. Conditions of Release

(1) Citation and Summons in Lieu of Arrest

Legislation should be developed to allow law enforcement authorities to issue citations in lieu of arrest. Those cited would be subsequently sent a summons to appear in court. The legislation should limit this procedure to traffic violations, health and safety codes violations, and certain minor misdemeanors involving crimes against property.

(2) Alternative Release with Supervision

Whenever possible, release before trial should be on the recognizance of the accused. The courts should develop an apparatus, however, of providing supervision for those individuals released. The level of supervision can vary according to the discretion of the court ranging from simple telephone call supervision or electronic monitoring, to admission to community-based release programs or substance abuse rehabilitation programs.

(3) Release on Bail

Reliance on money bail should be discouraged and be required only in those cases in which less restrictive conditions will not reasonably ensure the defendant's appearance. Compensated sureties should be abolished and, in those cases in which money bail is required, the defendant should ordinarily be released upon the deposit of cash securities equal to ten percent of the amount of the bail.

d. Willful Failure to Appear

Willful failure to appear in court in response to a citation or summons or when released on order to appear on one's own recognizance or on bail should be made a criminal offense. Proof that the defendant failed to appear when required should constitute *prima facie* evidence that the failure was willful. Failure to appear on misdemeanor charges should constitute a misdemeanor. Failure to appear on felony charges should be a felony.

**45.2 a. Policy Favoring Issuance of Citations**

It should be the policy of law enforcement agencies to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law and public safety. A law enforcement officer having grounds for an arrest should take the accused into custody or, already having done so, detain the accused further only when such action is required by the need to carry out legitimate investigative functions, to protect the accused or others where the accused's continued liberty would constitute a probable risk of harm, or when there are reasonable grounds to believe that the accused will refuse to respond to a citation.

b. Mandatory Issuance of Citation

(1) Legislative or court rules should be enacted which enumerate the offenses for which citations may be issued.

(2) An officer having authority to issue a citation may make an arrest:

(a) When an accused subject to lawful arrest fails to give satisfactory identification;

(b) When an accused refuses to sign the citation;

(c) When arrest or detention is necessary to prevent imminent bodily harm to the accused or to another or there is reason to believe the accused will commit another crime if released;

(d) When the accused has no ties to the jurisdiction reasonably sufficient to assure appearance and there is substantial likelihood that the accused will refuse to respond to a citation; or

(e) When the accused previously has failed to appear in response to a citation for an offense.

c. Encouragement to Issue Citation

Law enforcement agencies should promulgate regulations designed to increase the use of citations to the greatest degree consistent with public safety. Except where arrest or continued custody is patently necessary, the regulations should require such inquiry as is practicable into the accused's place and length of residence, family relationships, references, present and past employment, criminal record, and any other facts relevant to appearance in response to a citation.

**45.3 a. Policy: Authority to Issue Summons**

All judicial officers should be given statutory authority to issue a summons rather than an arrest warrant in which a complaint, information, or indictment is filed or returned against a person not already in custody.

b. Application for an Arrest or Summons

(1) Judicial authorities should issue summonses in cases except where there is reasonable cause to believe that unless taken into custody, the defendant:

(a) Will flee to avoid prosecution;

(b) Will fail to respond to a summons;

(c) Presents potential of self-inflicted harm;

(d) Presents a threat to others, including probable cause to believe that unless the defendant is taken into custody he will commit another crime.

(2) At the time of the presentation of an application for an arrest warrant or summons, the judicial officer should require

the applicant to produce such information as reasonable investigation would reveal concerning the defendant's:

(a) Residence,
(b) Employment,
(c) Family relationships,
(d) Past history of response to legal process,
(e) Past criminal history, and
(f) Criminal activities not necessarily related to the present case.

(3) The judicial officer should be required to issue a summons in lieu of arrest warrant when the prosecutor so requests.

c. Service of Summons

Statutes prescribing the methods of service of criminal process should include authority to serve a summons by certified mail with return receipt.

### 45.4 First Appearance

a. Prompt First Appearance

Except where the defendant is released on citation or by some other lawful manner, it is recommended that every arrested person be taken before a judicial officer without unnecessary delay.

b. Pre-First Appearance Inquiry

(1) In all cases in which the defendant is in custody and the maximum penalty exceeds one year, an inquiry into the facts relevant to pre-trial release should be conducted by the prosecutor or an agency acting under the authority of the court contemporaneous with the defendant's first appearance.

(2) In appropriate cases, the inquiry may be conducted in open court.

(3) The inquiry should be exploratory and may include such factors concerning the defendant as:

(a) Employment status and history and financial condition;
(b) The nature and extent of family relationships;
(c) Past and present residences;
(d) Character and reputation;
(e) Names of persons who agree to assist in attending court at the proper time;

(f) The nature of the current charge and any mitigating or aggravating factors that may bear on the likelihood of conviction and the possible penalty;
(g) Past criminal record, if any, and if previously released pending trial, whether he appeared as required;
(h) Any facts indicating the possibility of violations of law if released without restrictions; and
(i) Any other facts tending to indicate ties to the community and likelihood to flee the jurisdiction.

(4) Where appropriate, the inquiring agency should make recommendations to the judicial officer concerning the conditions, if any, which should be imposed on the defendant's release. The results of the inquiry and the recommendations should be made known to all parties at the first appearance in court.

**45.5 a. Alternative Release with Supervision**

(1) There should be a presumption that the defendant is entitled to be released on order to appear or on personal recognizance. This release should require no bail but will be on condition of supervision as deemed necessary by the court. The presumption may be overcome by a finding that there is substantial risk of non-appearance. In capital cases, the defendant should not be eligible for release with supervision.

(2) In determining whether there is a substantial risk of non-appearance, it is recommended that the judicial officer take into account the following factors concerning the defendant:

(a) The length of residence in the community;
(b) Employment status and history and financial condition;
(c) Family ties and relationships;
(d) Reputation, character, and mental condition;
(e) Past history of response to legal process;
(f) Prior criminal record;
(g) The likelihood that the defendant will commit another crime while awaiting trial in the present case;
(h) Identification of responsible members of the community who would vouch for the defendant's reliability;

(i) Nature of the current charge(s), the probability of conviction, and the possible sentence, insofar as these factors are relevant to the risk of non-appearance; and

(j) Any other factors indicating the defendant's ties to the community.

(3) In the event the judicial officer determines that release on order to appear or on personal recognizance is unwarranted, the judicial officer should include in the record a statement of the reasons but should not include information believed by the prosecutor to be confidential.

(4) Defendants released under supervision should be required to waive their right to challenge extradition in the event they leave the jurisdiction without judicial permission.

b. Levels of Supervision

(1) In determining the type of supervision for each defendant, the judicial officer should impose the least onerous condition reasonably likely to assure the defendant's appearance in court.

(2) Where conditions on release are found necessary, the judicial officer should impose one or more of the following conditions:

(a) Require that the defendant make periodic telephone calls to the court to inform the court of current status;

(b) Require that the defendant make periodic visits to court to inform the court of current status;

(c) Release the defendant into the care of some qualified person or organization responsible for supervising the defendant and assisting in appearing in court. Such supervisor would be expected to maintain close contact with the defendant, to assist in making arrangements to appear in court, and, where appropriate, to accompany the defendant to court;

(d) Place the defendant under the supervision of a probation officer or other appropriate public official;

(e) Impose reasonable restrictions on the activities, movements, associations, and residences of the defendant;

(f) Where permitted by law, release the defendant during working hours but require the defendant to return to custody at specified times; or

(g) Impose any other reasonable restriction designed to assure the defendant's appearance and the safety of others.

(3) Supervision of defendants released without bail should be conducted by employees of the court. Adequate funds should be provided to ensure a staff of qualified persons to perform this task.

**45.6 Money Bail**

a. Money bail should be set only when it is found that no other conditions on release will reasonably assure the defendant's appearance in court.

b. The purpose of money bail is to assure the defendant's appearance in court. Money bail should not be set to punish the defendant or to placate public opinion. It may, however, be set to prevent reasonably anticipated future criminal conduct.

c. Upon finding that money bail should be set, the judicial officer should require one of the following:

(1) The execution of an unsecured bond in an amount specified by the judicial officer;

(2) The execution of a secured bond in an amount specified by the judicial officer, accompanied by the deposit of cash or securities equal to ten percent of the face amount of the bond. The deposit, less a reasonable administrative fee, should be returned at the conclusion of the proceedings, provided the defendant has not defaulted in the performance of the conditions of the bond; or

(3) The execution of a bond secured by the deposit of the full amount in cash or other property or by the obligation of qualified, uncompensated sureties.

d. Money bail should ordinarily be set no higher than that amount reasonably required to assure the defendant's appearance in court. In setting the amount of bail, the judicial officer should take into account all facts relevant to the risk of willful non-appearance and for the defendant's propensity to commit another crime, including:

(1) Length and character of residence in the community;

(2) Employment status and history and financial conditions;

(3) Family ties and relationships;

(4) Reputation, character, and mental condition;
(5) Past history of response to legal process;
(6) Prior criminal history;
(7) Information concerning the likelihood that the defendant will commit another crime while awaiting trial;
(8) Identification of responsible members of the community who would vouch for the defendant's reliability;
(9) Current charge(s), the probability of conviction, and the possible sentence, insofar as these factors are relevant to the risk of non-appearance and the commission of other crimes while awaiting trial; and
(10) Any other factors indicating the defendant's ties to the community.

e. Money bail in felony cases should not be set solely by reference to a pre-determined schedule of amounts fixed according to the nature of the charge but should take into account the special circumstances of the defendant.

f. Money bail should be distinguished from the practice of allowing a defendant charged with a traffic or other minor offense to post a sum of money to be forfeited in lieu of any court appearance. This is in the nature of a stipulated fine and, where permitted, may be employed according to a pre-determined schedule.

**45.7 a. Prohibition of Wrongful Acts Pending Trial**

Upon a showing that there exists a danger that the defendant will commit another crime or will seek to intimidate witnesses or will otherwise unlawfully interfere with the orderly administration of justice, the judicial officer, upon the defendant's release, should enter an order:

(1) Prohibiting the defendant from approaching or communicating with particular persons or classes of persons, except that no such order should be deemed to prohibit any lawful and ethical duty of defendant's counsel;
(2) Prohibiting the defendant from going to certain described geographical areas or premises;

(3) Prohibiting the defendant from possessing any dangerous weapon, engaging in certain described activities or using intoxicating liquors or certain otherwise legal drugs;

(4) Requiring the defendant to report regularly to and remain under the supervision of an officer of the court;

(5) Requiring the defendant to submit to electronic monitoring;

(6) Requiring the defendant to submit to periodic or random substance abuse testing.

b. Violations of Conditions on Release

Upon a verified application by the prosecutor alleging that a defendant has violated the conditions of release, a judicial officer should issue a warrant directing that the defendant be arrested and taken forthwith before the court of general criminal jurisdiction for a hearing. A law enforcement officer having reasonable grounds to believe that a released felony defendant has violated the conditions of release should be authorized, where it would be impracticable to secure a warrant, to arrest without a warrant and take the defendant forthwith before the court of general criminal jurisdiction.

c. Sanctions for Violation of Conditions

After hearing, and upon finding that the defendant has willfully violated reasonable conditions imposed on release, the court should modify the conditions of defendant's release or revoke the release.

d. Commission of Crime(s) While Awaiting Trial

Where it is shown that a court or grand jury has found probable cause to believe that a defendant has committed a crime while released pending adjudication of a pending charge, the court which initially released the defendant should revoke the release.

### 45.8 Pre-Trial Detention

a. Bail may be denied and the defendant detained when charged with a serious crime and there is either no reasonable assurance that the defendant will appear for trial or it appears that release will endanger the safety of any person.

b. In any case where bail is denied, it must be pursuant to the following factors and circumstances:

(1) After an adversary hearing where the defendant has full procedural rights, including right to counsel;
(2) The court's finding is based upon clear and convincing evidence;
(3) The court has considered the nature and seriousness of charges;
(4) The court has considered the defendant's background and characteristics; and
(5) The court has considered the nature and seriousness of the danger posed by the defendant's release.

**45.9 Review of Release Decision**

a. Re-examination and Review of the Release Decision

(1) A defendant, whether or not in custody, should be able, on application, to obtain prompt review of the release decision.
(2) Periodic reports should be made to the court as to each defendant who has failed to secure release within one month of arrest. The prosecutor should advise the court of the status of the case and reasons defendant has not been released or tried.

# COMMENTARY

These provisions recognize a clear preference for release of defendants pending trial. At the same time, however, it is recognized that the public interest is paramount. The provisions incorporate the concept of preventive detention to ensure that this interest—as well as the interest of ensuring that the defendant appears for court proceedings—are properly served. Preventive detention is considered to be a "special circumstance" warranting detention of a defendant before trial on the basis of reason to believe that he will cause private or public harm if released.

It is recognized that the use of a citation and summons procedure is appropriate for many cases not involving crimes against the person. This simplified procedure eliminates much law enforcement and court personnel time; there is little risk that defendants will fail to appear in such cases. Since such cases account for a majority of the docket in many municipalities, the savings in cost

are substantial, with little or no adverse impact on the goal of bringing offenders to justice. Both law enforcement agencies and court personnel are encouraged to use the citation and summons procedure. This does not mean that citations should be used indiscriminately. Arrest and detention may be necessary, in the judgment of arresting officers, to defuse volatile circumstances, common in domestic relations intervention or public disturbances, for example.

With respect to supervision of those accorded alternative release, the standards recognize the existence of modern electronic monitoring devices. These devices are now widely used to monitor compliance with probation conditions for adjudicated offenders. Where a court believes it is appropriate, such devices should be considered for pre-trial release supervision. It is believed that there is no constitutional impediment to using such devices in this manner. If a court is empowered to set conditions (such as restrictions upon visiting locations where alcohol and drugs are available, confinement to home during certain hours, treatment, etc.) for release, it should have the power to monitor compliance with those conditions. It is anticipated that no special waiver of rights would be required from a defendant in these circumstances.

This edition of the standards continues the recommendation that compensated sureties be abolished. Indeed, the institution of bail bondsmen has greatly declined since the promulgation of the original standards in 1977 and there is little reason to believe that this trend will be reversed in the 1990s.

The "without unnecessary delay" language of the standards pertaining to prompt first appearance recognizes that it is impossible to define the level of administrative delay that is always "reasonable." Many law enforcement agencies continue to be seriously understaffed. While budgetary constraints are not an acceptable excuse for violating a defendant's constitutional right to a prompt court appearance, they are realities which must be confronted. The intent of the standards is to define "unnecessary delay" within the framework of whatever the courts may define as the constitutional limits of such delay. Agencies should strive to make such delay minimal in all cases, but it is recognized that such delay may be necessary to complete pre-court appearance

administrative procedures such as booking, identification, chemical testing in DUI cases, inventory of property, etc.

A condition for release or the setting of money bail includes the consideration of the likelihood that a defendant may commit another crime while awaiting trial in the present case. This, as noted, is the concept of "preventive detention." The burden of proof should properly be upon the prosecutor to establish the need for denying release or setting money bail with appropriate conditions, where it is argued that such is necessary to prevent the defendant from committing another crime while awaiting trial. However, that burden should be realistic in light of the nature of the information that a prosecutor would possess at that stage of the proceedings on that issue. It should be no more than a "reasonable suspicion" to believe that the defendant will commit another crime pending trial, not probable cause. The apropriate standard is that found in the cases of *Terry v. Ohio,* 392 U.S. 1 (1968) and *U.S. v. Cortez,* 449 U.S. 411 (1981). Obviously once there is probable cause to believe that a released defendant has committed another crime while awaiting trial, revocation of release should be automatic.

# FIRST APPEARANCE

### 46.1 Purposes of First Appearance

It is recommended that the first appearance of an accused before a judicial officer after arrest be prompt and without unnecessary delay and be for the purposes of:

a. Advising the accused of the charges against him;

b. Informing the accused of his constitutional and statutory rights;

c. Appointing counsel for the accused when necessary;

d. Making a preliminary pre-trial release determination;

e. Docketing a probable cause hearing if such is required in the jurisdiction; and

f. Taking a plea and docketing a date for trial or sentencing.

### 46.2 Prosecutor's Role

The prosecutor's presence at the first appearance should not be required. The prosecutor should be notified prior to the first appearance and have a reasonable time to appear and in all cases where a guilty plea is entered, an opportunity to appear prior to the plea being accepted by the court. When the prosecutor is present at the first appearance, he should take measures to assure that:

a. Bond is set commensurate with the offenses charged;
b. Charges are correct; and
c. Matters are set to avoid unnecessary delay.

In the event the prosecutor does not appear, he should be immediately notified of the proceeding's outcome.

## COMMENTARY

The standard recognizes that local variations exist in the procedures of court appearances and sets forth a preferred method. Some defendants may wish to plead guilty at their first court appearance. If so, the court may be disposed to sentence the defendant immediately. In that case, the presence of the prosecutor is essential since he may wish to be heard on the question of disposition. It is, therefore, recommended that the proceeding be continued for a short time if the prosecutor is not present so that he may be heard on the disposition of the case or perhaps even on the appropriateness of the guilty plea. The limitations of resources and/or size of the geographic jurisdiction may make it impossible for prosecutors to be present at the first appearance, particularly when the majority of cases are routine at this phase.

When present, the prosecutor should make certain that bond is set appropriately, that the charges are correct and that the case proceeds without unnecessary delay.

It is recognized that in some cases defendants charged with traffic offenses where another person has been injured have quickly pled guilty to traffic charges in order to establish a double jeopardy bar to the subsequent filing of more serious charges if the person dies or injuries worsen as a result of an accident growing out of the event leading to the initial traffic charges. See *Grady v.*

*Corbin*, 110 S.Ct. 2084 (1990). The prosecutor may not be aware of the more serious nature of the case at the time of the first appearance. The opportunity to appear at a shortly continued hearing for sentence will allow the prosecutor to attempt to prevent the contrivance of a double jeopardy defense by a defendant in this or similar cases. Prosecutors should keep law enforcement officials alert to this possibility and the police should communicate the facts to the prosecutor when such events are possible.

# PROBABLE CAUSE DETERMINATION

### 47.1 Purpose

The purpose of the probable cause determination is to determine whether there is probable cause to establish whether offenses were committed, and any lesser included charges and if so, by the defendant. Where there is a grand jury indictment, there should be no separate probable cause determination.

### 47.2 Time Frame

This determination should be made within 14 days after the first appearance unless continued by the court for good cause shown.

### 47.3 Waiver

The accused may waive the right to a probable cause determination, with the consent of the prosecutor. Any such waiver should be express or by failure to request a preliminary hearing within a specified time.

### 47.4 Prosecutor's Role

The prosecutor should appear and present only such evidence as is relevant to a determination that there is probable cause to believe that a crime was committed and that the defendant committed it.

### 47.5 Jeopardy
A probable cause determination should never constitute jeopardy.

### 47.6 Hearsay
Hearsay should be admissible at such a determination.

## COMMENTARY

Many defendants are not aware of the important benefits that they may derive from a probable cause determination, such as the termination of criminal charges if probable cause is lacking. They are often uncounseled at this stage of the proceedings. For that reason, the waiver, if any, should be in writing to aid in establishing its knowing nature if that becomes an issue in subsequent proceedings.

The standard assumes that no grand jury indictment has taken place before the probable cause hearing is held. If such an indictment does take place, it obviates the need for a probable cause hearing.

# ARRAIGNMENT AFTER INDICTMENT

### 48.1 Appearance to Answer Charge
If the accused is indicted or held to answer after a probable cause determination, he should appear in open court to answer the charge by plea, demurrer, or motion. This appearance is defined in these standards as the arraignment.

### 48.2 Purposes
The court, if need be, should appoint counsel, take a plea, set a trial date, and establish release conditions and bail.

## COMMENTARY

It is the intent of the standard that the prosecutor be diligent in taking this earliest opportunity where the defendant is highly likely to be represented by counsel, to respond to any interest on the part of the defendant to pursue a reduced or negotiated plea. In addition, the prosecutor should take this early opportunity to discuss with defense counsel the nature and extent of probable discovery requests and pre-trial motions that may be made in the case, with the aim of expediting such procedures and minimizing the necessity for both sides to prepare for trial.

The prosecutor should take steps to reform the process when the issues of an arraignment can otherwise be accomplished more efficiently without a formal proceeding. Some jurisdictions proceed without a formal arraignment and this may be a desirable procedure.

# FORFEITURE

### 49.1 Prosecutor's Position

The prosecutor should support the enactment and enforcement of statutes which permit the forfeiture of property used in or obtained as a result of criminal activity.

### 49.2 Private Counsel Issue

The ability of defendants to secure private legal counsel of their choice should not be a consideration in the prosecutor's enforcement of forfeiture statutes.

### 49.3 Factors in Mitigation

A decision to remit, mitigate, or forgo the forfeiture of property to an owner or interest holder other than the wrongdoer is appropriate in the discretion of the prosecutor. Factors a prosecutor may consider in making such a decision include whether an owner or interest holder has, under oath, established that:

a. The interest was acquired and maintained in good faith without knowledge or reason to know of the conduct which gave rise to the forfeiture or that the person whose conduct gave rise to the forfeiture had a record or reputation for such conduct; and
b. That the forfeiture would work a severe hardship on an otherwise innocent owner or interest holder and that the property will not be used in furtherance of future conduct giving rise to forfeiture or benefit the one whose conduct subjected the property to forfeiture.

**49.4 Discretion**

The fact that forfeited assets might be available to fund law enforcement efforts should not in any way affect the proper exercise of the prosecutor's discretion in the enforcement of forfeiture or criminal statutes.

# COMMENTARY

The reach of forfeiture should not be limited by any specific definition of property. While general definitions include real estate, bank accounts, and personalty, a broad definition, including assets of all types, must be considered in forfeiture statutes.

These statutes serve as a weapon in the war on drugs. They are both preventive and deterrent oriented measures that include controversial aspects. See 84 *ALR* 4th, Drug Forfeiture—Real Property as Subject to Forfeiture (1990).

It has been argued that forfeiture infringes on the Sixth Amendment right to counsel by taking the resources the defendant would use to pay for his attorney. However, the Sixth Amendment does *not* give one an absolute right to counsel of his choice. The U.S. Supreme Court, in *United States v. Montsanto* and *Caplin and Drysdale, Chartered v. United States*, 109 S.Ct. 2657, 2646 (1989), stated that the federal statute is "plain and unambiguous; all assets falling within its scope are to be forfeited upon conviction, with no exception existing for assets used to pay attorney's fees—or anything else, for that matter."

Our criminal justice system has struggled over many decades to create a system where all are entitled to competent counsel. It would be an affront to those who serve in public defense to imply they were not competent to provide representation to defendants who are accused of trafficking in narcotics or other offenses.

Frequently ownership interests in property are mixed and forfeiture would have adverse results for others. The prosecutor, in his discretion, may determine when extenuating circumstances are such that foregoing, remitting, or mitigating a forfeiture is appropriate. However, a number of factors should influence this decision in order to vindicate the public interest.

The purpose of forfeiture is to deter conduct giving rise to forfeiture and to remove the instrumentalities and proceeds of such conduct. The responsibility to avoid and stop the proscribed conduct is not and cannot belong solely to the government but must ultimately rest with those who own or have an interest in the property involved. As between these persons and the government it is the owner who is in the better position to prevent, discover, and by disclosure, stop the conduct.

Return of the property to close associates and family members of the wrongdoers inevitably fails to remove all incentive to engage in the conduct. Wrongdoers who realize that their friends or associates will benefit from the fruits of their illegal activity rather than the government, draw no small satisfaction from such a result.

Further, returning property to these persons also dramatically increases the risk of fraudulent claims by those whose alleged interest is manufactured solely to avoid forfeiture. Straw purchasers and owners are commonly used to thwart forfeiture in many cases already.

Finally, it is counter-productive to establish a standard of hardship which focuses attention, not on vindicating the societal interest in removing the implements and proceeds of wrongful activity, but rather on the consequences of these measures on third parties. The responsibility for the consequences of criminal activity properly rests with those engaged in committing it, not those putting an end to it. Prosecutors are in the unique position of representing and vindicating societal interests. Any decision to

forego, remit, or mitigate a forfeiture as a result of extenuating circumstances must be balanced against these interests.

Regarding the proceeds of forfeitures, Standard 36.4 calls for the funding of the prosecution function to be independent of revenues, including forfeiture assets. The prosecutor should be vigilant in maintaining this principle, lest such proceeds be relied upon by the funding agency to establish the prosecutor's budgetary allocation.

# MOTIONS BEFORE TRIAL

### 50.1 Single Pre-Trial Hearing

The trial court should utilize a single hearing, prior to the commencement of trial and upon motion of any party, to dispose of all pre-trial matters, including the following:

a. Ensuring procedural compliance with the defendant's right to counsel;

b. Scheduling completion of discovery;

c. Ruling on motion for disclosure;

d. Ruling on all pending motions, including but not limited to:

(1) Suppression of evidence;

(2) Challenges to the prosecution's identification procedures;

(3) Challenges to the voluntary nature of admissions or confessions;

(4) Challenges to the accusatory instrument or procedure; and

(5) Other procedural or constitutional issues.

e. Determining the need for and docketing of a pre-trial conference;

f. Accepting a change of plea if the defendant so requests such; and

g. Considering and ruling on any other matters which will facilitate trial by avoiding unnecessary proof or by simplifying the issues to be tried or which are otherwise appropriate to facilitate disposition of the proceeding.

### 50.2 Purpose

The prosecutor should present and defend all motions, demurrers,

and other requests prior to trial at this one pre-trial hearing unless the court otherwise directs. Any and all issues should be raised either by counsel or by the court without prior notice and, if appropriate, informally disposed of. If additional discovery, investigation, or preparation or evidentiary hearing or formal presentation is necessary for a fair and orderly determination of any issue, the pre-trial hearing should be continued from time to time until all matters raised are properly disposed of.

### 50.3 Waiver of Error

Failure to raise any error or issue at this one hearing constitutes waiver of such error or issue if the party concerned then has the information necessary to raise it.

### 50.4 Use of Forms

Checklist forms should be established and made available by the court and utilized at the hearing to ensure that all requests, errors, and issues are then considered.

### 50.5 Record of Hearing

The pre-trial hearing should be on the record.

### 50.6 Binding Stipulations

Stipulations by any party or counsel should be binding upon the parties at trial unless set aside or modified by the court.

### 50.7 Summary Memorandum

At the conclusion of the hearing a summary memorandum should be placed into the record or written on an appropriate court-established form indicating disclosures made, rulings and orders of the court, stipulations, and any other matters determined or pending.

### 50.8 Court's Role

The trial judge should conduct the pre-trial hearing. The findings of the pre-trial hearing should be binding on the trial court.

**50.9 Hearsay**
Hearsay (including laboratory, chemical analysis, DNA and medical reports) should be admissible at the pre-trial hearing.

**50.10 Defendant's Presence**
The presence of the defendant should be required at the pre-trial hearing.

# COMMENTARY

The single hearing procedure and unitary motion practice contemplated by this standard should be viewed by the prosecutor as the ideal. Any deviation from it should be resisted by the prosecutor unless the defendant has good reason, such as the acquisition, though no fault of his own, of information subsequent to the time of the filing of his motion of additional grounds for relief. If the prosecutor does not resist attempts to circumvent the limitation of Standard 50.3, he can hardly complain if motion practice in the jurisdiction deteriorates into a series of time-consuming successive motions by defendants which the standard is designed to eliminate. Strict adherence to the spirit of the standard will assure a speedy and efficient use of all parties' pre-trial time and make adherence to speedy trial rules more likely in the greatest number of cases.

While the standard articulates a formal and orderly process, the prosecutor should not insist upon formal motions if it is reasonable to agree with defense counsel informally on such things as discovery, withdrawal of obviously tainted evidence, obviously defective pleadings, etc. The prosecutor's goal should always be that of eliminating formal steps in the pre-trial process where justice will be served thereby. In making decisions whether to speed the process by informal means or insistence upon formal motions and hearings, the prosecutor should not act on the basis of improper motives directed to the defendant or defense counsel, such as a clash of personalities or feelings formed from prior contact. Each case should be evaluated objectively on its own merits. Additionally, the prosecutor should be alert to the pros-

pects of a reviewing court requiring a formal process. If the prosecutor has reason to believe this would happen, the informal process would be an inappropriate substitute.

Although the standard contemplates the design and promulgation by the trial court of checklists to be used in expediting the motion procedure, the prosecutor, with his experience in the process, has much to contribute in this regard. The prosecutor should, where appropriate, initiate the design of such checklists or seek to improve existing checklists. This can be done by a cooperative effort with the trial court and the defense by informal conferences called for that purpose. If the court initiates such a process, both counsel should cooperate by lending support to it.

There have been many examples known to prosecutors of trial court failure to adopt and apply the findings and orders of pre-trial hearing judges. The problem is especially apparent in larger jurisdictions where the judge who hears pre-trial motions may not be the judge who tries the case. Defense counsel may be quick to take advantage of this tendency of some trial judges. The prosecutor who fails to resist to the utmost each attempt to bypass the spirit and purpose of the standard will find himself with a growing duplication of the adjudicatory process, a proliferation of hearings, defense forum-shopping, and, in general, a clogged pre-trial and trial docket, with attendant strain on compliance with speedy trial rules.

# PRE-TRIAL CONFERENCE

### 51.1 Pre-Trial Conference Considerations

Whenever a trial is likely to be protracted or otherwise unusually complicated, the trial court should (in addition to the pre-trial hearing) hold a pre-trial conference with trial counsel present to consider such matters as will promote a fair and expeditious trial. The defendant should be present unless excused by the court. Useful matters which should be considered include:

a. Stipulating facts about which there can be no dispute;

b. Marking for identification various documents and other exhibits of the parties;
c. Waiving foundation as to such documents;
d. Excision from admissible statements of material prejudicial to a co-defendant;
e. Severing defendants or offenses;
f. Requests for continuance of an established trial date;
g. Making physical arrangements in the courtroom before and during the trial;
h. Use of jurors and questionnaires;
i. Conducting *voir dire;*
j. Establishing number and use of peremptory challenges;
k. Establishing procedures for objections where there are multiple counsel;
l. Establishing the order of cross-examination where there are multiple defendants;
m. Establishing the order of presentation of evidence and arguments where there are multiple defendants;
n. Dealing with temporary absence of counsel during trial;
o. Final disposition by plea agreement.

**51.2 Record of Conference**
The results of pre-trial conferences should be on the record.

**51.3 Court's Role**
The pre-trial conference should be conducted by the trial judge assigned to the case.

# COMMENTARY

The pre-trial conference should be viewed by the prosecutor as an opportunity to speed both the pre-trial and trial process. If the prosecutor exercises skill in choosing the subjects for consideration and in presenting material at such conference, considerable time can be saved at the trial. A lack of adequate preparation for the conference may be excused by a prosecutor's heavy caseload but will ultimately defeat the purpose of the conference. Caseload

distribution should be realistic in an office to ensure adequate preparation. If necessary, additional staff should be made available to individual prosecutors to ensure the fullest preparation.

The conference is an additional and important opportunity to consider or reconsider the subject of a plea agreement. Again, if the prosecutor is well-prepared and has marshalled the best of his disclosable case at such conference, it is likely that the defendant and counsel will be more amenable to a plea agreement.

The prosecutor should not insist upon the presence of the defendant at a conference devoted to discussion of a plea agreement if defendant's presence is waived by him and counsel and if his absence will facilitate the discussion. At the same time, the prosecutor should be vigilant in preventing the absence of the defendant personally at such conference from becoming an issue later on the voluntariness and knowing nature of a plea agreement.

The standard provides that conference results be placed in the record rather than a verbatim recitation of the discussion, at the conference itself. Such results should be that which is agreed upon by the parties, counsel, and the conference judge. The reason that the standard does not recommend that a verbatim recitation of discussion be placed into the record is that the creation of a verbatim record may inhibit the fullest exchange between the parties, counsel, and judge on sensitive matters frequently involved in plea negotiations. The pre-trial conference should be viewed by all parties as a mechanism for expediting the case through the freest possible exchange of information and viewpoints.

# DISCOVERY PRACTICE —GENERAL PRINCIPLES

### 52.1 Objectives of Discovery

The objectives of pre-trial discovery are to provide information for informed pleas, expedite trials, minimize surprise, afford the opportunity for effective cross-examination, meet the requirements of due process, and otherwise serve the interests of justice.

**52.2 Full Compliance**
To meet these objectives, the prosecutor and defense should diligently pursue discovery of material information and freely, fully, and promptly comply with lawful discovery requests from defense counsel.

## COMMENTARY

The prosecutor's fullest agreement and adherence to these general principles is essential to the carrying-out of their guiding purpose—the expediting of the pre-trial and trial process. The prosecutor who wishes to achieve the greatest benefit from the standards that follow will treat the principles as a minimum standard and will seek to exceed them in every case where it is appropriate.

# DISCOVERY AVAILABLE TO THE ACCUSED

**53.1 Discovery by the Defense**
Upon request of the defense, without order of court, within a reasonable time before the pre-trial hearing or trial if there is no pre-trial, the prosecutor should make the following disclosures:

a. Any known relevant statements made by defendants and accomplices in connection with the particular case within the possession or control of the prosecution, and the substance of any oral statements made by defendants and accomplices which the prosecution intends to offer at the hearing or trial;

b. Those portions of the grand jury proceedings containing testimony of the defendant only.

**53.2 Court Approved Discovery**
Upon request of the defense, within a reasonable time before the pre-trial hearing or trial if there is no pre-trial, the prosecutor should make the following disclosures unless such disclosures

would, in the opinion of the prosecutor, lead to improper influence, harassment, the threat of violence, or any other jeopardy to the safety of an individual:

a. The names and addresses of persons whom the prosecution intends at that time to call as witnesses at the hearing or trial, together with their relevant statements, including memoranda reporting or summarizing their oral statements;

b. Any reports, results, or statements of experts made in connection with the particular case which the prosecution intends to introduce into evidence, including results of physical or mental examinations, scientific tests, experiments, or comparisons;

c. Any books, papers, documents, photographs, and tangible objects which the prosecution intends to introduce into evidence at the hearing or trial.

Where the prosecutor does not make disclosure, the court should decide the appropriate disclosure after hearing.

### 53.3 Permissible Inspections

The prosecutor should permit the defense to inspect and photograph buildings or places concerning which evidence is intended to be introduced at the hearing or trial.

### 53.4 Discretionary Discovery

The prosecutor should consider the materiality and reasonableness of requests for production of information or material not included in these standards and contest such requests to the extent he deems reasonable considering the objectives of discovery.

### 53.5 Limits of Discoverable Information

The prosecutor should disclose to the defense any material or information within his actual knowledge and within his possession and control which tends to negate or reduce the guilt of the defendant pertaining to the offense charged. Information or material that is the subject of disclosure should be limited to that which the prosecutor knows or reasonably should know and is in the possession and control of the prosecutor, his agents, and staff.

## COMMENTARY

The prosecutor must realize the importance of discovery available to the accused. Failure to conform to Standard 53.1, whether intentional or through negligence—will defeat the purpose of these standards—expedition of the pre-trial and trial process, balanced with achievement of the best interests of justice.

In some jurisdictions the provisions of Standard 53.1 may not be required by law, *i.e.*, statute, court rule, or case law. In such cases, adherence to the standard will not only achieve its intended purpose, but will set an example—in practice—of the ideal. In such jurisdictions the prosecutor is encouraged to seek their adoption by the appropriate rule-making authority. The prosecutor should do so individually and through the legislative advocacy and related activities of his state prosecutors' association, bar association, and judicial conferences.

The U.S. Supreme Court in *Arizona v. Youngblood*, 109 S.Ct. 333 (1989), has ruled that good faith failure to disclose merely potentially useful material to a defendant is not a violation of due process. The prosecutor, in setting an appropriate example for law enforcement agencies within his jurisdiction, should consider the *Youngblood* rule the minimum standard and not a reason for denial of discretionary discovery or disclosure that aids the administration of justice. As the training agent for law enforcement officers within the jurisdiction—formal or informal—the prosecutor should set an office standard that goes beyond the rule in *Youngblood* and make it known that the office expects the same for law enforcement agencies.

# DISCOVERY AVAILABLE TO THE PROSECUTION

### 54.1 The Person of the Accused

a. Notwithstanding the initiation of criminal charges, and subject to constitutional limitations, the court should require the accused, among other things to:

(1) Appear in a line-up;
(2) Speak or wear designated clothing for identification purposes;
(3) Be fingerprinted;
(4) Pose for photographs not involving re-enactment of a scene;
(5) Give any non-testimonial evidence (including body fluids, hair, fingernail scrapings, etc.) which involve no unreasonable intrusion;
(6) Provide a sample of handwriting or voice recording; and
(7) Submit to a reasonable physical or medical inspection of the body.

b. Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance should be given by the prosecutor to the accused and defense counsel who should have the right to be present. Conditions may be made for appearances for such purposes in an order admitting the accused to bail or providing for release.

**54.2 Medical and Scientific Reports**

Subject to constitutional limitation, without court order, upon request of the prosecutor, and within a reasonable time before the pre-trial hearing, the prosecutor should be entitled to inspect, copy, or photograph any reports or statements of experts, made in connection with the particular case, which the defense intends to introduce into evidence, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.

**54.3 Nature of the Defense**

Subject to constitutional limitations, without court order, upon request of the prosecutor, and within a reasonable time before the pre-trial hearing, the defense should be required to inform the prosecution of any defenses, including alibi and insanity, which the defense intends to assert at a hearing or trial and should furnish the prosecutor within his possession or control:

a. The names and addresses of persons whom the defense intends to call as witnesses at the hearing or trial, together with

their relevant statements and the substance of the testimony of the defendant if the defendant intends to testify, including memoranda reporting or summarizing oral statements;

b. Any relevant statements made by defendants and accomplices in connection with the particular case within the possession or control of the defense, the existence of which is known by the defense attorney, and the substance of any statements made by the defendants and accomplices which the defense intends to offer in evidence at the hearing or trial;

c. Any books, papers, documents, photographs, and tangible objects which the defense intends to introduce into evidence at the hearing or trial, or which were obtained from or belong to the defendant, or concerning which the defense intends to introduce into evidence at the hearing or trial.

**54.4 Inspection, Photographs, Records**

The defense should permit the prosecution to inspect and photograph buildings or places concerning which evidence is intended to be introduced by the defense at the hearing or trial and any record of prior criminal convictions of persons whom the defense intends to call as witnesses at the hearing or trial, which the defense knows or reasonably should know.

# COMMENTARY

NDAA recognizes that defense counsel may have potential objections to discovery available to the prosecution related to the person of the accused. Such objections may be couched in constitutional terms.

NDAA believes that every element of discovery included in Standard 54.1 is constitutionally permissible. We will not set forth herein a case law development of the subject. If the defendant believes that in a particular case there are constitutional grounds for objection, adequate procedural safeguards are provided in the standard by

1. Notice to the accused and defense counsel (Standard 54.1(b)) and

2. Judicial determination and issuance of an order requiring the requested discovery (54.1 (a) and (b)).

While the standard does not require a contested hearing before issuing an order of discovery pertaining to the person of the accused, the trial court would certainly have the inherent authority to hold such a hearing; otherwise it may choose to grant the requested order on an *ex parte* basis. The standard thus conforms to the minimum requirements of procedural due process.

By the same token, the procedural rights of the defendant are adequately provided for in the provisions related to discovery by the prosecution of medical and scientific reports and the nature of the defense. While the procedure does not contemplate a court order, a defendant with a constitutional objection would merely refuse to grant discovery, requiring the prosecutor to seek a court order and, thus, invoking the judicial process. The standards specially reserve the "constitutional rights of the defendant" as may be applicable.

# REGULATIONS

### 55.1 Continuing Duty

If, prior to or during a hearing or trial, a party discovers additional witnesses or evidence or material previously requested or ordered which is subject to disclosure or inspection, the party or counsel should be promptly notified of the existence of the additional material or witnesses.

### 55.2 Information Not Subject to Disclosure

a. Work Product

Disclosure should not be required of legal research or of records, correspondence, or reports of memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecution or defense attorneys or members of their staff or official agencies participating in the prosecution or defense.

b. Informants

Disclosure of an informant's identity other than a witness at a

hearing or trial should not be required where the identity is a prosecution confidence and failure to disclose will not infringe the constitutional rights of the defendant.

**55.3 Investigation Not to be Impeded**

a. Except as otherwise provided as to matter not subject to discovery and protective orders, neither defense nor prosecution should advise persons having relevant material or information (except the defendant) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor should they otherwise impede opposing counsel's investigation of the case.

b. It is inappropriate for the prosecution or defense to deceive prospective witnesses or victims of their identity.

**55.4 Failure to Call a Witness**

The fact that a witness's name is on a list furnished by either the prosecution or the defense, should not be commented upon at a hearing or trial. In those jurisdictions requiring a written list, calling a witness who has not been disclosed is prohibited except for good cause shown to the trial court.

**55.5 Prohibition of Discovery Depositions**

No depositions should be conducted for the purpose of discovery in the preparation and trial of criminal prosecutions.

*Commentary follows standards on page 171.*

# SANCTIONS

In addition to any sanction previously provided in these standards, the following sanctions should apply to a failure to comply with these standards.

**56.1 Protective Orders**

Upon a showing of cause, the trial court may at any time order

that specified disclosures be restricted or deferred or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the prosecution or defense to make beneficial use thereof.

### 56.2 Excision

When portions of certain materials are discoverable, and other portions are not, as much of the material should be disclosed as is consistent with these standards. Material excised pursuant to judicial order should be sealed and preserved in the records of the court, to be made available to a court of review in the event of an appeal.

### 56.3 *In Camera* Proceedings

Upon request of any party, the court may permit any showing of cause for denial of regulation of discovery, or portion of such showing, to be made *in camera*. A record should be made of such proceedings. If the court enters an order granting relief following a showing *in camera*, the entire record of such showing should be sealed and preserved in the records of the court, to be made available to a court of review in the event of an appeal.

### 56.4 The Spirit of Discovery

All counsel should comply with the rules of discovery in good faith. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or order or failed to act in good faith or failed to comply with the spirit of discovery, the court, after a hearing, should order such party to permit the discovery or inspection, grant a continuance, or hold such material inadmissible as evidence or to enter such order as it deems just under the circumstances. Any person who willfully disobeys a court order under these discovery rules should be subject to contempt of court.

### 56.5 Failure to Comply

A failure of the defense to comply with a request made in these

standards should bar the use of any direct or derivative evidence covered by the request at a hearing or trial of the defendant.

## COMMENTARY

The standard adequately protects the work product of both defense and prosecuting attorneys, as well as confidential informers. If a defendant asserts a constitutional right to know the identity of an informer in connection with a challenge to an arrest or search, this claim would be adjudicated by the court at a pretrial motion to suppress, with the usual safeguards.

The provision for witness preclusion where either defense or prosecution has failed to furnish a prospective witness's name on a requested list is a certain safeguard to ensure conformity with the standard. The procedure has been approved by the U.S. Supreme Court in *Williams v. Florida*, 399 U.S. 78 (1969).

The standard also recognizes that the furnishing of a name of a prospective witness should not be taken as a representation that such witness *will* be called. NDAA considers this to be a matter of fundamental fairness that should apply to all parties in a criminal case. Failure to call a witness on such a list should not give rise to an inference that may be adversely commented upon by either defense or prosecution.

It should be noted here with respect to sanctions, as it was in the original NPS standards in 1977, that the subject of reciprocal discovery in criminal cases is *still* a relatively new one. The best generalized guide for those who wish to conform to better practice, as hopefully represented in these standards, may be that originally voiced by the standards in 1977:

> The modern trend has been toward greater ease as reflected in the Criminal Justice Reform Act of 1975. Rules for discovery in criminal cases are fraught with constitutional problems in that no rule may infringe on the right against self-incrimination. It is apparent that prosecutorial guidelines are yet to be resolved by the courts. As a general rule, the prosecutor's duty to disclose and his obligation to offer discovery should vary inversely with the ability of the defense to prepare its case.

> Beyond this, perhaps no inflexible rule can—or should—be laid down.

*National Prosecution Standards* (NDAA 1977), p. 179 (footnotes omitted).

A failure to comply with discovery required by these standards and/or the court should bar the use of direct or derivative evidence of the defendant. This is not a novel device.The U.S. Supreme Court has long approved reciprocal discovery statutes in criminal cases that bar the introduction of evidence by a party who has failed to comply with pre-trial discovery procedures. See, *Williams v. Florida,* 399 U.S. 78 (1969).

# THE GRAND JURY

### 57.1 Authorization

A grand jury should be authorized in all jurisdictions possessing both indictment and investigatory powers. It may be called into session upon motion of the prosecutor.

*Commentary follows standards on page 173.*

# CHARGING FUNCTION

### 58.1 Probable Cause Alternative

In jurisdictions where a probable cause determination exists, the prosecutor should have the discretion of using that procedure for bringing criminal charges.

### 58.2 Singular Charging Mechanism

Where charges are reviewed by a grand jury, the requirement for a probable cause determination should be eliminated.

### 58.3 Hearsay

Hearsay evidence should be permissible before the grand jury so long as sufficient competent evidence is available at trial.

### 58.4 Adverse Disclosure

The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt or preclude an indictment.

### 58.5 Prosecutor's Recommendation

A prosecutor should recommend that the grand jury not indict if he believes the evidence presented does not warrant an indictment under governing law.

### 58.6 Record of Testimony

At the discretion of the prosecutor, testimony before the grand jury should be of record.

## COMMENTARY

The standard's adoption of a position favoring continued use of the grand jury in investigative and indicting roles to the extent that the prosecutor chooses to use the grand jury, is made with an awareness of the views of the various proponents and opponents of the grand jury concept. NDAA is also aware of the tremendous variety in grand jury usage, ranging from states relying largely on a prosecutor's information for initiating charges, to states where even serious misdemeanors are required to be initiated by grand jury indictment.

There are similar differences encountered in the cost of grand juries in both money and case processing delay, in the independence and quality of grand jurors, in the scope and procedures for preliminary hearing, and in the scope of the investigatory and supervisory roles.

Finally, there are great disparities in citizen involvement and interest in the grand jury concept and in the degree of public trust in the institution.

All these factors make it difficult or impossible to adopt standards that can cover the entire scope of the grand jury's indictment or investigating functions. Instead, those matters are left for resolution to the individual jurisdictions, and the discretion of the prosecutor. These standards, however, will give the prosecutor both guidance and direction in his use of the grand jury process.

# INVESTIGATIVE FUNCTION

### 59.1 State Discretion

Each state should determine the precise scope of grand jury investigatory functions.

### 59.2 Counsel Barred from Grand Jury

Where a grand jury witness is represented by counsel, counsel should not accompany the witness into the grand jury room during the testimony but should be available for consultation only outside the grand jury room.

### 59.3 Reporting Function

Where grand jury reporting is provided for, the reporting function should be governed by the following procedures:

a. The grand jury may submit to the court by which it was impaneled a report:

(1) Concerning misconduct, non-feasance, or neglect in public office by a public official or employee as the basis for a recommendation of removal or disciplinary action; or

(2) Stating that after investigation of a public official it finds no misconduct, non-feasance, or neglect in office by that individual, provided that such public official has requested the submission of such report; or

(3) Proposing recommendation for legislative, executive, or administrative action in the public interest based upon stated findings.

b. The court to which such a report is submitted should examine it and the minutes of the grand jury and, except as provided in paragraph (d), make an order accepting and filing such report as a public record only if the court is satisfied that it complies with the provisions of paragraph (a), and that:

(1) The report is based upon facts revealed in the course of an investigation and is supported by probable cause based upon legally admissible evidence; and

(2) When the report is submitted pursuant to paragraph (a), that each person named therein was afforded an opportunity to testify before the grand jury prior to the filing of such report, and when the report is submitted pursuant to sections (2) or (3) of paragraph (a), the report is not critical of an identified or identifiable person.

c. The order accepting a report pursuant to paragraph (a)(1), and the report itself, should be sealed by the court and not filed as a public record or be subject to subpoena or otherwise be made public until at least 31 days after a copy of the order and the report are served upon each public servant or employee named therein, until the affirmance of the order accepting the report or until reversal of the order sealing the report or until dismissal of the appeal of the named public servant or employee by an appellate court, whichever occurs later. Such public servant or employee may file with the clerk of the court an answer to such report, not later than 20 days after service of the order and report. Such an answer should plainly and concisely state the facts and law constituting the defense of the public servant or employee to the charges in said report and, except for those parts of the answer which the court may determine to be scandalous or prejudicial and unnecessarily inserted therein, should become an appendix to the report. Upon the expiration of the time set forth in this subdivision, the prosecutor should deliver a true copy of such report and the appendix, if any, for appropriate action to each public servant or employee or body having removal or disciplinary authority over each public servant or employee named therein. The determination by the court as to whether a report is in compliance with the requirements of this standard and should be filed as a public record or whether it

should remain sealed for any reason, including prejudice to an on-going criminal matter, should be subject to appellate review.
d. Upon the submission of a report pursuant to section (a), if the court finds that the filing of such report as a public record may prejudice fair consideration of a pending criminal matter, it should order such report sealed and such report may not be subject to subpoena or public inspection during the pendency of such criminal matter, except upon order of the court.
e. Whenever the court to which a report is submitted pursuant to paragraph (a) is not satisfied that the report complies with the provisions of paragraph (b), it may direct that additional testimony be taken before the same grand jury or it should make an order sealing such report, and the report should not be filed as a public record or be subject to subpoena or otherwise be made public.

## COMMENTARY

American jurisdictions utilize the investigatory and supervisory capacities of grand juries in a large variety of ways. The standard does not address the basic investigatory functions a grand jury should have, leaving these matters to the individual jurisdictions.

In order to allow greater testimony before grand jury investigations, most states have statutes granting immunity which allow the compelling of testimony without intruding on the Fifth Amendment privilege of witnesses. However, witnesses may encounter a problem in seeking to handle the immunity or to invoke the Fifth Amendment. Courts in all jurisdictions have been reluctant to extend rights of counsel to grand jury proceedings. So, a witness, without the direct advice of counsel, must determine individually the incriminating nature of questions and answers and must decide whether to waive the privilege against incrimination.

The standard would avoid the problem by providing a limited right to counsel. Counsel would be available only for advising the witness; the presence of counsel would not create a quasi-trial adversary proceeding. There are some problems with the procedure—including the adverse effect of counsel's presence, especially

where counsel represents a crime syndicate or the head of a conspiracy. The attorney might in such cases act to coordinate witnesses' responses in such a way as to thwart an investigation. Judges should retain the power to issue protective orders excluding counsel likely to be in the service of a conspiracy, etc., upon showing of a reasonable likelihood of interference with the investigation. In such a case, the witness should be able to depend on some other source for legal advice.

The standard presents a procedure for reforming and standardizing the issuance of grand jury reports. For purposes of the standard, a report may be defined as an informal, written accusation, directed at either general conditions in the community or a specific individual as to which no indictment is framed. Such a report is not the same as an indictment or a "no true bill."

Although the controversy over the propriety of the grand jury's reporting power is not a new one, the historical roots of the practice are solid. The breadth of grand jury inquiry in England was broad as far back as the Middle Ages, including both criticisms of specific individuals and informational reports into broad areas of public concern. Many American colonies also adopted the practice of allowing the grand jury to issue reports on matters of public concern and interest.

Modern American practice regarding the scope of grand jury investigative and reporting power varies considerably. Based on the common law, many courts permit a general, information type of report to be made; on the other hand, a majority of courts which have addressed the issue have disapproved reports which publicly criticize an *individual* without indictment. Some states have resolved the issue by statute whereby the grand jury is assigned the duty to routinely investigate county government officials and agencies.

There have been a number of serious criticisms over the years of grand jury reports, especially, though not exclusively, those which criticize named individuals. First, an unfavorable report may stand as a severe form of extra-judicial punishment from which there is obviously no appeal. Second, the quasi-judicial nature of the grand jury gives it an apparent reliability which may not be justified in a particular case. Third, the secrecy of grand jury proceedings

prevents the accused from knowing the basis for the accusations; the accused is denied the chance to cross-examine accusers, or to present one's own side in the dispute. At least where an indictment is returned on the basis of such proceedings, there will be an opportunity to respond to the charges at trial. Fourth, grand jurors are accountable to no one. Fifth, grand jurors may impose their personal standards of morality on persons, rather than an abstract and neutral conception of right and wrong.

The standard, while recognizing the complexity of arguments for and against grand jury reporting, neither endorses nor opposes the concept. However, where the grand jury is given reporting powers, the procedures contained in the standard will operate to eliminate most of the negative aspects of reporting.

# PROSECUTOR'S RELATIONS WITH THE GRAND JURY

### 60.1 Procedural and Administrative Assistance

The prosecutor should assist the grand jury with procedural and administrative matters appropriate to its work including, but not limited to, information concerning the history, role and function of the grand jury, and the scheduling of witnesses and the meetings of the grand jury. In order to carry out this function, the prosecutor should prepare an informational guidebook for the grand jury and familiarize the grand jury with its contents before it commences its work.

### 60.2 Prosecutor as Legal Advisor

It is recommended that the prosecutor always be authorized to act as legal advisor to the grand jury. In his capacity as advisor, the prosecutor may appropriately explain the law and express his opinion on the legal significance of the evidence but should give due deference to the grand jury's status as an independent legal body.

### 60.3 Scope of Statements

The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury, except as otherwise indicated in these standards.

## COMMENTARY

This standard addresses the prosecutor's role in dealing with the grand jury. While the grand jury has often been criticized for being a rubber stamp for the prosecutor in granting or denying indictment, it is difficult to ignore the legitimate need for the grand jurors to receive legal advice on matters beyond their experience and knowledge. The standard forthrightly accepts the prosecutor's responsibility in this regard and provides guidance on the subject.

But at the same time the standard recognizes that public confidence in the indictment process may be dependent on the independence of the grand jury and its ability to refuse to charge when it believes an accusation is unfounded. Therefore, several limitations are placed on how the prosecution must conduct itself. Though it does not define how this is to be done, the standard calls on the prosecutor to respect the independence of the grand jury.

The prosecutor must also not attempt to unduly influence the jurors. One of the things a prosecutor *should* do is to prepare an information booklet for the grand jury to assist that body in understanding its proper role and function in the criminal justice system, as well as to cover a number of "housekeeping" details. The preparation and distribution of such material should never be misunderstood as interference with the grand jury.

# CALENDAR CONTROL

### 61.1 Jointly Vested Calendar Control

Control of the calendar should be jointly vested in the prosecution and the court, with the following division of responsibilities:

a. The court should allocate the days and weeks during which criminal cases are to be tried;
b. The prosecution should determine the date and order in which cases are to be tried.

### 61.2 Criminal Priority

Where the court is responsible for trial of both civil and criminal cases, criminal cases should be given priority.

### 61.3 Assignment of Dates

A pre-trial hearing and a trial date should be established on dates certain, be set as early in the procedure as possible, and be continued only through the procedure set out in these standards.

### 61.4 Judicial Assignment

The individual judges should preside over every aspect of the cases assigned to them through the trial level process.

## COMMENTARY

Joint vesting in the court and prosecution of calendar control is desirable because the prosecutor is in the best position to know the particular problems that exist in managing witnesses, marshalling evidence (especially technical and scientific evidence), and the availability of the victim. The defendant is not precluded from application to the court for consideration of his views or special problems that may also need to be addressed in establishing pre-trial and trial dates.

It is recognized that in some jurisdictions giving trial preference to criminal over civil cases may be viewed as a problem by the civil trial bar. The court and prosecutor should be cognizant of such concerns and can be expected to take them into consideration in jointly managing the trial calendar.

# PRIORITY CASE SCHEDULING

### 62.1 Factors to Consider

In establishing case priority, the prosecution should consider the following factors:

a. Whether the case is criminal or civil;
b. Whether the defendant is in pre-trial custody;
c. Whether the defendant constitutes a significant threat of violent injury to others;
d. Whether the victim is a child or family member;
e. Whether the defendant is a recidivist;
f. Whether the offenses charged include heinous crimes;
g. Whether the defendant is a public official;
h. The age of the case;
i. Any significant problem or interests of particular concern to the community.

## COMMENTARY

This list of factors is viewed as sufficiently flexible to take into consideration any special problems or needs in a community, such as, for example, the concerns of the civil trial bar mentioned in the commentary to Standard 61.

# SPEEDY TRIAL

### 63.1 Equal Application

The right of speedy trial should be afforded equally to the state as to defendants. The following provisions are recommended to implement these congruent rights.

### 63.2 Felony Time Limit

Each person accused of a felony should be brought to trial, or have his case otherwise disposed of, within three months following

arrest or entry of a plea to a formal charge, whichever is earlier. However, this three-month period should be exclusive of certain periods of necessary delay as set out in Standard 63.6.

**63.3 Misdemeanor Time Limits**

Each person accused of a misdemeanor should be brought to trial, or have his case otherwise disposed of, within 45 days following arrest or first appearance, exclusive of periods set out in Standard 63.6.

**63.4 Defendants Subject to Pre-trial Detention**

The basic period for disposal of felony charges against those persons denied pre-trial release should be set at 75 days.

**63.5 Waiver**

Defendants should be allowed, with the consent of prosecution, to waive speedy trial as a condition for entry into diversion programs or for other good causes. However, such waiver should only be accepted when consistent with the efficient administration of justice and public interest in prompt disposition of criminal cases.

**63.6 Necessary Delay**

For the purpose of determining compliance with the speedy trial requirement, the following periods should be excluded:

a. Delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial, hearings on pre-trial motions, interlocutory appeals, and trial of other charges.

b. Delay resulting from congestion of the trial docket when the congestion is attributable to exceptional circumstances.

c. Delay resulting from a continuance granted at the request or with the consent of the defense. A defendant without counsel should not be deemed to have consented to continuances unless advised by the court of the right to a speedy trial and the effect of consent upon that right.

d. Delay resulting from a continuance granted at the request of the prosecution if:

(1) The continuance is granted because of the unavailability of evidence material to the prosecution's case, when the prosecution has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date; or

(2) The continuance is granted to allow the prosecution additional time to prepare the prosecution's case and additional time is justified because of the exceptional circumstances of the case.

e. Delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent for this standard whenever his whereabouts is unknown and he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. A defendant should be considered unavailable whenever his whereabouts is known but his presence for trial cannot be obtained or he resists being returned to the jurisdiction for trial.

f. The period between dismissal of charges on the prosecution's motion and reinstatement of those charges if done in a timely manner.

g. A reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to him.

h. Delays resulting from trial *de novo*.

i. Other periods of delay for good cause.

### 63.7 Extension

In all cases, the speedy trial limit should be extended to allow at least one month for trial from the termination of any period of extension resulting from prosecution or defendant's motions or discovery proceedings.

### 63.8 Trial Court's Ruling

Whenever an event occurs that the prosecution believes would constitute excusable delay in the processing of a case (see Standard 63.6), it is recommended that the trial court be required to rule on

the issue. The order providing for the excludability of certain periods should include appropriate findings of fact.

### 63.9 Effect of Failure to Bring Defendant to Trial Within the Time Limit

The court should, prior to the commencement of trial, determine, taking into account the time exclusions of Standard 63.6, whether the speedy trial deadline has been exceeded. Just prior to trial, or to acceptance of a guilty plea, the defendant should be informed on the record that he has a right to a speedy trial and that because the applicable time limit has been exceeded, he has certain rights now accorded to him, including possible release or dismissal. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, the consequence will be immediate release on own recognizance if currently detained in jail or, at option of the court, could be absolute discharge. Such discharge should forever bar prosecution for the offense charged and for any other offense required to be joined with that offense. Failure of the defense counsel to move for a discharge at this time should be entered in the record and should constitute waiver of the right to a speedy trial. Where the defendant is represented by counsel, the failure by counsel to object to a setting of the trial upon a date which is beyond the expiration of a speedy trial deadline should constitute a waiver. Defense counsel has the responsibility to bring the defendant's case to trial within the speedy trial time limitations. Failure to do so, within the exclusions of Standard 63.6, will constitute waiver of the defendant's right to release or discharge at the end of speedy trial time limitations.

### 63.10 Special Procedures—Person Serving Term of Imprisonment

a. Prosecutor's Obligations; Notice to and Availability of Prisoner

To protect the right to speedy trial of a person serving a term of imprisonment either within or without the jurisdiction, it is recommended that it be provided by rule or statute and, where necessary, interstate compact, that:

(1) If the prosecutor knows that a person charged with a criminal offense is serving a term of imprisonment in a penal institution of that or another jurisdiction, he must promptly:

(a) Undertake to obtain the presence of the prisoner for trial or

(b) Cause a detainer to be filed with the official having custody of the prisoner and request him to so advise the prisoner and to also advise the prisoner of his right to demand trial.

(2) If an official having custody of such a prisoner receives a detainer, he must promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs such official that he does demand trial, the official should cause a certificate to that effect to be sent promptly to the prosecutor who caused the detainer to be filed.

(3) Upon receipt of such certificate, the prosecutor should promptly seek to obtain the presence of the prisoner for trial.

(4) When the official having custody of the prisoner receives from the prosecutor a properly supported request for temporary custody of such prisoner for trial, the prisoner should be made available to that prosecutor (subject, in cases of inter-jurisdictional transfer, to the traditional right of the executive to refuse transfer and the right of the prisoner to contest the legality of his delivery).

b. Computation of Time

The time for trial of a prisoner whose presence for trial has been obtained while he is serving a term of imprisonment should commence running from the time his presence for trial has been obtained, subject to all the excluded periods listed in Standard 63.6. If the prosecutor has unreasonably delayed causing a detainer to be filed with the custodial official or seeking to obtain the prisoner's presence for trial in lieu of filing a detainer or upon receipt of a certificate of demand, such periods of unreasonable delay should also be counted in ascertaining whether the time for trial has run.

*Commentary follows standards on page 187.*

# DEFENSE-INDUCED DELAY

The following provisions are recommended to implement the congruent rights to a speedy trial contained in these standards.

### 64.1 Continuances

Continuances should be granted by the court only upon written, noticed motion, stating the reason for the continuances, for good cause shown, taking into account not only the request or consent of the prosecution and defense, but also the public interest in prompt disposition of the case. "Good cause" specifically does not include the financial interest of defense counsel in receiving payment for his services. No court should grant a continuance to any party at any time without first setting a new and certain date for the trial or hearing.

### 64.2 Control of Continuance Abuse

Each state bar association should be encouraged to adopt rules providing that abuse of the continuance process for the purpose of delay is unethical conduct. The bar association should cooperate with the courts in cautioning or disciplining attorneys requesting an excessive number of continuances.

### 64.3 Substitution of Counsel

If defense counsel has such a number of cases assigned for trial so as to cause undue delay in the disposition of said cases, then said attorney should be required to provide substitute trial counsel for those cases which cannot be tried by him. If upon request the attorney fails to provide substitute trial counsel, the judge should remove him as counsel in the case. When the attorney has been appointed by the court, the court should appoint other trial counsel.

*Commentary follows standards on page 187.*

# REDUCTION OF TRIAL DELAY

**65.1 Procedural Reform**
State legislatures and courts should re-evaluate pre-trial procedures in order to replace those which have proved to be unduly time-consuming or sources of unreasonable delay.

**65.2 Adequacy of Resources**
State and/or local agencies should provide funding for sufficient resources—courtrooms, judges, prosecuting and defense attorneys—to insure the equitable administration of justice, taking into account:

a. The speedy trial time limit set by the jurisdiction;
b. The procedural requirements prevailing in the jurisdiction; and
c. All other conditions affecting the delay in case disposition.

## COMMENTARY

Delay in the processing of those accused of criminal acts continues to be the greatest single problem in the criminal justice system in the 1990s. This delay—with increasing court congestion and longer time periods consumed before cases are resolved—is often addressed as an abstract development, as if the mere fact that the judicial system was falling behind statistically was the sum of the ill effects experienced. But the inability of the system to resolve cases results in concrete detriments, both to society and to defendants.

At least until recently, the problem of delay was seen almost exclusively in terms of protecting the defendants' rights. The whole development of a "right to speedy trial" through English and American legal history has assumed that the state must sometimes be forced to bring a person to trial rather than oppressing him with unresolved charges and pre-trial restraint. However, while this aspect of delay remains relevant, it is clear that the costs

to society of delay are currently more significant than the cost to the individual.

In addition to the constitutionally based means of enforcing the speedy trial right, both the federal and state governments have adopted specific statutes and rules which expand upon minimum constitutional speedy trial guarantees.

The problem of trial delay has become even more acute since the original promulgation of the standards in 1977. The harm potentially resulting from pre-trial delay has been recognized widely; however, the responses of individual jurisdictions to the challenge have been far from uniform. Congestion caused by increased influx of drug and related offenses is well documented. Most jurisdictions have simply not kept pace.

The modern trend in speedy trial rules is for the speedy trial deadline to be expressed in terms of a period of days or months. Where states have expressed the time period, the time allowed for a felony trial to be commenced, or the charge otherwise disposed of, can range from 60 days to a period of years.

The time period may differ depending on the seriousness of the crime charged, whether felony or misdemeanor. Occasionally the classification of the charges will be broken down further in existing rules. The less serious the charge, the less delay will be tolerated. Some rules provide a shorter time limit for the trial of defendants who are denied pre-trial release. These standards are intended to offer a uniform format for determining speedy trial rights that satisfies both constitutional considerations and the spirit of the best of existing rules and statutes.

Just as in the constitutional development of the concept, the rules and statutes on speedy trial recognize various acceptable causes for delay, which are not held against the state or result in violation of the established trial deadline. The two major differences in these provisions are the specificity with which excusable delay is outlined and the types of delay which are excusable.

In defining the type of delay not chargeable to the state, a key difference is the way in which delay resulting from trial court congestion is regarded. In some states, trial court congestion is specifically excepted from delay which may be held against the state. In rules where a "good cause" exception is mentioned,

decisions are in conflict as to whether court congestion falls within this category. Several rules have indirectly avoided the problem by requiring merely that the prosecution be "ready" for trial within a certain period. While such rules encourage prompt case preparation and eliminate tactical delay by the state, they do little to protect the accused, or the public interest, against increasing court backlogs. Finally, some rules specifically provide that chronic court congestion is *not* an excusable delay.

Current speedy trial rules provide a variety of remedies for a defendant whose case is not disposed of within the allowable time period, as extended by excusable delay. As in constitutional enforcement, the most common remedy is dismissal of the charges pending against the accused.

This dismissal may be granted in a variety of different ways and with varying effect. In some cases, dismissal is mandatory, while in others it is granted at the discretion of the trial court. In addition, the legal effects of dismissal may differ greatly—while in some states the dismissal is with prejudice and bars further prosecution, in the others the charges may be reinstated, usually with the approval of the court. The effect of the dismissal may be dependent upon the seriousness of the charge. Some rules grant absolute dismissal of misdemeanor charges, while felony charges are dismissed without prejudice.

Two major sources of excessive delay, identified in the standards, are continuances resulting from scheduling conflicts and intentional abuse of continuances by the defense for tactical or personal purposes. These standards directly address each problem and provide a workable remedy that takes into consideration the proper interests of both the prosecution and the defendant.

Traditionally, judges have played little or no management or supervisory role in the control of their courts and in the speed at which cases are processed. At least at the federal level, there have been several enactments directing the courts to make plans for reducing trial delay and to implement them. The Federal Rules of Criminal Procedure charge district courts to continually study criminal justice administration in their jurisdiction and to adopt a detailed plan—including pre-trial, trial, and sentencing procedures—for achieving prompt case disposition. The federal Speedy

Trial Act reaffirms the requirement for study of criminal justice and, in particular, calls for plans to achieve the speedy trial limits to be phased in according to the terms of the law. The statute details the required contents of each plan. Since it is clear that the reduction of trial delay remains a major problem in the 1990s, the standards urge the courts and legislatures to continue their studies to seek ways—including court rules and legislation—to solve it.

# PROPRIETY OF PLEA NEGOTIATION AND PLEA AGREEMENTS

### 66.1 Propriety

Where it appears that the interest of the state in the effective administration of criminal justice will be served, the prosecution, while under no obligation to negotiate any criminal charges, may engage in plea negotiation for the purpose of reaching an appropriate plea agreement.

### 66.2 Types of Plea Negotiations

The prosecution, in reaching a plea agreement, may agree to one or more of the following dispositions, depending on the circumstances of the case:

a. To make or not oppose appropriate recommendations concerning the sentence which may be imposed if the defendant enters a plea of guilty or *nolo contendere;* or

b. To seek or not to oppose dismissal of an offense or offenses charged if the defendant enters a plea of guilty or *nolo contendere* to another offense or offenses supported by the defendant's conduct; or

c. To seek or not oppose dismissal of other charges or potential charges against the accused if the defendant enters a plea of guilty or *nolo contendere;* or

d. To seek or not oppose dismissal of the offense charged, or not to file potential charges, if the accused, when counseled by

his attorney, agrees not to pursue potential civil causes of action arising therefrom against the victim, witnesses, law enforcement agencies or personnel, or the prosecutor or his staff or agents.

### 66.3 Uniform Plea Opportunities

Similarly situated defendants should be afforded substantially equal plea agreement opportunities.

*Commentary follows standards on page 196.*

# AVAILABILITY FOR PLEA NEGOTIATION

### 67.1 Prosecution Availability

The prosecutor should make known a policy of willingness to consult with the defense concerning disposition of charges by plea and should set aside times and places for plea negotiations, in addition to pre-trial hearings. The prosecution should be available for plea negotiations but need not enter into such discussions on the telephone and may require the setting of a definite appointment.

*Commentary follows standards on page 196.*

# FACTORS FOR DETERMINING AVAILABILITY AND ACCEPTANCE OF GUILTY PLEA

### 68.1 Factors to Consider

Prior to negotiating a plea agreement, the prosecution should consider the following factors:

a. The nature of the offense(s);

b. The degree of the offense(s) charged;
c. Any possible mitigating circumstances;
d. The age, background, and criminal history of the defendant;
e. The attitude and mental state of the defendant at the time of the crime, the time of the arrest, and the time of the plea discussion;
f. Sufficiency of admissible evidence to support a verdict;
g. Undue hardship caused to the defendant;
h. Possible deterrent value of prosecution;
i. Aid to other prosecution goals through non-prosecution;
j. A history of non-enforcement of the statute violated;
k. The age of the case;
l. Likelihood of prosecution in another jurisdiction;
m. Any provisions for restitution;
n. The willingness of the defendant to waive his right to appeal; and
o. The willingness of the defendant to waive (release) his right to pursue potential civil causes of action arising from his arrest, against the victim, witnesses, law enforcement agencies or personnel, or the prosecutor or his staff or agents, where such willingness is concurred in and recommended by the defendant's counsel.
p. With respect to witnesses, the prosecution should consider the following:
(1) The availability and willingness to testify;
(2) Any physical or mental impairment;
(3) Certainty of identification;
(4) Credibility of the witness;
(5) The witness's relationship with the defendant;
(6) Any possible improper motive of the witness;
(7) The age of the witness;
(8) Undue hardship of the witness caused by testifying.
q. With respect to victims, the prosecution should consider those factors identified above and the following:
(1) The existence and extent of physical injury and emotional trauma suffered by the victim; and
(2) Economic loss suffered by the victim.

### 68.2 Unique Circumstances

The prosecution should be certain that all cases are determined individually and on their own unique facts and circumstances and not solely on the basis of a policy pertaining to the offense or the offender.

### 68.3 Police Input

The prosecution should examine and take into consideration the circumstances of the arrest and the attitude of the arresting officer, which may include:

a. The time and place of the arrest; and

b. Whether the arrest was made pursuant to a warrant, after several attempts to find the accused, or the accused surrendered individually.

### 68.4 Innocent Defendants

The prosecutor should always be vigilant for the case where the accused may be innocent of the offense charged.

*Commentary follows standards on page 196.*

# FULFILLMENT OF PLEA AGREEMENTS

### 69.1 Prosecutor's Limits

The prosecution should not make any guarantee concerning the sentence which will be imposed or concerning a suspension of sentence; the prosecution may advise the defense of the position prosecution will take concerning disposition of the case, including a sentence that the prosecution is prepared to recommend to the court based upon present knowledge of the facts of the case and the offender (including his criminal history). If the facts known to the prosecution change materially prior to sentencing, prosecution is not bound by such representation.

**69.2 Implication of Authority**
Prosecution should avoid implying a greater power to influence the disposition of a case than prosecution actually possesses.

**69.3 Inability to Fulfill Agreement**
If the prosecution is unable to fulfill an understanding previously agreed upon in plea negotiations, the prosecution should give prompt notice to the defendant and cooperate in securing leave of court for the defendant to withdraw any plea and take such other steps as would be appropriate to restore the defendant and the prosecution to the position they were in before the understanding was reached or plea made.

**69.4 Rights of Others to Address the Court**
The prosecutor should make clear that he has no control over the right of the victim or arresting police officers to make statements to the court at the time of the plea or sentencing, if they wish to do so.

*Commentary follows standards on page 196.*

# RESPONSIBILITY OF COURT

**70.1 Court's Role**
The trial judge may participate in plea discussions.

**70.2 Acceptance of Plea**
The court should accept a plea negotiated by the parties when the interest of the public in the effective administration of justice would be served.

**70.3 Court's Decision on Concessions**
When such a plea is tendered and the accused is questioned, the trial judge should reject or accept the plea of guilty on the terms of the plea agreement, but notwithstanding a negotiated plea, the

trial judge should reach an independent decision on whether to grant charge or sentence concessions.

**70.4 Rejection of Plea Agreement**
The court may postpone its acceptance or rejection until it has received the results of pre-sentence investigation. If the court rejects the plea agreement, it should so advise the parties in open court and then call upon the accused to either affirm or withdraw the plea.

*Commentary follows standards on page 196.*

# RECORD OF THE PLEA AGREEMENT

**71.1 Record of Agreement**
Whenever the disposition of a charged criminal case is the result of a plea agreement, the prosecutor should make the existence and terms of the agreement part of the record.

It is recommended that the defendant acknowledge the voluntary, knowing, intelligent and understanding nature of the agreement in open court. The prosecutor should maintain the reasons for the disposition in his case file.

*Commentary follows standards on page 196.*

# CONDITIONS FOR PLEA ACCEPTANCE

**72.1 Conditional Offer**
Prior to reaching a plea agreement and subject to the standards

herein, the prosecutor may set conditions on a plea agreement offer, such as acceptance within a specified time period which would obviate the need for extensive trial preparation.

## COMMENTARY

> Plea bargaining is an essential component of the administration of justice. Properly administered, it is to be encouraged . . . It leads to prompt and largely final disposition of most criminal cases.
>
> Chief Justice Burger, *Santobello v. New York,* 404 U.S. 257 (1971).

The plea negotiation process, operating as an exchange of prosecutorial, defense, and judicial concessions for pleas of guilty has never been overly popular in the United States. The basic criticisms range from constitutional infringements to the need of a more efficient criminal court system capable of handling caseloads without the use of plea agreements; but largely, the thrust of the attack can be attributed to a lack of understanding by the general public.

The plea negotiation process operates as a viable, effective tool of the criminal justice system, but still demands greater visibility to and comprehension by the general public. Long recognized by those intimately involved with criminal law as a proper disposition of a violation against accepted behavior patterns of society, the plea agreement is too often publicly viewed as a closed-door "deal" worked out between the judiciary and the defendant by the prosecutor and defense counsel. Only through concerted effort by the prosecution, the defense, and the judiciary can plea negotiation gain the stature it deserves as one of the most efficient means of criminal disposition.

The standards deal in detail with a number of issues that impact on the interests of all participants in the process of plea negotiation. The prosecutor must consider all these interests when he engages in plea negotiation. This may necessitate a variety of prosecutorial roles. He may act as an administrator trying to dispose of each case in the fastest, most efficient manner. He may

act as a judge by implementing what is best for the defendant in view of the circumstances or of the particular crime. The prosecutor may act as a guardian for unprotected victims. Finally, the prosecutor may act as a legislator, granting concessions where the law may be too harsh for all defendants. In all roles except the last, the prosecutor must determine on a case-by-case basis the concessions that he will offer to defendants who plead guilty. Also, the importance of each role may vary with each case. Thus, the prosecutor combines all of these roles in varying degrees in the prosecutorial function. This is an enormous responsibility because while the prosecutor is trying to maximize the benefits of conviction without trial, he is also trying to minimize the risks of unfair results.

Whether one views plea negotiating favorably or not may depend upon how one views the overall responsibility of the prosecutor's office. There are two general schools of thought concerning the prosecutor's responsibility. In one view, generally held by the public, the prosecutor is expected to objectively evaluate the defendant's past behavior in relation to a statutory criminal code. If the defendant's behavior matches the behavior prohibited by the statute, then under this view, he should be prosecuted for violation of that particular statute. The second view of prosecutorial responsibility envisions the various statutes as weapons within the criminal code. If one statute does not work, then another might be successful in encouraging an offender to negotiate a surrender. The discrepancy between the two attitudes might be described as the traditional conflict between theory and practice.

Reason dictates that the one person who can best evaluate the functioning of a system is the one who is closest to the individual cases within that system. It is there, at the individual level, where all interests intertwine. It is there where the prosecutor must consider the time, the manpower of the office, available financial resources, and the specific circumstances surrounding the defendant and the alleged crime, that the prosecutor must determine whether or not to negotiate a guilty plea. Legal commentators can write a thousand articles on the subject, but the prosecutor must learn largely from experience.

Several benefits are to be noted as a result of the utilization of the system of plea negotiation. Benefits that the state receives include reduction of the overall costs of the criminal prosecution, enhancement of the administrative efficiency of the courts, and capability of devoting more prosecutorial attention to cases of greater importance. Primarily, however, negotiated pleas permit the prosecutor more time to individualize punishment with an eye toward rehabilitation of a defendant. This is particularly true in jurisdictions where plea negotiating centers essentially on the questions of what punishment the prosecutor will recommend to the court. Whether prosecutors, in fact, take the opportunity to "individualize" punishment or merely seek to "move the calendar" may be another question. Whatever benefit or combination of benefits one considers, the point is that, from the eyes of the prosecutor and the courts, plea negotiation is presently an absolute necessity and will likely remain such well into the twenty-first century. And it should be said unequivocally that it is *not* against principles of justice to plea negotiate with the reduction of an overburdened caseload as a goal. In point of fact, such goal is part of the present and foreseeable reality.

There are, of course, benefits the prosecutor alone derives from plea negotiations. The prosecutor is usually under pressure to reduce the caseload, or at least to process more cases in less time. These demands may be attainable by reliance on plea negotiations. The standards recognize this as proper. But these negotiations should not be used merely to enhance the prosecutor's conviction record or clean up backlogs in his office. Even though the chance of convicting a defendant before a jury may often be high, the prosecutor should seek justice with a charge equal to the offense and a sentence or punishment/rehabilitation that is in line with the charge. As the probability of conviction at trial decreases, a prosecutor often becomes increasingly receptive to conviction of the accused through a guilty plea extracted via plea negotiations—but as a prosecutor the responsibility is for a fair conviction, not a high conviction rate or easy caseload.

With these basic principles and considerations in mind, the prosecutor of the 1990s needs no further justification for continuation of the now time-honored institution of plea negotiation.

Whereas in past decades the prosecutor may have felt compelled to justify the process, he should now devote attention to refinement and improvement of the process. These standards will help the prosecutor attain that goal.

For an analysis of civil liability issues, see the commentary to Standard 42, Screening.

# Trial

# JURY SELECTION

### 73.1 Initial Selection

The names of those called for jury duty should be obtained by random selection from sources which reflect a representative cross-section of the community.

### 73.2 Exemptions and Excusals

An individual should be exempted from or excused from jury duty only upon a showing of good cause to the court. Reasons for such excusal should be shown upon the court record. Good cause for exemption or excusal may include:

a. Failure to meet statutory requirements for jury duty such as age, residence, or citizenship;

b. Physical or mental incapacity to render competent jury service;

c. Previous service as a juror within a recent, specified time period;

d. Vulnerability to excessive hardship or embarrassment in the *voir dire;*

e. Conviction of a felony; or

f. Clear showing of undue hardship.

### 73.3 Compensation

Adequate compensation should be provided for jury service. Such compensation should include a reasonable per diem allowance and reimbursement of other expenses.

### 73.4 Investigation

a. An informational questionnaire should be administered to each prospective juror prior to jury selection and be made available to court and counsel prior to *voir dire;* and

b. Counsel for either side should have the right, at their

discretion, to conduct a pre-*voir dire* investigation of any prospective juror, but any such investigation should not harass or intimidate prospective jurors. Prosecutors may conduct criminal history record checks of prospective jurors and use such information in conducting the *voir dire* examination.

### 73.5 *Voir dire* Examination

Initial examination of jurors as to statutory qualifications should be conducted by the court; thereafter, examination should be conducted by counsel.

### 73.6 Peremptory Challenges

An equal number of peremptory challenges or strikes should be made available to prosecution and defense. In trials involving multiple defendants, the prosecution should be allowed challenges equal to the total number available to the defendants. Trials involving capital offenses should be allocated additional challenges. Peremptory challenges should be exercised to exclude prospective jurors who would base their verdicts on reasons extraneous to the evidence.

### 73.7 Duration

Selection of the jury should be conducted as expeditiously as possible. All unnecessary questioning and delay should be avoided by counsel and discouraged by the court.

### 73.8 Challenges for Cause

a. Removal of any prospective juror for cause should be accomplished by the court or upon motion of counsel. Challenge may be made at any time before jeopardy has attached unless the basis for the challenge has been concealed by the prospective juror.

b. In capital cases, challenge for cause may be made to those jurors who state that their opposition to capital punishment would prevent them from considering imposition of the death penalty.

### 73.9 Identity of Jurors

In cases where probable cause exists to believe that jurors may be

subjected to threats of physical or emotional harm, their identity may be kept from the defendant.

## COMMENTARY

The standard takes as its objective that selection of potential jury members should be conducted so as to, as far as possible, produce a representative cross-section of the community. This does not mean that every jury must contain a representative cross-section, or even that every potential jury panel called must be representative; rather, the master list from which juror names are selected must be representative. The master list should be developed from multiple sources so as to include all classes of citizens: voter registration lists, phone books, lists of licensed drivers, utility customers, state income taxpayers, city directories, property taxpayers, etc. Continual updating of the master list should be conducted.

Selection from the master juror list should be by random method, using a predetermined methodology that neutralizes any possibility of systematic inclusion or exclusion of identifiable segments of the population or specific individuals.

Exemptions and excusals from jury duty should be delineated by statute and should be restricted to cases of clear necessity. The current system of exemptions has been greatly abused.

A program of adequate compensation of jurors is highly desirable. Such compensation is necessary for two reasons. First, it is necessary to reduce the economic hardship imposed by loss of earnings during jury service. And second, compensation is needed to retain the representative character of juries. Without compensation the tendency is for excusal from duty of those classes least able to bear the economic burden, with a corresponding decrease in community representativeness of the jury. In jurisdictions where adequate compensation is not provided, juries often lack adequate representation of wage earners and salaried personnel. Compensation should be provided promptly for each day of attendance, regardless whether actual service at trial occurs.

A basic informational questionnaire should be administered to

each prospective juror prior to jury selection. The questionnaire may be administered by mail, accompanying the jury summons. The court may require a personal interview for those persons failing to return the questionnaires. The questionnaire should elicit information required by the court for juror qualification and potential reasons for juror exemption or excusal. The questionnaire can also elicit information such as residence, occupation, and biographical data which would ordinarily be determined in the *voir dire,* thus saving time. The questionnaire should be made available to both court and counsel to aid in the *voir dire.*

If he determines that additional information would be desirable, the prosecutor should have the right to conduct a pre-*voir dire* investigation of any prospective juror. Such investigation may be required to obtain information necessary for a specific case which has not been solicited by questionnaire or to obtain information in cases where there may be a need for verification of facts. The prosecution should have the ability to check the criminal history and motor vehicle history of prospective jurors. Use of these questions to search criminal and motor vehicle records by prosecutors is encouraged as a practice designed to aid in the selection of a fair and impartial jury.

Initial examination of potential jurors as to statutory qualifications should be conducted by the court; thereafter, examination should be conducted by counsel. The utility of the *voir dire* has long been recognized and this process should be retained. *Voir dire* examination should not be conducted solely by the court since there is information in practically every case which is peculiar to that case and which is unknown to the trial judge but known to counsel and the parties.

The peremptory challenge is designed to allow rejection for a real or imagined partiality that is less easily designated or demonstrable than that necessary to challenge for cause. The peremptory challenge permits counsel for both parties to probe deeply for juror bias or hostility. The preferred practice in the allocation of peremptory challenges is to allow an essentially equal number to both prosecution and defense. Those jurisdictions which allocate fewer challenges to the prosecution than to the defense unjustifiably restrict the ability of the prosecution to strive to obtain an

impartial jury. Our system of jury selection is designed to produce jurors who are free from bias or prejudice towards either party. The prosecutor has the same need for peremptory challenges as does the defense. Unless the total number of peremptory challenges available to both prosecution and defense is equal, a defendant has a privilege inconsistent with the ideals of justice.

The traditional, and correct standard, that prosecutors use their peremptory challenges to exclude prospective jurors who would base their verdicts on reasons extraneous to the evidence, is not in direct conflict with the decisions in *Batson v. Kentucky*, 476 U.S. 79 (1986) and *Powers v. Ohio*, 111 S.Ct. 1364 (1991). *Batson* provides that prosecutors cannot use peremptory challenges to exclude potential jurors that are of the same minority race as the defendant, on the assumption that the minority jurors as a group will be unable to impartially consider the evidence because they are of the same race as the defendant. If the minority defendant can establish an inference, by facts and relevant circumstances, that the prosecutor used peremptory challenges to exclude veniremen solely on account of their race, the burden shifts to the prosecutor to provide specific, racially neutral reasons that need not amount to a challenge for cause, related to the particular case, for the challenges. *Batson* does not prohibit a prosecutor from challenging a juror for cause when the facts and the juror's answers on *voir dire* specifically indicate that the juror could not fairly consider the state's case because of his racial kinship with the defendant. If the facts and the juror's answers indicate that racial considerations would weigh heavily in his consideration of the evidence, prosecutors are not prohibited by *Batson* from peremptorily challenging the juror in a situation where the juror's answers do not justify a challenge for cause and where the prosecutor can affirmatively show that the peremptory challenge is being used to eliminate racial prejudice from the jury and not to further any racial prejudice of the prosecutor. *Batson* prohibits a prosecutor from assuming that racial kinship will affect a minority juror's verdict but does not prohibit him from demonstrating such prejudice where it exists and can be shown. A fair reading of *Batson* allows for the prosecutor to use peremptory and cause challenges to excuse prospective jurors, of minority or majority

race, whose racial views can be affirmatively shown to significantly affect verdicts.

*Powers* modified *Batson* by providing that a prosecutor is prohibited from exercising the state's peremptory challenges to exclude otherwise qualified and unbiased persons from petit juries solely by reason of their race, on the basis that the juror has a right under the Equal Protection Clause not to be excluded on account of race. *Powers* eliminated the *Batson* pre-condition that the defendant and the potential jurors be of a minority race. Although *Powers* recognized a juror's right not to be excluded on account of race, it stopped short of prohibiting defendants from violating that right. Other decisions are expected to further clarify these issues.

NDAA officially opposed *Batson* and filed an *amicus curiae* brief in support of the State of Kentucky in that case. NDAA's position was that permitting judicial inquiry into the reasons for peremptory challenges would be inconsistent with historic and contemporary trial practice in America, and that if any rules were developed, they should apply also to defense counsel, *i.e.*, that the defense should not be allowed to peremptorily challenge jurors solely on the basis of race. *Batson* and *Powers* are not adopted as standards, but prosecutors should be familiar with the decisions, should closely follow other cases that develop the *Batson/Powers* issues, and meet the local guidelines of their application.

Selection of the jury should be conducted as expeditiously as possible. Unnecessary delays reflect badly on the criminal justice system and may have a prejudicial effect on the opinions of jurors in a specific case. Unnecessary questioning and delay should be avoided by counsel and discouraged by the court.

Challenges for cause are designed to provide for the fairest trial possible by the elimination of any potential juror who can be reasonably shown to possess some bias regarding the issues or the outcome of the case in question. Challenges for cause are generally outlined by state statute and reasons for challenge may vary among the individual states. The manner of accomplishing the challenge for cause should be arranged so that a challenge which is refused by the court does not result in the prejudicing of any juror member against the side presenting the challenge. In capital cases it should

be a valid cause for challenge that any juror expresses an unequivocal opposition to the imposition of the death penalty.

The standard recognizes that in recent years jurors have sometimes been subjected to threats of violence in especially sensitive cases, such as those involving members of organized crime. It recognizes the need to protect such jurors and adopts a probable cause test for cases where the prosecution—or court—believes that their identity should be kept from the defendant and defense counsel. The defendant in such a case will have ample opportunity through use of the *voir dire* process to carefully screen such jurors for bias, prejudice, etc. In order to effectively protect the confidentiality of jurors in these sensitive cases, probable cause should be established by the prosecution before the jury selection process begins.

# JURY SIZE

### 74.1 Limits

In all criminal cases triable by jury, it should be permissible for the jury to be composed of less than 12 members. However, cases involving either a capital offense or a crime punishable by life imprisonment should be tried by a 12 member jury.

# COMMENTARY

Over 20 years ago in the case of *Williams v. Florida,* 399 U.S. 78 (1969), the U.S. Supreme Court ruled that the constitutional guarantee of trial by jury in criminal cases did not require a jury composed of 12 members. Since that time, many jurisdictions have concluded that *Williams v. Florida* offers a welcome measure of relief to an overly-burdened criminal justice system. States are now free to streamline their juries and make trials more time—and cost—efficient. The experience of the last 20 years has shown that the use of reduced-size juries effects a number of substantial benefits without any improper infringement upon the constitutional rights of the accused. The standards, therefore, recognize that the

jury size may be reduced for all but the most serious cases. Prosecutors are encouraged to seek statutory or court rule changes that reduce the size of the jury within the *Williams* guidelines.

# NON-UNANIMOUS JURY VERDICTS

### 75.1 Non-Unanimous Verdicts

Non-unanimous jury verdicts should not be allowed in criminal trials in which punishment may be death. In all other cases the verdict may be non-unanimous.

## COMMENTARY

Whether unanimity should be required in criminal proceedings has become, in recent years, a question of policy for the states. Persuasive arguments are proffered from both points-of-view. Traditionalists assert that the unanimous verdict developed over time because it was essential to a system of justice which requires proof beyond a reasonable doubt. Despite the fact that the two factors may have developed distinctly historically, they are now so intertwined as to be inseparable. The experience of prosecutors has been that more convictions occur with non-unanimous verdicts than with unanimous verdicts.

There are a number of policy arguments supporting non-unanimous verdicts. For example, the experience of prosecutors has shown that one unreasonably stubborn juror can produce a hung jury, thwarting the will of the majority and its reasoned discussion. There is also the danger that a corrupt juror could prevent unanimity. Then again, non-unanimous verdicts reduce the number of hung juries and save the expense of retrial, which can be considerable in major cases. It can even be argued that unanimity is an unreasonable and unrealistic requirement. In fact, unanimity is no longer a necessary safeguard for the accused since harsh penalties have largely disappeared in our jurisprudence and

numerous due process safeguards are now available to prevent unreasonable convictions.

Most of these arguments center around the administration of justice and the consequent respect for the judicial system by the public. It may very well be true that it is more difficult for the prosecution to convince all the jurors of the defendant's guilt when unanimity is required. This is not the same as saying that a verdict of guilty by a substantial majority is any less valid or any less reliable than a verdict by the whole jury. Those who support the traditional notion of unanimity ignore this assertion and cling, unreasonably, to the position that all voices must be in accord when an individual's liberty is at stake, pointing to the notion that there may sometimes be the opportunity for one lone juror to sway fellow jurors to a particular position. This assertion assumes that the jury will walk into the jury room, vote, and simply cease discussion or deliberation once the required majority is obtained. It assumes that the jury will not take its duty seriously, simply ignoring minority views no matter how strong or how well-supported. Perhaps such a situation will arise from time to time, just as perhaps from time to time one lone juror will cling obstinately to an unsupported view and thus prevent a justified verdict. No system composed of humans will probably ever be perfect. What needs to be developed in such a light, however, is a system which best meets the needs of all involved. A system which allows for non-unanimous verdicts meets those needs, if rationally drawn and reasonably applied.

Non-unanimous verdicts will facilitate, expedite, and reduce expense in the administration of criminal justice. The opportunity to achieve such ends should not be hampered by cries that since unanimity has long been rooted in the jury system, it should be left undisturbed. The reasons for unanimity are no longer as compelling in contemporary society as they were in antiquity. Due process safeguards now exist and harsh penalties have faded into the past. At the same time, demands made on the criminal justice system in the 1990s have increased to the point where change is necessary to relieve unreasonable burdens on the process. The adoption of non-unanimous verdicts provides much-needed change without consequent loss of individual rights.

# OPENING STATEMENTS

### 76.1 Purpose
The prosecution should be afforded the opportunity to give an opening statement for the purpose of explaining the issues, the evidence, and the procedures of the particular trial.

### 76.2 Limits
The prosecution should not allude to evidence unless there is a reasonable objective basis for believing that such evidence will be tendered and admitted into evidence at the trial.

## COMMENTARY

The prosecutor should be guided by the principle that the opening statement should be confined to assertions of fact which he intends or, in good faith, expects to prove. Although it may be acceptable for the prosecuting attorney to state facts that are expected to be proved, such assertions should be founded upon the prosecutor's good faith and reasonable basis for believing that such evidence will be tendered and admitted into evidence. The prosecutor should be zealous in maintaining the propriety and fairness which should characterize his conduct as an officer of the court whose duty it is to competently represent the citizenry of the state in seeking justice. So long as the prosecutor's remarks are guided by a good faith and a reasonable belief that such assertions will ultimately be supported by the admissible evidence, the prosecution will have fulfilled the basic requirements of an opening statement.

# EXAMINATION OF WITNESSES

### 77.1 Fair Examination
The examination of all witnesses should be conducted fairly,

objectively, and with due regard for the reasonable privacy of witnesses.

**77.2 Improper Questioning**
Counsel should not ask a question which implies the existence of a factual predicate which he knows to be untrue or has no reasonable objective basis for believing is true.

**77.3 Impeachment of State Witnesses**
The prosecution should not be prohibited from impeaching a witness for the state.

**77.4 Prior Inconsistent Statements**
Prior recorded statements which are materially inconsistent with the testimony of a witness may be introduced as substantive evidence of the content of the prior statement, if the person who elicited, witnessed, or recorded the statement is available for confrontation and cross-examination and after the witness has been given an opportunity, under oath, to explain or deny the prior statement.

**77.5 Purpose of Cross-Examination**
The purpose of cross-examination is a good faith quest for the ascertainment of truth and should be conducted pursuant to this purpose.

**77.6 Impeachment and Credibility**
Counsel should not misuse the power of cross-examination or impeachment to ridicule, discredit, undermine, or hold the witness up to contempt, if counsel knows the witness is testifying truthfully. The credibility of any witness may be alluded to by a showing of any prior conviction.

**77.7 Competency**
Witnesses offering testimony at trial should not be held incompetent on the basis of age alone. Any person may be a witness in a criminal proceeding unless the court finds that, by reason of infancy or mental incompetence, the individual does not possess

sufficient capacity to justify the reception of the individual's testimony.

**77.8 Exceptions to Sequestration**

Expert witnesses, victims, parents of juvenile victims, and case workers should not be subject to sequestration at trial.

# COMMENTARY

The standard recognizes that the control of witness examination, for both direct and cross-examination, rests primarily with the judiciary. The control over witnesses in the trial of a case rests primarily in the sound discretion of the trial court, and an appellate court will not review the exercise of such discretion in the absence of abuse. Whether the party going forward with the burden of proof should be permitted, as part of the evidence in chief, to anticipate alleged defenses is a matter within the sound discretion of the trial court. Where the defendant has told the jury of certain facts that he intends to prove in denial of the charge, it may be appropriate for the prosecution, in presenting the case in chief, to anticipate this defense through the testimony of witnesses whose knowledge of the transaction will negate the facts as stated by the defendant. This technique could similarly be employed to bolster the credibility of the state's witnesses.

Moreover, where evidence not competent in chief is offered and excluded, if it is proper rebuttal it must then again be offered or no advantage can be taken of its exclusion. As a general rule, a party will be allowed, as part of the case in chief, to give evidence to rebut matters which can be foreseen by the defense upon which the adversary avows an intention to rely. Where the defendant has expressed an intention to rely on a particular defense or to use certain material for impeachment of the state's witness, the prosecution ought to be allowed, as part of the case in chief, to present testimony expected to rebut such matters.

It is axiomatic that the prosecutor's primary duty is not to convict but to see that justice is done. Underlying this duty is a judgmental obligation imposed upon the prosecution to carefully

balance the importance of the evidence in question against the potential humiliation and disgrace to the witness. A dilemma frequently encountered in criminal trials is whether, in the cross-examination of a truthful witness, restraints should be imposed upon the examining advocate. Only where the prosecuting attorney has knowledge of the truthfulness and veracity of a witness and where the purpose of the cross-examination is to undermine the credibility of the witness, should constraints be imposed. In his quest for justice, the prosecutor should not attempt to mislead a witness by using improper and unfair tactics. The prosecuting attorney, in his examination of witnesses on both direct and cross, should be guided by conduct that is not inconsistent with a good faith quest for the ascertainment of the truth. Prejudicial error, bred by improper examination tactics, might result in an undesirable conclusion of a criminal trial. The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness.

# DEPOSITIONS

### 78.1 Depositions to Perpetuate Testimony

After a defendant has made a first appearance in court, and only with leave of court, a deposition to perpetuate testimony may be taken. Leave of court should be granted upon a showing that the deponent will be able to give material testimony but may not be able to attend a trial or hearing. Upon motion of counsel, the court should preside over the taking of such depositions.

### 78.2 Propriety of Depositions

Upon motion of a party or of the deponent and upon a showing that the taking of the deposition does or will unreasonably annoy, embarrass, or oppress the deponent or a party, the court may order that the deposition not be taken or be continued or the scope limited. Upon demand of the objecting party or deponent, the taking of the deposition should be suspended for the time necessary to make and dispose of the motion. Attendance of witnesses and

production of documentary evidence and objects may be compelled by subpoena under applicable rules of procedure.

### 78.3 Custody of Deponent

If a party is granted leave to take a deposition to perpetuate testimony, the court, upon motion of the party and a showing of probable cause to believe that the deponent would not respond to a subpoena, by order should direct a law enforcement officer to take the deponent into custody and to hold him until the taking of the deposition commences, but not to exceed a reasonable time, and to keep the deponent in custody during the taking of the deposition.

### 78.4 Notice

The party at whose instance the deposition is to be taken should give all parties reasonable written notice of the name and address of each person to be examined, the time and place for the deposition, and the manner of recording. Upon motion of a party or the deponent, the court may change the time, place, or manner of recording. A deposition may be taken after the time set by court only with leave of court, and any subsequent deposition may be taken only with leave of court.

### 78.5 Videotape

For purposes of accuracy, economy, and preservation, the sworn deposition of witnesses, by order of the court, should be taken by videotape.

a. It is the responsibility of the court to insure that the videotaped deposition be accurate and trustworthy and to provide the details of recording and preservation.

b. The videotaped deposition of witnesses should be presented to the jury with all formal motions, objections, and matters ruled inadmissible edited and redacted.

c. The evidentiary standard of admissibility is that the videotaped deposition be a true and accurate reproduction of the events the recording purports to represent and that a party's or witness's constitutional rights have not been infringed in the process of taking the videotape and admitting it into evidence.

### 78.6 Presence of Defendant

Presence of the defendant includes the following:

a. The defendant must be present at the taking of a deposition to perpetuate testimony, but if defense counsel is present at the taking:

(1) The court may excuse the defendant from being present at the deposition if the defendant understandingly and voluntarily waives the right to be present in open court;

(2) The taking of the deposition may continue if the defendant, present when it commenced, thereafter voluntarily leaves or absents himself; or

(3) If the taking of the deposition is presided over by a judge, the judge may direct that the taking of the deposition be conducted in the defendant's absence if the judge has justifiably excluded the defendant because of disruptive conduct.

b. If the defendant is not present at the commencement of the taking of a deposition to perpetuate testimony after having received notice thereof and his absence has not been excused:

(1) The defendant's presence should be deemed waived, and its taking may proceed;

(2) If the deposition is taken at the instance of the prosecution, the prosecution may direct that the commencement of its taking be postponed until the defendant's attendance can be obtained; and the court, upon application of the prosecution, by order may direct a law enforcement officer to take the defendant into custody and keep him in custody during the taking of the deposition.

### 78.7 Expense of Deposition

If the deposition is taken at the instance of the prosecution and in all cases where the defendant is unable to bear the expense, the court should direct the prosecution to pay the expense of taking the deposition, including the reasonable expenses of travel and subsistence of defendant and defense counsel.

# COMMENTARY

The deposition to perpetuate testimony has been legally accepted in a number of courts, but its use has still not yet become widespread. The evidence deposition, because of its limited and explicit use, is not subject to the many complex problems and the skepticism which have accompanied the pre-recorded videotaped trial deposition. The videotaped deposition shares all the benefits of videotaped witness testimony. Previously, admissible depositions have been read into the court trial record, a method generally recognized as far less effective than the live testimony of a witness. Assuming that videotape is, in fact, capable of accurately producing in sight and sound the voice, appearance, and demeanor of a witness, it follows that a videotape presentation would be superior to the customary deposition which is read to the jury. In addition to preserving the demeanor of the witnesses, the videotaped deposition can clearly depict visual references (diagrams, equipment, or demonstrations).

A second advantage to the videotaping of evidence depositions benefits the witnesses who can be scheduled at a convenient time and location. The videotaped deposition, then, could be taken soon after the event in question, while the witness's memory was fresh, thereby avoiding the deleterious effects of memory lapses. The videotaped deposition seems especially beneficial to expert witnesses who, by virtue of their busy professional schedules, are often unavailable at the time of trial.

The videotaped evidence deposition should always satisfy the evidentiary standard of admissibility. Most state rules of civil and criminal procedure which allow for electronic recording of a deposition also stipulate that the deposition notice should specify the manner of recording, preserving, and filing the deposition, thereby insuring reliability.

The constitutional guarantees which address the defendant's rights to trial must not be impaired by the videotaped deposition. Consequently, in fulfillment of his right to be present and to confront his accusers, the accused and counsel must be present at this stage of the trial unless he waives this right.

# EVIDENCE: CHEMICAL ANALYSIS

**79.1 Admissibility of Certificate**

In the prosecution for a criminal offense where a certificate of chemical analysis by a physician, chemist, or technician is required, the certificate should be admissible as evidence of the facts stated therein and of the results of the analysis referred to therein, provided that:

a. The chemical analysis is performed in an authorized laboratory; and

b. The certificate of analysis is duly attested to by the physician, chemist, or technician in performance of his official duties.

**79.2 Motion to Appear**

On motion of any party, within a reasonable time prior to trial, the court may in its discretion require the official making the analysis to appear as a witness.

**79.3 Types of Chemical Analysis**

The chemical analysis referred to should include blood, breath, urine, DNA (genetic), drugs, fiber, hair, or any other type of chemical analysis admissible under the rules of evidence in the jurisdiction pertaining to scientific and other evidence.

## COMMENTARY

The standard establishes an expedited procedure by which a certificate of chemical analysis is immediately admissible as proof of an evidentiary fact and presumed to be correct and reliable. The standard assumes the existence of a state laboratory. The certificate of analysis would be made by an officer in the regular course of his duties and, therefore, would be presumed to be properly made.

The purpose of the standard is to effect increased efficiency, economy of time, and uniformity of procedure. No longer will it be necessary to summon witnesses who, in their official capacity,

were required to make examinations and issue reports thereon. Thus the delay and amount of time normally consumed in testifying (whenever a report made by a physician, chemist, or technician is offered in evidence) is prevented. Also, a uniform procedure is established with adequate safeguards to provide proof of the result of the analysis without the necessity of producing as a witness every person through whose hands the sample may have passed in the completion of the established routine.

The standard not only provides for a reasonable time of discovery by the defense but also enables the defense to call the physician, chemist, or technician for cross-examination. Notwithstanding the provision for cross-examination and inquiry, such certificates would not violate the defendant's constitutional rights. The standard will facilitate the fact-finding process and allow for an efficient utilization of reliable and essential information. It recognizes as well the progress of the courts in admitting new scientific evidence such as DNA "genetic fingerprints" for identification.

# EVIDENTIARY PRIVILEGES

### 80.1 Limits on Sexual History

A sex crime victim should not be cross-examined as to past sexual conduct, except as to previous sexual conduct with the defendant. Jury instructions cautioning the jury to view the victim's testimony with special caution should be prohibited.

### 80.2 Spousal Privilege

No evidentiary or witness privilege of a spousal nature should be recognized.

### 80.3 Subpoenas to Persons Holding Privileged Information

The prosecutor should exercise caution when obtaining evidence by subpoena from persons who, in the course of their profession, obtain information the disclosure of which is protected by an evidentiary or other privilege. Subpoenas to such persons should

only be issued when the prosecutor has a reasonable, good faith belief that the information sought is non-privileged.

The prosecutor should be required to establish the non-privileged nature of the information sought only in response to a properly filed motion to quash or an equivalent motion based on an asserted privilege.

## COMMENTARY

Examination of the past sexual conduct of the victim in sexual crime prosecutions has been one of the less fortunate aspects of the criminal justice system for many years. Operating on the assumption that such past conduct is a clear indication of intention in the instant situation, or acting simply for the purpose of minimizing the credibility and integrity of the witness, defense attorneys have often turned examination of the victim into a prurient inquisition. On some occasions it became difficult to determine who was on trial.

The standard seeks to limit this abuse by prohibiting investigation or examination of the victim's past sexual conduct, except as it relates to conduct with the defendant in the instant case. It recognizes a change in patterns of sexual behavior in recent decades but seeks to preserve the essential protection of the defendant by retaining the right of examination toward particular conduct connected with the victim.

The standard eliminates the use of cautionary instructions concerning sex crime victims. It does so as a reaction to the growth of protections in the law to safeguard against wrongful conviction. The cautionary instruction may have been necessary in the past when little substantive protections were afforded the defendant, but in recent years particularly, substantial advances have been made in protecting individual liberties. The defendant is guaranteed representation by counsel, guaranteed certain rights at trial, and guaranteed rights of appeal. The defendant is protected by all the rights of due process, is presumed to be innocent, and must be acquitted unless proven guilty beyond a reasonable doubt. Given these safeguards, the necessity for the cautionary instruction

is minimal at best in the context of the 1990s and is demeaning to the victim and prejudicial to the presentation of the prosecution's case.

The early common law excluded husbands and wives from testifying against each other in a criminal proceeding in which either was the defendant. This grant of privilege was justified by the interest of the state in maintaining the tranquility of the domestic institution, which was considered to be overriding. The common law privilege has been made statutory in variant forms in many states but recent decades have witnessed considerable erosion of the privilege by case law or subsequent statutory abrogation.

An exception to the rule was established in criminal cases where the offense was committed against the person of the spouse called to testify. The exception developed in part because assaults by one spouse upon another were usually committed in the privacy of the home with no other witnesses available; denial of testimony by the assaulted spouse would, therefore, be equivalent in many cases to foreclosure of prosecution. The public interest in protecting the safety of its members was judged to be paramount to the interests of a marital relationship which has apparently suffered some deterioration.

The standard now recognizes that the time has come for elimination of spousal privileges that would act to bar the otherwise admissible testimony of a witness. Such privileges seriously hamper the prosecution of cases and their original rationale has been largely eroded in present-day society. In fact, there is little to recommend a privilege that would bar *any* witness's testimony on the basis of the witness's status alone. Such privileges seriously impede the truth-determining process of a criminal trial, with little benefit to anyone other than the defendant.

# EXPERT WITNESSES

### 81.1 Purpose

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact

in issue, counsel may utilize the testimony of an expert witness qualified by knowledge, skill, experience, training, or education.

**81.2 Basis of Opinion**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing or trial. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

**81.3 Scope of Opinion**

Testimony in the form of an opinion or inference otherwise admissible should not be held objectionable on the ground that it embraces an ultimate issue to be decided by the trier of fact.

## COMMENTARY

The standard recognizes that experts are often a necessary adjunct to the presentation of evidence in a trial. At the same time, the position of the expert witness is often abused by defense and prosecuting attorneys alike as they attempt to make a dramatic impression in the minds of the jurors. Ultimately, however, the opinion of an expert should aid the judge or jury in ascertaining the facts. His impartiality and expertise inject an air of neutrality in an essentially adversarial situation. The standard reflects a desire to safeguard this essential element of trial and to utilize it to the highest degree of efficiency and efficacy.

If we keep in mind that expert witness testimony exists for the benefit of the trier of fact, then any modifications in the manner of testifying which render the material more coherent and lucid for the jury are to be encouraged. And by reversing the traditional rule that experts may not testify to "ultimate facts," the standard seeks to make the expert's testimony more accessible to the jury and of greater benefit to the "truth determining" process of a criminal trial.

# ACCOMPLICE RULE

**82.1 Abolition of Accomplice Rule**
The rule requiring corroboration of an accomplice's testimony should be abolished.

**82.2 Credibility of Accomplice**
The credibility of the uncorroborated testimony of an accomplice should be a matter determined by the jury.

## COMMENTARY

The standard takes the position that the traditional rule that corroboration evidence is required for accomplice testimony is outmoded and unnecessary. About half of the states still adhere to the traditional view and consider it at least the better practice to warn the jury to view such testimony with distrust. Other states have adopted statutes which do not allow a conviction based solely on uncorroborated testimony of an accomplice.

Corroboration creates a situation in which the defendant can escape prosecution or conviction because only his accomplice can furnish the evidence. When the crime involved is one of a highly secretive nature, *i.e.*, a gangland slaying, the only available evidence may be testimony of the corrupt participants in the crime itself. The rule, then, is highly irrational, impeding or preventing prosecutions because of a technical requirement which often has no sound basis. Some courts, in order to avoid technical acquittals, have held whenever possible that the witness is not an accomplice. This puts a court in the unenviable position of using a subterfuge to avoid the impact of an undesirable technical rule of evidence.

A particularly disturbing aspect of "the Accomplice Rule" is its rigidity. It arbitrarily determines prior to testimony that an accomplice is not credible. No other witness is treated this way. The use of cross-examination by the defendant is an adequate device for the defendant to test the bias, interest, credibility, etc., of such a witness. The Rule, in short, is not needed.

# OBJECTIONS

### 83.1 Procedure

All objections made by counsel or a party during the course of trial, to the introduction of evidence, testimony of witnesses, or orders of the court, should be formally stated in the presence of the jury as an "objection," along with the basis and grounds of the objection. Argument of counsel or parties in connection therewith, and discussion of the court, should usually be made outside the hearing of the jury in cases where lengthy argument will be necessary to resolve the objection.

### 83.2 Rulings

All formal rulings on objections should be made by the court in the presence and hearing of the jury but the reasons therefor should be stated outside the hearing of the jury.

### 83.3 Record of Objection

In all objections, the statement of basis and grounds, and the ruling of the court and reasons, should be a part of the record.

### 83.4 Exception

Every ruling on objections should be deemed excepted to by the party adversely affected and error, if any, preserved for appeal.

### 83.5 Preservation of Error

No error occurring during trial should be deemed preserved for appeal unless counsel or a party has interposed a contemporaneous objection directed thereto and has stated the basis and grounds therefor, except that an appeals court may always consider fundamental error, whether or not objections have been made.

## COMMENTARY

In recognition of the different roles of the jury and the trial court, these standards give procedural direction designed to avoid

the possibility of prejudice to a party as the result of legal arguments advancing or defending an objection.

Accordingly, the trier of the facts, where such is a jury, rather than the court sitting without a jury, is to be insulated from lengthy argument of counsel and the reasons of the trial court for its ruling. Most, if not all, objections involve questions of law to be ruled upon by the trial court. The legal arguments are of little or no concern to the jury. Such argument may also refer to factual matters that have not, up to that point in the proceedings, been brought out by sworn testimony and which, additionally, may not be brought out and/or may be inadmissible. This should not, however, preclude the trial court from giving the jury an explanation of the basis for the objection and/or its ruling, sufficient to dispel the questions that could normally arise in the minds of the jurors, so that no unfavorable inferences will be drawn by them reflecting upon a party.

The standard seeks not only to avoid the prejudice to parties that frequently occurs as a result of the manner of stating and ruling upon objections but also to streamline the procedure used in making and adjudicating objections. For example, it is a matter of fundamental fairness to allow a party to correct an error made; thus the requirement is that an objection be contemporaneous with a claimed error. It should be unnecessary for a party to take a formal exception to an adverse ruling on an objection; and, while the procedural rules of many states have reflected the concept of an automatic and continuing exception, many attorneys persist in making dramatic displays with their exceptions in the presence of the jury. The standard supports procedural rules making the formal exception unnecessary in order to preserve error for appeal and discourages the practice of taking such exceptions unnecessarily.

The standard is also concerned with the problem of finality in criminal proceedings, including the appellate process. Except in the case of plain error or fundamental error, *i.e.*, error of constitutional proportions, no litigant should be permitted to raise error on appeal, unless they have first given the trial court an opportunity to cure it by way of objection or appropriate trial motion, assuming that such objection or motion could have and should have (due diligence) been raised during the course of the trial.

# TRIAL MOTIONS

**84.1 Timeliness**
No motion made during the course of trial should be entertained by the court if such motion could have been brought as part of a pre-trial hearing, except in such cases where the movant is in fact surprised and could not have, with the exercise of due diligence, made such motion at an earlier time and a failure to entertain and rule upon such motion would deprive a party of a fair trial.

**84.2 Procedure**
All motions made during trial should be formally stated in the presence of the jury as a "motion," but the basis and grounds and all argument before the court should be made outside the presence of the jury.

**84.3 Rulings**
All formal rulings and orders on trial motions should be made by the court in the presence of the jury, but all statements of the court in connection therewith and the reasons therefor should be stated for the record outside the presence and hearing of the jury, and the record thereof should be available for appeal.

**84.4 Exception**
Every ruling should be deemed excepted to by the party adversely affected and error, if any, preserved for appeal.

**84.5 Preservation of Error**
Any matter that could properly be raised by a trial motion but not raised should be deemed waived and unavailable for appeal, except that an appeals court may always consider fundamental error, whether or not a trial motion addressed thereto was made.

# COMMENTARY

This standard is designed to not only guard against the possibility of prejudice to a party, but also to contribute to the efficient operation of trial proceedings. Accordingly, it provides that if any motion, sought to be raised during the course of trial, could have been raised during, and as a part of, the pre-trial hearing procedure, the party is precluded from bringing the motion during the course of trial. Exceptions to this rule may be made where preclusion would deny a party a fair trial. For example, where the motion is based upon newly-discovered or developed facts, the ascertainment of which the party could not have discovered at an earlier stage of the proceedings by the use of diligence.

A second concern addressed by the standard is that the trier of the facts, where such is a jury rather than the court sitting without a jury, is to be insulated from the argument of counsel and the reasons of the trial court for its ruling. Most, if not all, such motions involve questions of law to be ruled upon by the trial court. The legal arguments are of little or no concern to the jury. Such argument may also refer to factual matters that have not, up to that point in the proceedings, been brought out by sworn testimony and which, additionally, may not be brought out and/or may be inadmissible. This should not, however, preclude the trial judge from giving the jury an explanation of the basis for the motion and/or its ruling, sufficient to dispel the questions that would normally arise in the minds of the jurors, so that no unfavorable inferences will be drawn by them reflecting upon a party.

Another concern of the standard is to avoid the prejudice to parties that frequently occurs as a result of trial motion practice, as well as to streamline the procedure used in making and adjudicating such motions. As in the case of Standard 83, Objections, it should be unnecessary for a party to take a formal exception to an adverse ruling on such a motion. This standard should be read in harmony with that on objections; both support procedural rules making the formal exception unnecessary in order to preserve error for appeal and discourage the practice of taking such exceptions unnecessarily.

# CLOSING ARGUMENTS

**85.1 Characterization**
Closing arguments should be characterized by fairness, accuracy, rationality, and a reliance upon the evidence or reasonable inferences drawn therefrom.

**85.2 Order of Argument**
Prosecution should begin closing argument and should be given the opportunity to rebut closing argument of the defense.

**85.3 Comment on Substantive Law**
Counsel should have the discretion to comment upon the substantive law relevant to the case.

**85.4 Failure to Call Witnesses**
The prosecution should have the discretion to comment upon the failure of the defendant to call witnesses under his control and reasonably expected to be favorable to his cause, subject to the prohibition against commenting directly or indirectly upon the defendant's failure to take the stand.

## COMMENTARY

The standard calls for the prosecutor to make the first closing argument followed by the defense and then to have rebuttal time for responding to the defense. The government's burden of overcoming the presumption of innocence provides the rationale for this order and statutes adopting this procedure have been held constitutional against challenge on due process and right to counsel grounds. The initial closing argument should contain all essential points so that the defense may respond. In turn, in rebuttal, the prosecutor should only respond to the defense summation; he should not introduce any new line of argument or contradict his original argument.

In keeping with the purpose of the closing argument, it is fitting for the prosecutor to discuss the evidence, drawing individual pieces together to form a cohesive and logical argument. The general rule regarding comment on the evidence is that such comment is proper if it is either provided by direct evidence or is a fair and reasonable inference from the facts and circumstances proved and has bearing on an issue in the case. It is allowable, then, for the prosecutor to draw logical deductions from the facts, to restate the evidence or testimony, and to comment upon results of the crime if apparent from the evidence.

The prosecutor's closing remarks should constitute "fair argument," a term which allows for not only a fair discussion of the evidence but also commentary on the law relevant to the case. Because the purpose of the closing argument is to enlighten the jury, the prosecutor should be permitted to comment on the applicable principles of substantive law during summation, emphasizing the theory of the government's case and the criminal law and perhaps the purposes of the particular statutes involved. The distinction between commenting on the law (proposed in the standard) and instructing the jury on the law is significant; while the former is universally allowed when free of intentional misstatement or the citing of irrelevant law, the latter is the exclusive right of the trial court.

The defendant's testimony is always subject to comment, cross-examination, and impeachment; thus, the prosecutor may draw reasonable inferences from the testimony, interpret it, and point out any conflicts or inconsistencies. Characterizing the defendant's testimony (*e.g.*, "incredible," "fantastic") is proper if it is based on evidence. Furthermore, once the defendant has taken the stand, the prosecution may call attention to the defendant's failure to testify on material matters within his knowledge. Or, if the defendant's testimony only partially refutes the government's case, silence with regard to other damaging evidence is subject to comment. The defendant's testimony or an attempt to indicate his good character is also an available subject for rebuttal. As long as prior crimes and misconduct have been accepted into evidence, the prosecution may comment on them only for the purposes for which they were admitted into evidence.

This principle is similarly applicable to the prosecution's comments regarding witnesses. With the exception of statements of personal belief, the prosecutor may comment unfavorably on witnesses, noting inconsistent accounts of the crime, possible sources of bias, prior convictions, participation in the crime, and courtroom conduct. Furthermore, it is proper for the prosecution to note the absence of witnesses favorable to the defense. Specifically, courts have recognized the prosecution's right to point out that the defense "did not use its power to subpoena witnesses or that the defense failed to produce any witnesses or specific witnesses." The latter comment is particularly appropriate and damaging when the absent witness is a material one, the most common example being the alibi witness. Vess, "Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument," 64 *J. Crim. L. & C.* 22, 46 (1973). However, it should also be noted that any comments on an absent witness may be improper where the witness is equally available or accessible to the government; the absent witness must be "peculiarly within the other party's power to produce and [it must be likely that his testimony] would elucidate the transaction." *Id.* at 47.

In conclusion, the scope of the prosecution's closing argument, in keeping with his responsibility to seek justice, should be confined to evidence admitted, to the lack of evidence, to reasonable conclusions of fact that the state may draw therefrom, and to the law applicable to the case.

# JURY INSTRUCTIONS

### 86.1 Uniform Jury Instructions

The prosecutor should participate, through his state association or an advisory committee, in the development and maintenance of uniform, state-wide pattern jury instructions.

### 86.2 Instructions Conference

Any instructions conference should be held out of the hearing of

the jury and prior to the closing arguments, with the judge, defense counsel, and prosecutor present.

### 86.3 Counsel's Offer

Prior to the instructions conference, the defense counsel and prosecutor should offer the court, in writing, any instructions they wish to be given to the jury.

### 86.4 Purpose of Conference

The purpose of an instructions conference is twofold:

a. The court will provide defense counsel and prosecutor with the complete instructions to be given to the jury; and

b. Defense counsel and prosecutor will have the opportunity to further contribute to, or object to, any instructions to be given the jury.

### 86.5 Record of Instructions

All instructions, whether given or refused, should become a part of the court record. All objections made to instructions and the rulings thereon should be included in the record.

### 86.6 Limits on Appeal

No party should be permitted to raise on appeal the failure to give an instruction unless that party should have tendered it at trial, and no party should be permitted to raise on appeal the giving of an instruction unless that party objected thereto, stating the grounds of the objections.

### 86.7 Written Instructions

All instructions to the jury should be in written form. The jurors should be allowed to have the instructions during their deliberation in the jury room.

## COMMENTARY

The standard advocates dependence upon state pattern jury instructions, a practice which is presently operative in most of the

states. In general, five reasons exist for the adoption of pattern jury instructions: accuracy, economy of time, impartiality, uniformity, and intelligibility. These reasons are largely uncontested and it would be difficult to argue against them.

The standard also provides for procedures which insure maximum communication among the defense and prosecution counsel and the judge. The expediency of these provisions is immediately apparent. The instructions conference with counsel, by virtue of the advance planning which it necessitates, will undoubtedly save time. Also, by efficient management it may be possible to have a complete copy of the court's proposed charge ready at the conclusion of the evidence, a procedure which would certainly benefit counsel. It is the judge's minimum responsibility to advise the lawyers of his proposed action on their requests before argument so they may be guided in their closing statements to the jury. And while a lawyer is under no obligation to request instructions, if he fails to request them, counsel should not complain that he is surprised at the law as contained in the charge or that he has been induced to argue legal theories which the court does not accept. In addition, for appeal purposes, the lawyer must have presented a request and made a proper objection. Thus, the standard urges that all requests and denials become part of the record. All too often lawyers are told by the appellate court that their argument concerning jury instructions cannot be considered because it has not been sufficiently preserved.

The presentation of the instructions to the jury can be an additional aid to their comprehension. Currently the most common practice is for the judge to read the instructions aloud to the jury, hopefully in a lucid, conversational, and communicative manner. The use of instructions would be greatly facilitated if they were put in written form and the jury were permitted to take them into the jury room. The fear that juries will somehow misuse written instructions approved by a trial court but can be trusted with the same instructions read aloud to them by the judge, belies a lack of trust in the jury as an institution.

## Post-Trial

# POST-VERDICT MOTIONS

**87.1 Power of the Court**
When the defendant has been found guilty, the trial court, on motion of the defendant, or *sua sponte,* may order a new trial before sentence is imposed.

**87.2 Timeliness**
A motion for a new trial should be initiated no later than 14 days after the verdict has been rendered and before sentence is imposed.

**87.3 Grounds**
The trial court may grant a new trial where there is a guilty verdict for any of the following reasons, which must be stated on the record:

a. The verdict is contrary to law or the weight of the evidence.
b. A juror or jurors have been guilty of misconduct by:
   (1) Receiving evidence not admitted during the trial;
   (2) Perjuring themselves or willfully failing to respond fully to a direct question posed during the *voir dire* examination, where a truthful or full answer would have revealed a basis for a challenge for cause;
   (3) Receiving a bribe or pledging their vote in any other way;
   (4) Being intoxicated during the course of the deliberation to such an extent as to interfere with the capacity to reach a verdict;
   (5) Conversing before the verdict with any interested party concerning facts which may affect the outcome of the case; or
   (6) Deciding the verdict by lot.
c. The trial court has committed error of a reversible nature.

**87.4 Admissibility of Juror Evidence to Impeach the Verdict**
Whenever the validity of a verdict is challenged, the trial court may receive the testimony or affidavit of any witness, including

members of the jury, which relates to the conduct of a juror, official of court, or third person. No testimony or affidavit should be received which inquires into the subjective motives or mental processes which led a juror to assent or dissent from the verdict.

**87.5 Appeal by State**
Where the trial court grants a motion for a new trial, the prosecution should have an absolute right of appeal.

**87.6 Grounds for Motion to Vacate Judgment**
Upon motion, the trial court may vacate the judgment on any of the following grounds:

a. That it was without jurisdiction to try the case;

b. That newly-discovered material facts exist, which facts were not previously known to the moving party and could not have been previously known by the exercise of due diligence and which facts would by a fair preponderance of the evidence produce a different verdict.

**87.7 Previous Rulings**
The trial court may deny any such motion on the grounds that the matter has already been decided.

**87.8 Modification of Sentence**
The trial court may correct any unlawful sentence or one imposed in an unlawful manner within 28 days of the entry of judgment and sentence but before the defendant's notice of appeal, if any, is filed.

# COMMENTARY

The motion for new trial is intended to permit a defendant to raise for reconsideration any errors occurring in the conduct of the trial. More fundamental matters which rise to the level of "jurisdictional" defects are to be raised by a motion to vacate judgment. The essential purpose of this standard is to achieve an early adjudication of issues that could be reached by appeal or collateral

remedy, thereby saving the time and expense of all concerned. All prayers for relief, however, should be addressed to the sound discretion of the trial court. In any event, the trial court may choose to have such issues resolved on appeal or collateral remedy.

The grounds for a motion for new trial are intended to fall into three basic categories:

1. Verdict against the law or against the weight of the evidence;
2. Misconduct of a juror or jurors; or
3. A mistaken ruling of the trial court.

The provisions pertaining to jury misconduct, however, are not intended to permit a full scale judicial investigation of jury deliberations in every case. Counsel should always be cautious *not* to invade the important privacy of the jury. It is the intent of the standard to restrict the operational definition of juror misconduct to factors including receiving evidence not admitted during the trial, deciding the verdict by lot, perjuring themselves or willfully failing to respond fully to a direct question posed during the *voir dire* examination, receiving a bribe or pledging a vote in any other way, being intoxicated during the course of the deliberations to such an extent as to interfere with the capacity to reach a verdict, or conversing before the verdict with any interested party about the outcome of the case. These are considered to be forms of jury misconduct so blatant as to justify impeachment of a verdict as a remedy. Impeachment of a verdict, however, in general, is not favored, beyond closely-supervised limitations.

The trial court should be permitted to deal summarily with motions made on grounds that it has previously adjudicated the issue. But the standard is not intended to have an absolutely preclusive effect; the trial court may re-hear and re-decide an issue, if it deems the expenditure of time warranted.

The motion for modification of sentence allows the trial court to correct an unlawful sentence or one imposed in an unlawful manner within 28 days of the entry of judgment and sentence but before the defendant's appeal is filed (if any). An unlawful sentence is not one authorized by law. A sentence imposed in an unlawful manner is one imposed without due regard to sentencing procedures. Whereas the motion to vacate judgment attacks the

validity of the judgment itself, the motion for modification of sentence assumes the correctness of the judgment but attacks the validity of the sentence.

# ROLE IN SENTENCING

### 88.1 Sentence Recommendations

The prosecution should make sentence recommendations to the court or jury, whichever imposes sentence, in situations deemed appropriate.

### 88.2 Comments at Sentencing

The prosecution should have the option to make comments at the time of sentencing.

### 88.3 Non-Binding Recommendations

Recommendations made by the prosecution should not be binding on the court or jury, whichever imposes sentence.

### 88.4 Fair Sentencing

To the extent that the prosecution becomes involved in the sentencing process, it should seek to assure that a fair and informed judgment is made and that unfair sentence disparities are avoided.

### 88.5 Accuracy of Pre-Sentence Report

The prosecution should assist in basing sentencing upon complete and accurate information drawn from the pre-sentence report and any other information the prosecution possesses.

a. The prosecution should disclose any information in its files relevant to the sentencing process.

b. If incompleteness or inaccuracy in the pre-sentence report comes to its attention, prosecution should take steps to present the complete and correct information.

**88.6 Pre-Sentence Disclosure**
A pre-sentence investigation report which includes a sentence recommendation by the probation office should be made available to both prosecution and defense prior to sentencing.

**88.7 Scope of Pre-Sentence Report**
The probation report should be restricted to the basic elements of sentence recommendation and contain general character references and summaries, rather than verbatim remarks. The report should not contain confidential information that could be harmful to persons other than the defendant or hinder on-going law enforcement investigations.

**88.8 Confidential Elements**
If the court is of the view that the disclosure of certain information in the pre-sentence report would be harmful to the defendant or to other persons, the court, in lieu of making the report or part thereof available, should state orally, or in writing, a summary, the factual information contained therein to be relied on in determining sentence, and should give the defense an opportunity for comment or rebuttal.

**88.9 Sentencing Date**
The court should set a date for sentencing upon the entry of a plea of guilty or verdict of guilty, and that date should be no more than 60 days thereafter.

# COMMENTARY

The prosecutor has traditionally exercised at least inadvertent control over sentencing by virtue of his discretionary power. First of all, his decision whether or not to prosecute has an obvious impact on sentencing. Secondly, where the facts fit more than one statutorily-defined offense, the prosecutor can, by virtue of his discretionary power, determine the section under which the charge will be brought. If the decision involves the choice of a felony versus a misdemeanor charge, its effects may be highly influential.

For example, the decision will often determine whether the defendant, if convicted, will be eligible for probation. In addition, the place of confinement—state prison or county jail—may be determined by the prosecutor's decision. Finally, the maximum-minimum limitation of an indeterminate sentence will often vary according to the charge selected.

Perhaps the prosecutor's greatest impact on sentencing lies in the area of plea negotiation. As a practical necessity in the administration of criminal justice, plea negotiations have been widely accepted by courts and advisory bodies and are routinely engaged in by prosecuting attorneys. The prosecutor's alternatives enable him to offer a reduced sentence in return for a guilty plea; and this authority both speeds the criminal justice process and determines its outcome.

The distinction between plea or sentence negotiation and sentence recommendation after trial is significant; nonetheless, the former may be viewed as a valid precedent for the latter. First consideration should be given to the question of how many prosecutors actually do make sentence recommendations. Unfortunately, existing studies are few. However, it is believed that the majority of prosecutors commonly implement this aspect of their discretionary power.

The prosecutor's participation in sentence recommendation will benefit both the court and the public, and such participation is recommended by the standards. To begin with, the prosecutor can reflect the victim's point of view regarding the appropriate sentence, thereby equalizing the defense counsel's recommendations. This "advocate" or "adversary" philosophy is essentially that the job of the prosecutor is to suggest aggravating factors to counterbalance the mitigating factors presented by the defense. It should be noted, however, that this point of view has been the focus of much of the traditional criticism leveled against sentence recommendation by the prosecutor. Nonetheless, there is merit in the contention that the possibility of a detached assessment is minimized if only one side is heard. Moreover, as a public, elected official the prosecutor represents not only the individual victim but also society and is a person who has an important interest in determining the consequences and effects of law violations.

Informed sentencing is a goal which all the involved parties subscribe to. The pre-sentence report, when utilized effectively, functions as a practical source of information upon which a trial judge can rely in determining an appropriate sentence. Although some variance exists concerning the information to be included, it is generally agreed that essential to the report is the offense, the evidence, any mitigating or aggravating factors, the defendant's version of the offense, prior criminal record, the defendant's physical and mental history, employment record, family history, military service record, and any sentence recommendation.

Apart from possible disagreement concerning disclosure of the pre-sentence report to the defendant, there seems to be no effective rationale for withholding the report from either the defense or prosecuting attorney. Thus, the standards recommend access to the report by the defendant, with appropriate safeguards for confidential and sensitive material. The defense counsel's need for the report simply stems from his need for the facts, some of which he may not have the time or resources to locate, in order to best serve the client. But prosecutors, too, need these reports if they are to effectively perform their jobs.

Some prosecutors feel that their contribution to the sentencing process should be the presentation of arguments concerning the nature and severity of the crime and the criminal history of the defendant and an expression of the prosecutor's position concerning the desirability of an award of probation to be included in the pre-sentence report. Admittedly, the probation department accomplishes a similar task; and, ideally, information should be exchanged between the two parties. But the prosecutor who is consistently and intimately involved in the sentencing process can edit irrelevant material, correct inaccurate or incomplete information, and forward any material which only he possesses. Should duplication occur, it is a better alternative than a sentence based on erroneous facts which could easily have been corrected by information in the prosecutor's files.

By logical extension, such a contribution to informed sentencing and his reception and study of the pre-sentence report may qualify the prosecutor for participation in the actual recommendation of a sentence. Some have argued in the past that the prosecutor is not

sufficiently trained to make sentence recommendations. Quite the contrary, his role as a resource, and experience with alternative sentencing, may enable him to, in many cases, make a recommendation based on greater experience than many judges have.

Since the final sentencing decision rests with the judge (or, in a few cases, with the jury), the prosecutor's desire for the *option* to recommend a sentence cannot be viewed as an encroachment upon that separate judicial territory which insures fairness and objectivity. The standard reflects prosecutors' desires to continue to exercise their discretionary power and to be able to participate as effectively as possible in the criminal justice system. To those who fear distortion, invasion, or imbalance, there remains the assurance of the judge's correlative discretion and the prosecutor's option to refrain from recommendation altogether.

# APPELLATE PROCESS

### 89.1 Discretionary Appeal

The defendant's right to appeal from a state court judgment in criminal cases should be limited to discretionary appeal (except that where a conviction results in capital punishment, automatic appeal may be provided). There should be a right of first appeal only and, in an appellate structure consisting of more than one tier or review, review by the highest appellate court should be discretionary.

### 89.2 Right to Counsel

The appellant should be afforded counsel to assist in pursuing his right of first appeal.

### 89.3 Harmless Error

The doctrine of harmless error should be applied whenever appropriate to avoid unnecessary re-litigation and unjustified reversals.

### 89.4 Prosecutorial Appeal

The prosecution should be permitted, without the concurrence of the court, to appeal in the following situations:

a. From judgments dismissing an indictment or information on substantive grounds or for failure of the charging instrument to state an offense under the statute;

b. From other pre-trial orders that terminate the prosecution;

c. From pre-trial orders that substantially impede the prosecution by excluding evidence but do not technically foreclose prosecution;

d. From a trial order of dismissal or directed verdict upon a question of law; and

e. From sentences deemed grossly inadequate or reflecting an abuse of discretion.

### 89.5 Multiple Appellate Review

When more than one level of appellate review is provided in a jurisdiction, the prosecution should be permitted to seek further review in the highest court whenever an intermediate court has ruled in favor of a defendant-appellant. Where the trial court has dismissed the indictment or information on substantive grounds, or the court has otherwise upheld a pre-trial motion that terminates the prosecution, the defendant should be released on nominal bail or his own recognizance pending final decision on appeal. In other cases, the defendant should not be denied liberty pending determination of such an appeal unless there is cogent evidence that he will not abide by the judgment of the appellate court. In all cases where release is contemplated, the court should consider evidence adduced by the prosecution that the defendant is likely to commit a crime while appeal is pending or flee the jurisdiction of the court.

### 89.6 Appeal After Guilty Plea

Upon conviction based upon a valid plea of guilty, the defendant should not be allowed to appeal upon the merits of the case. The plea should operate as a waiver of any right to appeal with regard to any matter excepting such as are related to the jurisdiction of the trial court or to a question specifically reserved for appeal by

stipulation of the parties. The defendant should be fully informed that by a plea of guilty he thereby waives any right to appeal on the merits or on the sentence imposed.

**89.7 Appellate Reform**

Efforts should be made to increase the efficiency of the criminal appellate process. Reforms may include but should not be limited to:

a. Limiting the grounds for appeal;
b. Restructuring the appellate court system to effect a more efficient handling of caseload;
c. Increasing clerical personnel and responsibility;
d. Implementing procedural changes in both the taking and hearing of appeals;
e. Utilizing technological innovations where appropriate.

# COMMENTARY

The state should be permitted to appeal certain rulings after jeopardy attaches, even if the defendant does not appeal. Certainly, appeals by the state should be allowed from orders which may terminate the proceedings or which are made prior to jeopardy attaching. It seems appropriate that the prosecution should be allowed to appeal in at least some situations where double jeopardy has not attached. Thus, the prosecutor should be permitted to appeal, *inter alia,* from judgments dismissing an indictment or information on substantive grounds or for failure of the charging instrument to state an offense under the statute, as well as from other pre-trial orders that seriously impede but do not technically foreclose prosecution. In these situations, there is no danger of double jeopardy, because the case has not yet been decided on the merits.

When more than one level of appellate review is provided, the prosecution should be permitted to seek further review in the highest court whenever an intermediate court has ruled in favor of a defendant-appellant. Thus, the prosecutor would be allowed to appeal a decision by the intermediate court of a case which arose

on an appeal by the defendant. This is not tantamount to double jeopardy because the basic issues litigated at the trial court level are not being relitigated but rather the appellate process of the same trial is being continued to its logical conclusion. In all fairness to the defendant, however, and to prevent undue incarceration, where the trial court has dismissed the indictment or information on substantive grounds or the court has otherwise upheld a pre-trial motion that terminates the prosecution, the defendant should be released on nominal bail or personal recognizance pending final decision on a state appeal. In other cases, a defendant should not be denied liberty pending determination of such an appeal unless there is cogent evidence that he will not abide by the judgment of the appellate court or will commit a crime while appeal is pending or will flee the jurisdiction.

When an accused in a criminal case pleads guilty to the charges, he is in effect securing his own conviction. A plea of guilty, unlike a confession or admission, leaves to the trial court only the tasks of rendering judgment and determining the appropriate punishment. Thus, the prosecution is not required to rebut any presumption of innocence by a showing of guilt beyond a reasonable doubt, as would be necessary in a case tried before a jury. However, the trial court should be satisfied that there is a factual basis for the plea.

Concomitant with this concept of self-conviction by guilty plea is the theory that a defendant who so pleads also waives certain constitutional rights and privileges. Those rights are:

1. The privilege against self-incrimination;
2. The right to a trial by jury; and
3. The right to confront adverse witnesses.

In view of its critical impact upon the status and rights of the accused, the courts have erected certain criteria which are to be applied in determining the voluntariness of the plea and the effectiveness of the waiver. Since the rights waived derive from the federal constitution, the waiver must conform to federal standards.

Given the present state of the criminal appellate process in most states, no promulgation of standards should fail to call for efforts to be made to increase its efficiency. If a jurisdiction has a central

screening process for appeals, it should have a policy to encourage the local prosecutor's discretionary participation.

# COLLATERAL REMEDIES

### 90.1 Unified Procedure

With regard to collateral remedies, a unified and consolidated post-conviction procedure should be adopted, eliminating state *habeas corpus*, *coram nobis*, and other special remedies. Such procedure would deal with all possible attacks upon the judgment of the trial court by the use of appropriate screening mechanisms and simplified, comprehensive forms.

### 90.2 State Procedures

States should provide adequate post-conviction procedures to minimize the necessity for resort to federal *habeas corpus* relief. The prosecutor should strive to ensure that all pleas of guilty are knowingly, intelligently, and voluntarily made and free of potential errors that would be a basis for post-conviction remedies.

### 90.3 Guilty Plea Limitations

A plea of guilty should waive any basis for post-conviction relief (including federal right to *habeas corpus* relief), other than that based upon the jurisdiction of the trial court.

# COMMENTARY

Collateral remedies exist to challenge the conviction and sentence of the trial court. The most commonly used collateral remedies are the writ of *coram nobis* and the writ of *habeas corpus*.

The writ of *habeas corpus* is available to a defendant who can show that he is in custody in violation of the Constitution or laws or treaties of the United States. However, the defendant must have exhausted his state remedies. As a result of the broadening of the concepts of "due process" and "equal protection" in criminal

procedure, there has been a veritable flood of *habeas corpus* petitions in the federal courts in the last four decades.

Aside from the burden imposed upon the federal judiciary by the current volume of petitions, there is the issue of federal-state judicial relations. As a result of a *habeas corpus* proceeding, a single federal district court judge may release a prisoner whose conviction was affirmed with care and consideration by the full supreme court of a state.

To avoid such frustration of state appellate processes, it has been suggested that the quality of trials be improved in that the protection of constitutional rights appear in the record. It has also been recommended that the state make available adequate procedures for dealing with post-conviction claims, especially where federal constitutional issues are raised.

Over the years many commentators have suggested adoption by the states of a single post-conviction remedy which would supersede and include all other common law and statutory remedies. Such revision is warranted by the tremendous increases in recent years in caseloads in many state appellate systems. What is needed is an omnibus type of post-conviction procedure which would afford an all-encompassing remedy for defendants challenging their convictions and which would supplant both state and federal *habeas corpus* and other special writs. Many such state provisions are modeled upon the federal *habeas corpus* statutes. The ideal omnibus post-conviction procedure would deal with all possible attacks upon the judgment of the trial court by using appropriate screening mechanisms and simplified, yet comprehensive forms. In the case of guilty pleas, the same logic that argues for the forfeiture of the right to appeal argues equally for the unavailability of collateral remedies—state and federal—after entry of a voluntary plea of guilty.

# APPEAL BONDS

### 91.1 Post-Conviction Detention

A person who has been found guilty of a criminal offense and who

has filed an appeal of the conviction or sentence should be detained during the appeal if the offense provides for a sentence which includes a term of imprisonment.

**91.2 Burden of Defendant**

In those jurisdictions where a defendant may be released on appeal bond, release should only be considered when the defendant makes a showing that:

a. By clear and convincing evidence he is not likely to flee or pose a danger to the safety of any person or the community if released during the pendency of the appeal; and

b. The appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

**91.3 Prosecutor's Role**

The prosecutor should vigorously defend against the efforts of convicted defendants to seek release on appeal bond.

# COMMENTARY

Just as a person is innocent until proven guilty, a defendant should be considered guilty after such a verdict is rendered and subject to appropriate sanctions. There is no constitutional right to release pending appeal of a criminal conviction and conviction is the terminal point of the presumption of innocence.

Like trial courts, appellate courts frequently lack the resources to avoid delays. It is for this very reason that appeal bonds are attractive to all convicted defendants. These standards suggest that appeal bonds be eliminated. But, in those jurisdictions where they are permitted, it must be the burden of the defendant to show the appeal is not a frivolous exercise. Such a requirement will reduce the defendant's incentive to take an appeal where the possibility of reversal is remote.

More important, however, is the need to protect society by the detention of the convicted defendant. Not only are witnesses and victims frequently at peril when a convicted defendant is released

but, so too, at this point, are the members of the jury. This situation paves the way for jury intimidation too subtle to effectively address otherwise. Who in society wishes to take the responsibility to sit on a jury that convicts a dangerous felon, knowing that such person will be temporarily freed by little more than the filing of an appeal?

Finally, there is the public cost to apprehend fugitives. The greater the certainty of imprisonment, the greater the likelihood the convicted defendant will flee. The cost of tracking and apprehending these individuals is unnecessary and easily avoided by a system that denies appeal bonds or balances the risk in favor of society.

# JUVENILE JUSTICE

## Introduction

Excellence in criminal prosecution demands excellence in all areas—including both adult and juvenile justice. Whether in response to formalization of juvenile court procedures or increased interest in juveniles and the crimes they commit, America's prosecutors are playing a larger role in the juvenile justice system. The important substantive changes in prosecutorial involvement in juvenile delinquency cases prompted NDAA's Juvenile Justice Committee to revise National Prosecution Standard 19.2, Juvenile Delinquency, originally adopted in 1977. The revised standard is designed to guide prosecutors in redefining their role. Many years have passed since the Supreme Court rendered its landmark decision, *In Re Gault,* 387 U.S. 1 (1967). The revised standard incorporates many of the lessons learned since then.

The standard is aimed at promoting justice in juvenile delinquency cases. It emphasizes the prosecutor's duty to provide for the safety and welfare of the community and victims and, at the same time, consider the special interests and needs of juveniles to the extent possible without compromising that primary duty. The standard accepts the premise that a separate court for most juvenile delinquency cases continues to be an indispensable alternative to the adult court.

Members of the NDAA Juvenile Justice Committee prepared ten drafts over 18 months before the final revision of this standard was adopted by the NDAA Board of Directors. Chief prosecutors on the Committee extensively discussed and debated the revisions, helped by input from other chief prosecutors, deputy and assistant district attorneys, and juvenile justice practitioners. The Committee also examined carefully the Institute of Judicial Administration/ American Bar Association (IJA/ABA) Juvenile Justice Standards published in 1980. With respect to juvenile prosecution, the stand-

ard largely agrees with the IJA/ABA Volume, *Standards on Prosecution of Juveniles* (IJA/ABA Reporter: James P. Manak).

The standard necessarily established positions on controversial issues but incorporated the best guidelines the Committee could suggest for prosecutors. It was recognized that different approaches to juvenile prosecution are necessary because of varying state law and practice, limitations on resources, and institutionalized philosophic differences. The standard is therefore intended to be advisory only. Chief prosecutors remain the final arbiters of policy in their offices, and the commentary to the standard makes clear this flexibility. At the same time, the Committee believed that the standard sets forth ideal approaches to the prosecution of juvenile delinquency and is worthy of each chief prosecutor's careful consideration. The standard can also be used as a model by prosecutors seeking changes in state law and practices.

**92.1 General Responsibilities of a Prosecutor**

a. Appearance of Prosecutor

The prosecutor should appear as an attorney for the state in all hearings concerning a juvenile accused of an act that would constitute a crime if he were an adult ("a delinquent act"). This includes but is not limited to hearings for: detention, speedy trial, dismissal, entry of pleas, trial, waiver, disposition, revocation of probation or parole status, and any appeal from or collateral attacks upon the decisions in each of these proceedings.

b. Primary Duty

The primary duty of the prosecutor is to seek justice while fully and faithfully representing the interests of the state. While the safety and welfare of the community, including the victim, is their primary concern, prosecutors should consider the special interests and needs of the juvenile to the extent they can do so without compromising that concern.

c. Personnel and Resources

Chief prosecutors should devote specific personnel and resources to fulfill their responsibilities with respect to juvenile delinquency proceedings, and all prosecutors' offices should have an identified juvenile unit or attorney responsible for representing the state in juvenile matters. Additionally, the prosecutor for juvenile

cases should have adequate staff support to the extent possible, given office resources including: clerical and paralegal personnel, interns, investigators, and victim/witness coordinators.

d. Qualifications of Prosecutor

Training and experience should be required for juvenile delinquency cases. Chief prosecutors should select prosecutors for juvenile court on the basis of their skill and competence, including knowledge of juvenile law, interest in children and youth, education, and experience. While the unit chief, if any, must have criminal trial experience, assistant prosecutors assigned to the unit should also have prior criminal trial experience, if possible. Entry-level attorneys in the juvenile unit should be as qualified as any entry-level attorney and receive special training regarding juvenile matters.

e. Cooperation

To the extent possible, prosecutors should cooperate with others in the juvenile justice system to promote speedy trials and efficient case processing.

**92.2 Responsibilities of the Prosecutor for Charging Function**

a. Right to Screen Cases and File Petitions

The prosecutor should have the exclusive right to screen facts obtained from the police and other sources to determine whether those facts are legally sufficient for prosecution. If it is determined that the facts are legally sufficient, the prosecutor should determine whether a juvenile is to be transferred to adult court, charged in juvenile court, or diverted from formal adjudication.

b. Definition of Legal Sufficiency

Legally sufficient cases are those cases in which the prosecutor believes that he can reasonably substantiate delinquency charges against the juvenile by admissible evidence at trial. The charging process requires early determination as to whether the facts constitute *prima facie* evidence that a delinquent act was committed and that the juvenile accused committed it. If the facts are not legally sufficient, the matter should be terminated or returned to the referral source pending further investigation or receipt of additional reports.

c. Prosecutorial Disposition of Legally Sufficient Cases

The prosecutor or a designee should further review cases determined to be legally sufficient to decide whether the case will be transferred to adult court, filed as a formal petition with the juvenile court, or diverted.

d. Juveniles Held in Custody

If the juvenile is being held in custody after arrest or detention, the prosecutor should screen the facts for legal sufficiency within 24 hours (excluding Sundays and legal holidays) after receipt from the police or other referral sources, unless state law or practice provides for a shorter period. If the allegations do not substantiate a legally sufficient basis for proceeding, the matter should be terminated and the juvenile released. If the juvenile continues to be held in custody based upon legally sufficient facts, the prosecutor should determine within 72 hours (excluding Sundays and legal holidays) after receiving the facts from police and other referral sources whether the case should be transferred to the adult court, filed as a formal petition with the juvenile court, or diverted. State law or practice may provide, however, for a shorter period.

e. Juveniles Not Held in Custody.

If the juvenile is not held in custody, the facts should be screened for legal sufficiency within seven calendar days from receipt from police or other referral source, unless state law or practice provides for a shorter period. If the allegations do not substantiate a legally sufficient basis for proceeding, the matter should promptly be terminated. If the allegations do substantiate a legally sufficient basis for proceeding, the prosecutor should transfer the case to an adult court, file it as a formal petition with the juvenile court, or divert it within ten calendar days after receipt of the report, unless state law or practice provides for a shorter period.

f. Transfer or Certification to Adult Court

To the extent that the prosecutor is permitted by law to use discretion to decide whether a juvenile delinquency case should be transferred to the adult court, prosecutors should seek transfer only if the gravity of the current alleged offense or the record of previous delinquent behavior reasonably indicates that the

treatment services and dispositional alternatives available in the juvenile court are:

(1) Inadequate for dealing with the youth's delinquent behavior; or

(2) Inadequate to protect the safety and welfare of the community.

g. Criteria for Deciding Formal Adjudication Versus Diversion

The prosecutor or a designee must further review legally sufficient cases not appropriate for transfer to adult court to determine whether they should be filed formally with the juvenile court or diverted for treatment, services, or probation. In determining whether to file formally or divert, the prosecutor or designated case reviewer should investigate to decide what disposition best serves the interests of the community and the juvenile, considering the following factors:

(1) The seriousness of the alleged offense;

(2) The role of the juvenile in that offense;

(3) The nature and number of previous cases presented by the police or others against the juvenile, and the disposition of those cases;

(4) The juvenile's age and maturity;

(5) The availability of appropriate treatment or services potentially available through the juvenile court or through diversion;

(6) Whether the juvenile admits guilt or involvement in the offense charged;

(7) The dangerousness or threat posed by a juvenile to the person or property of others;

(8) The provision of financial restitution to victims; and

(9) Recommendations of the referring agency, victim, and advocates for the juvenile.

h. Qualifications of Case Screeners

Case screening may be accomplished by the prosecutor or by screeners employed directly by the prosecutor. If case screeners outside the prosecutor's office are employed, the prosecutor should have the right to review charging decisions and to file, modify, or dismiss any petition.

Screening for the legal sufficiency of facts related to a criminal incident should be conducted only by a prosecutor. Further screening of legally sufficient cases for prosecutorial disposition (transfer, filing with juvenile court, or diversion) should be conducted by or with advice of screeners knowledgeable about treatment and services for children and youth.

i. Role of the Prosecutor in Formal Filing

Formal charging documents for all cases referred to juvenile court should be prepared or reviewed by a prosecutor.

**92.3 Diversion of Legally Sufficient Cases**

a. The Role of the Prosecutor in Diversion

The prosecutor is responsible for deciding which legally sufficient cases should be diverted from formal adjudication. Treatment, restitution, or public service programs developed in his office may be utilized or the case can be referred to existing probation or community service agencies. If the probation or service agency decides the case is not appropriate for their services, they must return it immediately to the prosecutor's office. The prosecutor will then make a further determination about an appropriate disposition.

b. Diversion Requires Admission of Involvement

A case should be diverted only if the juvenile admits guilt for the offense(s) charged in the written diversion contract. If the juvenile does not admit guilt, the case should be filed with the juvenile court or terminated. Admissions by the juvenile to the prosecutor or case screener in the course of investigating an appropriate prosecutorial disposition should not be used for any purpose by the prosecutor. Admissions in the juvenile's written diversion contract, however, may be used by the prosecutor in any subsequent adjudication.

c. Diversion Contract

All cases diverted require a written diversion contract between the juvenile and the supervising authority. The diversion contract should set forth the conditions of the informal disposition or diversion, together with an admission of guilt and waiver of a speedy trial and should be executed by both the juvenile and his parent or legal guardian. Diversion contracts should, in general,

specify duties of the juvenile and the supervising authority that can reasonably be accomplished in three to six months. If the supervising authority determines that a juvenile has substantially breached his diversion contract, the case should be returned to the prosecutor for formal filing of a petition with the juvenile court. If the juvenile successfully complies with the contract duties, the case should be terminated with a favorable report.

d. Records of Diversion Contracts and Compliance

Records of diversion contracts and compliance or non-compliance should be maintained in the prosecutor's office. If screening is conducted outside that office, records should also be maintained in the case screener's office. These records should be used exclusively by the prosecutor or designated case screeners to screen any subsequent case reports with respect to the juvenile. They should be destroyed when the juvenile reaches the age of majority.

e. Prosecutorial Review of Diversion Programs

The prosecutor should periodically review diversion programs, both within and outside the district attorney's office, to ensure that they provide appropriate supervision, treatment, restitution requirements, or services for the juvenile. The prosecutor should maintain a working relationship with all outside agencies providing diversion services to ensure that the prosecutor's diversion decisions are consistent and appropriate.

**92.4 Uncontested Adjudication Proceedings**

a. Propriety of Plea Agreements

The prosecutor can properly enter into a plea agreement with a defense attorney concerning a filed petition against a juvenile. The decision to enter into a plea agreement should be governed by both the interests of the state and those of the juvenile, although the primary concern of the prosecutor should be protection of the public interest as determined in the exercise of traditional prosecutorial discretion. Plea agreements, if appropriate, should be entered into expeditiously without delaying speedy adjudication and disposition, in order to protect the juvenile, the victim, and the state.

## 92.5 The Adjudicatory Phase

a. Speedy Adjudication

When the prosecutor decides to seek a formal adjudication of a complaint against a juvenile, he should proceed to an adjudicatory hearing as quickly as possible. Detention cases should receive priority treatment. An adjudicatory hearing should be held within 30 days if the juvenile is held in detention pending trial or within 60 days if the juvenile is arrested and released. A dispositional hearing should be held within 30 days after the adjudicatory hearing.

b. Assumption of Traditional Adversarial Role

At the adjudicatory hearing the prosecutor should assume the traditional adversarial position of a prosecutor. The prosecutor should recognize, however, that vulnerable child witnesses should be treated fairly and with sensitivity.

c. Standard of Proof; Rules of Evidence

The juvenile prosecutor has the burden of proving the allegations in the petition beyond a reasonable doubt. The same rules of evidence used in trying criminal cases in the jurisdiction should apply to juvenile court cases involving delinquency petitions. The prosecutor is under the same duty to disclose exculpatory evidence in juvenile proceedings as he would be in adult criminal proceedings.

d. Notice to Prosecutor Before Dismissal

Once a petition has been filed with the juvenile court, it should not be dismissed without providing the prosecutor with notice and an opportunity to be heard.

## 92.6 Dispositional Phase

a. Prosecutor Should Take an Active Role

The prosecutor should take an active role in the dispositional hearing and make a recommendation to the court after reviewing reports prepared by prosecutorial staff, probation department, and others.

b. Victim Impact

At the dispositional hearing the prosecutor should ensure that the court is aware of the impact of the juvenile's conduct on the

victim and should further report to the court any matter concerning restitution and community service.

c. Prosecutor's Recommendation

In recommending a disposition, the prosecutor should consider those dispositions that most closely meet the interests and needs of the juvenile offender, bearing in mind that community safety and welfare is his primary concern.

d. Effectiveness of Dispositional Programs

The chief prosecutor along with the prosecutor in juvenile court should evaluate the effectiveness of dispositional programs used in the jurisdiction, from the standpoint of both the state's and the youth's interests. If the prosecutor discovers that a youth or class of young people are not receiving the care and treatment envisioned in disposition decisions, he should inform the court of this fact.

### 92.7 Post-Disposition Proceedings

a. Appeals and Hearings Subsequent to Disposition

The prosecutor should represent the state's interest in all appeals from decisions rendered by the appropriate court, all hearings concerning revocation of probation, all petitions for modification of disposition, all hearings related to the classification and placement of a juvenile, and all collateral proceedings attacking the orders of that court.

b. Duty to Report

If the prosecutor becomes aware that the sanctions imposed by the court are not being administered by an agency to which the court assigned the juvenile or that the manner in which the sanctions are being carried out is inappropriate, the prosecutor should take all reasonable steps to ensure agency supervisors are informed and appropriate measures are taken. If the situation is not remedied, it is the duty of the prosecutor to report this concern to the agency and, if necessary, to the dispositional court.

# COMMENTARY

Standard 92.1 emphasizes three aspects of the role of the prosecutor. First, the prosecutor is charged to seek justice just as he does in adult prosecutions. The prosecutor in the juvenile system, however, is further charged to give special attention to the interest and needs of the accused juvenile to the extent that it does not conflict with the duty to fully and faithfully represent the interests of the state. This call for special attention reflects the philosophy that the safety and welfare of the community is enhanced when juveniles, through counseling, restitution, or more extensive rehabilitative efforts and sanctions, are dissuaded from further criminal activity.

Second, Standard 92.1 emphasizes the desirability of having the prosecutor appear at all stages of the proceedings. In so doing, the prosecutor maintains a focus on the safety and well-being of the community at each decision-making level. Further, because the juvenile system is increasingly adversarially based, the prosecutor fulfills an important role in addressing the arguments of other juvenile and social service advocates. The prosecutor's presence guarantees the opportunity to exercise continuous monitoring at each stage and broad discretion to ensure fair and just results.

The standard recognizes that in some jurisdictions prosecutors are barred by statute from participating at all in juvenile proceedings. In others, prosecutors are by law or practice not involved in hearings or discussions at certain stages. For instance, in many jurisdictions the state attorney general handles all appeals. The standard suggests that prosecutors examine their systems to see whether representation of the community's interests would be better served through the presence and involvement of someone from their office at each stage of the adjudicatory process. If so, prosecutors may choose to use these standards in advocating change in existing law or practice.

Finally, the standard emphasizes professionalism in juvenile court work. It provides that attorneys in juvenile court should be experienced, competent, and interested. It suggests that the practice of using the juvenile court as a mere training forum for new prosecut-

ing attorneys should be abandoned, because continuity of involvement in the system creates professionalism.

Standard 92.2 describes a large role for prosecutors in the charging function. This function has often been delegated by law or by practice to other agencies. While this may be a workable procedure, it is paramount that the prosecutor maintain ultimate responsibility for charging for many reasons. A major function of screening is to determine whether there is sufficient evidence to believe that a crime was committed and that the juvenile committed it. A case should only be further processed if it is legally sufficient. "Legally sufficient" means a case in which the prosecutor believes that he can reasonably substantiate the charges against the juvenile by admissible evidence at trial. These determinations should be made by a prosecuting attorney. If these determinations are, by law or practice, made initially by an outside agency, it is imperative that the prosecutor have the authority to review and revise them. The standards recommend that these decisions are best made through an intake process within the prosecutor's office.

After a determination of legal sufficiency, the next decision to be made is whether the case should be transferred to the adult court, diverted informally, or referred to the juvenile court. This decision has both legal and social implications. It should be made either by an experienced prosecutor who has an interest in juveniles or by other case screeners under the guidance of a prosecutor. The prosecutor, in exercising this function, should try to accommodate the needs of the juvenile while upholding the safety and welfare of the community.

Additionally at this stage, the prosecutor may elect to exercise his discretion to dismiss a case that may be technically sufficient but from a policy or economic point of view lacks prosecutorial merit. Continuation of the case may not serve the best interests of justice.

The large role of the prosecutor in screening is intended to eliminate at least two major abuses of the intake process. Juveniles are disserved when they are charged by non-lawyers in cases where there is insufficient evidence that they committed a crime. A lawyer, the prosecutor, should make this determination. On the other hand, the community is disserved if intake screeners

continuously divert a juvenile from the court system despite an extensive background of lawbreaking. This standard seeks to halt these abuses by emphasizing the discretionary role of the prosecutor who has the primary authority to uphold the law and to evaluate what course will best achieve justice for the accused and the community.

Standard 92.2 also exhorts the prosecutor to make a prompt determination of legal sufficiency and prosecutorial disposition. The time limits suggested are ideal ones. It is recognized that some jurisdictions by law or practice make even more prompt determinations and that other jurisdictions, due to limitations in resources or the environment, have been unable to make such timely decisions. The point is that prompt determinations generally promote confidence in the system and fairness to both the victim, the community, and the juvenile. Further, prompt decisions are more likely to result in rehabilitation of the juvenile by providing more immediate attention.

The standard also recognizes that it is sometimes necessary to go beyond these time limits. Complicated cases may need additional investigation. A particularly sensitive case may require additional time so that the prosecutor can review a social history or psychological report before making a decision to, for instance, transfer a case to adult court. These exceptions should not dictate the rule. Many high volume jurisdictions have successfully instituted speedy case reviews.

It is important to note that the period described for the review of legal sufficiency encompasses only the initial review. The decision whether to transfer, charge, or divert comes later. This prompt determination is meant to uncover deficiencies in a case, so that they can be remedied, if possible, through additional investigation. If there is insufficient evidence and the deficiencies cannot be remedied, the matter should be terminated promptly and the juvenile, if in detention, should be released.

It is also important to note that the time periods begin to run after law enforcement reports the facts to the prosecutor. Delays in law enforcement reporting do not directly affect these time periods unless the prosecutor becomes aware of the facts through an alternate source, for instance at a detention hearing. Facts pre-

sented at a detention hearing commence the time limits. Prosecutors should encourage police to present facts promptly. At the same time, they should discourage law enforcement reporting that is incomplete or dependent upon extensive additional investigation unless absolutely necessary. Prosecutors must inform law enforcement that the practice of providing skeletal reports that barely describe probable cause without substantive information necessary for charging decisions is unacceptable.

In many jurisdictions, transfer of juveniles to adult court is controlled by statute or practice. In most states, the juvenile court determines whether a juvenile is to be transferred. This standard simply provides guidance for prosecutors in using discretion to the extent that they participate in this process. The provision reflects the view that the juvenile justice system should be utilized to the greatest extent possible given the level of resources available to address the juvenile's behavior. The provision further suggests that juveniles should not be transferred to the adult system unless and until a determination is made that the juvenile cannot be rehabilitated within the juvenile system or alternatives would be contrary to the safety and welfare of society or the nature of the crime dictates a transfer.

Prosecutors differ in their views about whether they should be involved in diverting less serious cases from formal adjudication. The consensus seems to be, however, that because most juveniles are in the process of developing their behavior and values, there is a unique opportunity presented at the juvenile court level to dissuade them from criminal activity. The prosecutor should seriously consider involvement in this process. For all the pessimism that abounds in the system, it is nevertheless undoubtedly true that many first-time or minor offenders will never enter the justice system again if their cases are handled properly. Treatment, restitution, or service programs often are viable alternatives to court processing. Standard 92.3 describes the opportunity for prosecutors to be involved either in diversion programs based in their offices or through referral to existing probation or community service agencies.

Diversion pursuant to this standard requires an admission of involvement in the offense. While many are critical of this

requirement, the standard takes the position that it is necessary for three reasons. First, juveniles should not be sanctioned unless there is legally sufficient evidence that they committed what would otherwise be a crime or offense if they were an adult. Denial of involvement by the juvenile should weigh heavily in favor of a formal determination of guilt or innocence. Second, many juvenile justice practitioners believe that effective treatment or rehabilitation begins with an acknowledgment of wrong-doing. Third, cases that are diverted with no admission of guilt often cannot be restored if the juvenile fails to meet the conditions agreed upon for diversion. Revival of the case is often not possible because too much time has passed and witnesses are unavailable or evidence is lost. A written admission of involvement provides evidence that the prosecutor may need if the case has to be referred to court upon failure of the diversion process.

Given this requirement for an admission of involvement, the standard delineates a careful process that should be undertaken when a juvenile case is diverted. It is critical that the juvenile and his parents understand the nature of diversion, the effect of an admission of guilt, the waiver of his rights, and his responsibilities under the diversion contract. In order to ensure that the juvenile and his parents understand this process, diversion is preceded by execution of a written contract.

Additionally, Standard 92.4 reflects the consensus that plea agreements are appropriate in a juvenile court to the extent that they are appropriate in the adult court. The appropriateness and extent to which plea agreements are used are matters of office policy to be determined by the chief prosecutor. The prosecutor should always take steps to ensure that the resulting record is sufficient to reflect the actual nature of the offense.

In juvenile courts where a plea to any offense vests full dispositional jurisdiction in the court, there is sometimes a practice to reduce the charge through a plea agreement. For instance, a provable burglary charge is reduced to theft or a sex offense to an assault. For at least these serious offenses, NDAA urges prosecutors to only enter into pleas that reflect that seriousness, unless there is a problem with proof. A provable burglary case should result in a court record that reflects commission of a burglary, not

just theft. The court record can then be used as an accurate gauge of prior delinquent behavior if the juvenile is later accused of additional offenses.

A plea agreement with a juvenile should be conducted through defense counsel. Juveniles, and even juveniles and their parents, should not be involved in plea agreements when they are unrepresented by an attorney, because the danger of misunderstanding the nature of the agreement and the potential consequences are so great.

NDAA recognizes that in some jurisdictions this general rule could result in the availability of "reduced charge" pleas to represented juveniles and not to unrepresented juveniles. The rule is not meant to discriminate against unrepresented juveniles and the prosecutor is charged to exercise his discretion wisely to avoid this result.

A plea agreement should be accompanied by a recitation on the court record of sufficient facts to demonstrate a *prima facie* case that the juvenile has committed the acts alleged in the petition to which he is pleading guilty. When a confession by the juvenile is introduced, the prosecutor must assure that the record recites corroborative evidence establishing the crime itself. The prosecutor's recitation should be limited to the act(s) to which the juvenile is pleading guilty, except when the juvenile accepts responsibility for financial restitution with respect to dismissed charges. Where restitution is involved for dismissed charges, the court may nevertheless require a recitation to establish the basis for financial liability.

The time limits in Standard 92.5, like those in Standard 92.2, are intended to expedite juvenile cases in order to promote fair treatment to both victim and juvenile and to make the experience more meaningful for the juvenile. Many juvenile justice professionals believe that a court appearance or a disposition several months after the delinquent act is much less useful than a prompt response. Like the time limits on screening in Standard 92.2, these are suggested limits. Some jurisdictions may process cases more quickly than this while others may find it impossible, given local law and practice. NDAA recognizes, for instance, that the defense discovery process in some jurisdictions may require a longer time period. It also

recognizes that good cause may exist in specific cases to extend the time period. Prosecutors may find that they can utilize these standards to convince lawmakers or other juvenile justice professionals that changes should be made to ensure prompt case processing and disposition.

Section 92.5 envisions a formal, adversarial process with respect to determination of guilt or innocence. This standard, therefore, suggests that the same rules of evidence employed in adult criminal cases in the jurisdiction should be applied to juvenile court cases. Prosecutors should strive in the juvenile court setting to maintain a distinction between a factual determination of innocence or guilt and a determination of disposition. This approach promotes fairness to both the victim and the community and enhances the integrity of juvenile court findings.

Standard 92.6 encourages prosecutors to participate in the dispositional phase because the community should be represented in this phase just as it is or should be in earlier phases. Prosecutors should also offer appropriate alternatives to the court because they have been involved with the particular juvenile's case. They are familiar with dispositional alternatives that are most appropriate. When a juvenile presents a danger to the safety and welfare of the community, the prosecutor should voice this concern. On the other hand, when appropriate, the prosecutor may offer a dispositional recommendation that is less restrictive than what the juvenile court judge may contemplate imposing. The standard recognizes that, given the scarce resources in many prosecutors' offices, it may not be practical to assign attorneys to attend disposition hearings for minor offenses. One possibility in these cases is that the prosecutor submit to the court a written recommendation on disposition.

This standard also suggests that the prosecutor should take a leadership role in the community in assuring that a wide range of appropriate dispositional alternatives are available for youth who are adjudicated delinquents. The prosecutor is challenged to assume this leadership role because he is in the unique position to help organize the community and because successful programs should serve to actually reduce crime.

Standard 92.7 suggests that the work of the prosecutor is not finished at disposition of the case. Instead, the prosecutor is

encouraged to follow up on cases to ensure that dispositions are upheld, court ordered sanctions are administered, and treatment is provided. At the same time, NDAA recognizes that in some states legal restrictions do not allow such follow-up, and scarce resources prevent follow-up in other offices.

# APPENDIX

A comparison of the National Prosecution Standards, Second Edition, to related Second Edition Standards, the First Edition, and the ABA Model Rules of Professional Conduct.

| NPS Second Edition Standards | NPS Second Edition Related Standards | NPS First Edition | ABA Model Rules of Professional Conduct |
|---|---|---|---|
| **Functions/Relations** | | | |
| **The Prosecution Function** | | | |
| 1.1 Primary Responsibility | 25.3 | 17.1 | |
| 1.2 Civil/Criminal Jurisdiction | 2.1-2.5, 7.1, 7.4 | 1.3 | 1.7 |
| 1.3 Societal Rights | | 1.3 | |
| 1.4 Full-Time/Part-Time | 7.2 | 1.3 | |
| 1.5 Rules of Conduct | | 25.1 | |
| 1.6 Inconsistency in Rules of Conduct | | 2.3 | |
| **Civil Representation** | | | |
| 2.1 Scope | 1.2 | 1.3 | |
| 2.2 Specific Assignment | 1.2, 8.1, 11.1 | | |
| 2.3 Concentration | 1.2, 8.1, 11.1 | | |
| 2.4 Training | 1.2, 9.4 | 4.2 | |
| 2.5 Risk Management | 1.2 | | |

| NPS Second Edition Standards | NPS Second Edition Related Standards | NPS First Edition | ABA Model Rule of Professional Conduct |
|---|---|---|---|
| **Selection** | | | |
| 3.1 Local Control | | 1.1 | |
| 3.2 Qualifications | | 1.2 | |
| **Removal** | | | |
| 4.1 Procedure | | 1.5 | |
| 4.2 Replacement | | 1.5 | |
| 4.3 Inappropriate Factors | | | |
| **Compensation** | | | |
| 5.1 Responsibilities | | 1.4 | |
| 5.2 Factors to Consider | | 1.4 | |
| 5.3 Salary Ranges | | 1.4 | |
| 5.4 Factors Not Considered | | | |
| 5.5 Benefits | | 1.4 | |
| **Professionalism** | | | |
| 6.1 Standard of Professionalism | | 17.1 | |
| 6.2 Code Compliance | 9.9 | | |
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