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H. Lynn Edwards

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A COMPARISON OF THE FIRST AND SECOND EDITIONS OF THE ABA STANDARDS FOR CRIMINAL JUSTICE

H. LYNN EDWARDS*

INTRODUCTION

In today's milieu of commercial hucksters' overkill of the label "New and Improved," there is an understandable hesitancy to undertake a comparison of a first and second edition of a product, notwithstanding the fact that the second edition may reflect many legitimate changes both new and definitely improved. The average consumer has become callous and his skepticism heightened by too many commercial products hardly born before being replaced in kind by a successor, usually distinguishable only by a dressed-up package prominently bearing the label "New and Improved." Sadly enough, in too many instances the consumer is left confused and disillusioned as to precisely what makes these "new and improved" versions meaningfully different from what they replace.

The American Bar Association's *Standards for Criminal Justice*[1] (*Standards*) are not in commercial competition with anyone or anything. Rather, as more fully explained in one of the companion articles in this symposium, the *Standards* exemplify a public service motivated by a mammoth commitment of time, money, and personnel to pioneer, publish, implement, and keep up to date a complete set of standards relating to the entire spectrum of the administration of criminal justice.

The second edition truly represents many major improvements over the first. For one thing, it has a greatly revised format, comprising both utilitarian and stylistic revisions. The *Standards* were intended as valuable tools to assist in comprehending and participating in the improvement of criminal justice, and the changes will make the *Standards* more comprehensible and useful to laymen and professionals alike. These nonsubstantive changes are

* Mr. Edwards received an A.B. degree (Phi Beta Kappa) from Dickinson College, earned his J.D. degree (Order of Coif) at the Dickinson School of Law, and is a member of the bars of Pennsylvania and District of Columbia. Mr. Edwards retired from the staff of the American Bar Association in 1980 after service as the Director of the ABA's Criminal Justice Section and as Director of the ABA's Standing Committee on Association Standards for Criminal Justice. Prior to his affiliation with the ABA Mr. Edwards spent 26 years with the Federal Bureau of Investigation where he held a variety of executive legal positions. The author gratefully acknowledges the research assistance of Sandra Lee Thomas, Esquire. Ms. Thomas is a *cum laude* graduate of Boston University and earned her law degree at Georgetown University. She is a member of the Bar of the District of Columbia.

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1. ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980).

fully explained in the introduction to the four-volume set, and are summarized in this symposium's initial article, which chronicles the history and evolution of the project.

Also, the second edition contains many substantive changes. These evolved from a thorough evaluation of the entire bold-face text of the first edition as well as its rich and extensive supporting commentary. More than a decade had passed since many of the first edition's volumes had been finally approved and published. Given the dynamic nature of criminal justice in the decades of the 1960's and 1970's, it is little wonder that the task forces were confronted with a multitude of appellate court opinions and new philosophical insights. Add to these the practical experience garnered from almost ten years of nationwide implementation coordinated by the ABA's Criminal Justice Section, supplemented by feedback from many experimental and research projects initiated or stimulated in whole or in part by the influence of the *Standards*. Finally, the second edition represents a significant degree of confirmation and fine-tuning of an impressive number of concepts that were innovative or tentative in the original product, yet withstood the rigid stresses of time and testing, and merited restatement with only the commentary updated.

The major substantive changes will be the focus of this article. This task will be massive, requiring a broad-brush treatment in many areas. In certain categories, where particularly complex issues or unsettled problems are undergoing intensive national debate or litigation, the substantive standards relevant to such will be covered in depth in companion articles in this symposium issue. I trust the overall result will reaffirm the established classic stature of the ABA *Standards for Criminal Justice*, thus vindicating the confidence of the first edition's host of adherents and winning new converts to the second edition.

I. CHAPTER 1—THE URBAN POLICE FUNCTION

This set of standards—the last of the original eighteen sets to be approved (1973)—constitutes the first chapter in the revised format. The rationale for the change in sequence of the chapters is that the chapters should be arranged in the order in which a case would proceed through the criminal justice system—from the initial involvement of the police through final post-conviction remedies.

Despite the increasingly critical role of the police and escalating national concern about crime, few major substantive changes were warranted in this chapter. As will be seen, even those additions built upon foundations solidly laid in the original work.

Standard 1-3.5, entitled "Developing Alternative Responses," reads as follows:

> The development of alternatives to investigation, arrest, and prosecution should be the responsibility of the entire community and not of the police alone. However, the police should inform the community of the need for such alternatives within their area of responsibility. The choice among alternative responses should be

based on a careful assessment of effectiveness in dealing with social problems.

The entire standard is new. Examples of situations where police involvement may not be the best way to respond include problems with the chronic alcoholic, the mentally disturbed, or parties to domestic disputes; yet these are among the high-volume social problems which have been traditionally relegated to the police to handle under their general authority to respond to complaints and make arrests. More often than not, the police have become dumping grounds for such social problems simply because more enlightened and effective alternative solutions have not been sought.

It has become clear that police alone cannot successfully handle all social problems. To illustrate, well intentioned experiments for police referral of alcoholics to detoxification centers as an alternative to the all too familiar turnstile justice have failed because some treatment centers have imposed on the police highly selective requirements that have limited referrals to a small fraction of the total volume, simply because the treatment centers wanted only the best prospects for rehabilitation. Other failures have resulted because detoxification centers were located too far from the police stations that were to utilize them. In still another example, involving battered wives, New York City initiated a Family Crisis Intervention Project, but it led to a lawsuit by wives against the police department, alleging that police were failing to respond to their requests for protection from assaultive husbands—that instead of making arrests, police were referring complaints to agencies in accordance with the project which was predicated upon noncriminal handling.

Although this single new standard is but a fraction of the entire chapter, its implementation holds enormous promise of economies and relief for overworked, undermanned police; raises expectations of improved allocation of scarce resources of state and local governments facing impossible budget problems; and points the way for cooperative planning and meaningful involvement of community leaders and human resource agencies in devising more permanent solutions to high-volume social problems that are not really criminal.

Standard 1-5.3, entitled "Sanctions," has been amended substantially, in that paragraph (b) has been amended to read as follows:

> (b) Legislatures should clarify the authority of police agencies to develop substantive and procedural rules controlling police authority—particularly regarding investigatory methods, the use of force, and enforcement policies—and creating methods for discovering and dealing with abuses of that authority. *Where adequate administrative sanctions are in effect, evidence obtained in violation of administrative rules should not be excluded in criminal proceedings.*

The italicized portion is new, and represents an effort in the second edition to provide a practical alternative to the exclusionary rule except in instances where the court's examination of the circumstances cannot overcome the unconstitutional taint on the evidence.

As the commentary to standard 1-5.3 reflects, the Supreme Court in

recent years has refused to expand the exclusionary rule; to the contrary, a number of decisions have restricted its applicability, while retaining the basic doctrine. At the same time, the Court has permitted the clear inference that it would consider meaningful alternatives. Thus, the American Bar Association (ABA) urged that the search for alternatives be given a high priority.[2]

Both the first and second editions of the Urban Police Function Standards recognize that the hope of successfully controlling the evil that generated the exclusionary rule lies in guiding and governing the exercise of police discretion. Despite the undisputed logic and basic soundness of the thesis presented by the *Standards*, progress in the form of visible action by courts, legislatures, and even police departments has been lamentably slow. Judges tend to focus in suppression issues only on the actions of the officers rather than the policy—or lack thereof—of the department relating to the action; yet there is precedent where the court did go behind the action and concluded that the police department had established guidelines for the officers which the court accepted as "a careful and commendable administrative effort . . . ."[3] In another case, the refusal of the Court to examine the constitutionality of New York's stop-and-frisk statute, and to confine itself solely to the officer's actions, may have discouraged legislative efforts to enact standards for police investigative methods.[4]

Legislatures need to persist in taking proper initiatives to encourage police in the rule-making process. Where there might be police hesitancy because of uncertainty as to whether police have the authority, legislation should be passed to clarify the issue, setting benchmarks as needed, and providing for periodic review.

In the final analysis, police administrators must overcome a traditional reluctance to formulate and articulate administrative policies covering the exercise of police discretion as officers confront the myriad problems in investigations, interrogations, arrests, searches and seizures, and identifications. An essential part of these policies is a fair set of procedures for ensuring accountability of police officers to the department and the public for their actions. The *Standards* also outline the need for positive approaches to complement sanctions as aids and inducements to control police practices.

Approval by the American Law Institute of the Model Code of Pre-Arraignment Procedure[5] is an encouraging example of an attempt to find an alternative to the exclusionary rule. The Model Code, in simplistic terms, proposes that a motion to suppress be granted only if the violation was "substantial," or if exclusion is otherwise constitutionally required. As to whether a violation is substantial, the Model Code provides as one of the criteria: *"whether there is a generally effective system of administrative or other sanctions which makes it less important that exclusion be used to deter such violations."*[6]

2. ABA REPORT OF POUND CONFERENCE FOLLOW-UP TASK FORCE (1976).

3. United States v. Perry, 449 F.2d 1026, 1037 (D.C. Cir. 1971) (pertaining to pretrial identification procedures).

4. Sibron v. New York, 392 U.S. 40 (1968).

5. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1975).

6. *Id.* § 150.3(3)(e) (emphasis added).

Although the ABA has not taken an official position on the Model Code, the Code's recognition of the concept of administrative regulations and sanctions in relation to the exclusionary rule should provide additional incentives to courts, legislatures, and the police to implement the concept recommended in the *Standards*.

II. CHAPTER 2—ELECTRONIC SURVEILLANCE

The first edition of these standards was approved in 1971. They were formulated contemporaneously with congressional consideration of legislation which was enacted as Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[7] commonly referred to as the federal wiretap act. The first edition closely parallels Title III, but, like all of the standards, is also intended to provide suggested guidelines for state and local jurisdictions as well as the federal government.

These standards and Title III have both withstood constitutional and other challenges in the intervening years. With some exceptions, the second edition is substantially a restatement of the first, but much stronger because of confirming and interpretative case law, plus an extensive evaluation of Title III by the National Wiretapping Commission.[8]

The pervading theme of the second edition continues to be two-fold: assisting law enforcement and protecting privacy. Considering the fact that the Electronic Surveillance Standards and Title III both represented a frontier-clearing effort in a veritable thicket of uncharted legal terrain, the findings of the Commission were a gratifying credit to the structure and functioning of both.

In formulating the second edition, the decision was made not to include new standards covering the use of pen registers and similar devices which record numbers dialed from a monitored phone without intercepting conversations. Rather, the standards were limited to conversations.

One amendment in the second edition was to change the title of Part III of the *Standards* from "National Security" to "Surveillance Related to Foreign Intelligence Activities." This was done to identify more accurately the precise scope of the standard and reflect the distinction made in *United States v. United States District Court*[9] (commonly known as the *Keith* case). In *Keith*, the Supreme Court held that the warrant requirements of the fourth amendment applied to electronic surveillance conducted against domestic organizations that have no direct or indirect involvement with a foreign power. In the interim between the approval of the first and second editions, the Foreign Intelligence Security Act of 1978 was enacted, establishing procedures similar to Title III for judicially supervised electronic surveillance involving foreign security.[10]

Standard 2-5.2, dealing with emergency surveillance, was amended to

7. 18 U.S.C. §§ 2510-2520 (1976).
8. NATIONAL WIRETAPPING COMMISSION REPORT (1976).
9. 407 U.S. 297 (1972).
10. 50 U.S.C. §§ 1801-1811 (1976).

limit its use to situations "involving substantial and imminent danger to human life"; thus there was deleted an implicit authorization for emergency installations in covering meetings characteristic of organized crime as being too vague and susceptible of abuse by law enforcement officers who should normally have time to obtain a court order.

Standard 2-5.3 covers the application for an electronic surveillance order. One change in the second edition is to require "a full and complete statement of other investigative procedures that have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."[11] Another is to require "a statement of the need for telephone or telegraph companies, landlords, custodians, or other persons to furnish information, facilities, or technical assistance, if such is necessary in the execution of the order."[12] The first was designed to conform to the basic requirement of probable cause (Standard 2-5.4). The second tracked a 1970 amendment to Title III[13] resulting from the opinion in *In re Application of United States*[14] holding that telephone company cooperation could not be compelled by judicial order absent statutory authority.

Another substantive change in the second edition was made in standard 2-5.9 pertaining to extensions. The provision in the first edition authorizing extensions of initial surveillance orders for not longer than thirty days was changed to fifteen days; inasmuch as the *Standards* place a fifteen-day limit on initial orders,[15] logic would argue against granting more time for an extension.

Standard 2-5.10, relating to privileged communications, contains a change of substance from the first edition to expand the scope of the standard to include all professionals whose conversations are deemed privileged under applicable state law. Thus it serves as a guideline to correspond with the expansion of the concept and protections of privileged communications.

III. CHAPTER 3—THE PROSECUTION FUNCTION

When the first edition of the Prosecution Function Standards was adopted by the Association in 1971, it represented the first national effort to compile uniform guidelines for the professional conduct of prosecuting attorneys. The standards contained in the first edition did no more than codify standards of conduct which were already adhered to by the best advocates, both prosecution and defense, throughout the country.

Although promulgating and enforcing professional standards are clearly matters that must be handled by the individual jurisdiction, a national organization such as the ABA is in an ideal position to establish recommended standards of conduct to guide the individual jurisdictions as well as individual practitioners. The standards relating to the prosecution and defense

11. STANDARDS, *supra* note 1, § 2-5.3(i).
12. *Id.* § 2-5.3(k).
13. 18 U.S.C. § 2518(4) (1976).
14. 427 F.2d 639 (9th Cir. 1970).
15. STANDARDS, *supra* note 1, § 2-5.8.

functions, along with the ABA Code of Professional Responsibility,[16] are just such guidelines. In the decade of their existence the prosecution function standards have become the basic ethical guidelines relied on by many prosecutors.

In preparing the second edition of these standards the ABA reviewed court decisions and recommendations of other organizations and concluded that the standards required no fundamental alteration. There are, of course, changes in the second edition reflecting both evolving concepts of what is appropriate behavior and significant court decisions affecting this area.

The first of the revised standards (3-1.1), which contains only stylistic changes from the first edition, outlines the function of the prosecutor and his or her role as "both an administrator of justice and an advocate." The standard states that "the duty of the prosecutor is to seek justice, not merely to convict." These phrases highlight the important role of the prosecutor as an officer of the court charged with protecting the rights of the accused as well as enforcing the rights of the public.[17]

Standard 3-1.3, dealing with public statements, contains a new paragraph, 3-1.3(c), which provides that the prosecutor and the police should cooperate in complying with the chapter on Fair Trial and Free Press in order to assure a fair trial for the accused.

Standard 3-2.5 reflects a change in policy recommended by the ABA to permit public access to the "office handbook," except to confidential portions. The handbook is a statement of policies and procedures which should be kept within each prosecutor's office to promote continuity and clarity of functioning. Such a handbook would include current rules, statutes, and judicial decisions, along with detailed descriptions of the criteria governing the principal duties of the office and standards pertaining to the exercise of discretion. Standard 3-3.2 deals with the prosecutor's relations with prospective witnesses. Like its predecessor, it proscribes compensation of witnesses (other than experts) for giving testimony, but authorizes reimbursement of a witness for reasonable expenses, including transportation and loss of income. Unlike the first edition, this section authorizes reimbursement not only for court appearance but also for "attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews."[18] A more important change in this section replaces the first edition statement that "it is proper but not mandatory" for a prosecutor to caution a witness concerning possible self-incrimination (whenever there is reason to believe the witness may be the subject of a criminal prosecution) with the stricture that a prosecutor "should" so advise a witness.[19] This situation does not constitute "custodial interrogation," which would trigger the constitutional requirement of such a warning,[20] but the Association has con-

16. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1969).

17. *See id.*, EC 7-13.

18. The same change has been made in the standards on the Defense Function 4-4.3(a).

19. *Cf.* § 4-4.3(b) ("It is not necessary for the lawyer or the lawyer's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.").

20. Miranda v. Arizona, 384 U.S. 436 (1966).

cluded that fairness to the witness requires more than the minimum actually imposed by law.

A new section has been added to standard 3-3.4, which states that "[a]bsent exceptional circumstances, no arrest warrant or search warrant should issue without the approval of the prosecutor." In approving similar provisions in the National Prosecution Standards,[21] the National District Attorneys Association noted that "[t]he role of the prosecutor is most apparent in determining whether probable cause exists in preparation of search and arrest warrants. Review of all applications for warrants prior to their submission for judicial approval could enhance the efficiency of the criminal justice process."[22] "Exceptional circumstances" might exist, for example, if a prosecutor were unavailable at a time when a warrant had to issue immediately.

A change in standard 3-3.6(b) would amend the duty of the prosecutor to present exculpatory, as well as incriminating, evidence to a grand jury. The first edition required the prosecutor to "disclose to the grand jury any evidence which he knows will tend to negate guilt." Under the revision, "[n]o prosecutor should knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt." This change was made to conform this section to the grand jury standards which were approved by the ABA House of Delegates in 1977.[23]

Standard 3-3.11(a), like standard 3-3.6, deals with required disclosure of exculpatory evidence, but in the context of disclosure to the defense rather than the grand jury. This paragraph classifies as "unprofessional conduct" the intentional failure of a prosecutor to disclose to the defense the existence of evidence which would tend to negate the guilt or reduce the punishment of the accused.[24] The word "intentional" was added in the second edition. The definition of what constitutes exculpatory material is adopted from the decision of the Supreme Court in *Brady v. Maryland*.[25] The standard adopts the suggestion of the Supreme Court that "the prudent prosecutor will resolve doubtful questions in favor of disclosure."[26]

Part IV of these standards concerns the role of the prosecutor in plea discussions. Standard 3-4.1 remains largely unchanged from the first edition, though paragraph (b) has been amended to include a recommendation that a prosecutor make and preserve a verbatim record of plea discussions with a defendant who has waived counsel. The first edition simply stated that a prosecutor would be "well advised" to make sure that another attorney was present at such discussion. The requirement of a verbatim record is a more efficient means of protecting the rights of the defendant and protect-

21. NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 7.3(a)-.3(b).

22. *Id.* § 7.3, commentary at 116.

23. *See* Report with Recommendations to American Bar Association, 1977 Annual Meeting, Report 115. The standards relating to the charging process (including grand jury), when drafted and approved, will become Chapter 9 of the ABA STANDARDS FOR CRIMINAL JUSTICE.

24. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(B) contains a similar provision but extends it to evidence that tends to "mitigate the degree of the offense."

25. 373 U.S. 83 (1963).

26. United States v. Agurs, 427 U.S. 97, 108 (1976).

ing the prosecutor from charges of exerting undue influence in a situation which obviously involves very unequal bargaining positions.[27]

The first edition standard 4.2 has been deleted following the Supreme Court decision in *North Carolina v. Alford*.[28] The deleted standard provided that a prosecutor could not participate in a disposition by guilty plea if the prosecutor was aware that the accused persisted in denying guilt or the factual basis for the plea. The Court in *Alford* held that a guilty plea can be accepted by a court even when the defendant denies guilt so long as the plea is voluntarily and intelligently made.

Revised standard 3-4.2 (which appeared as 4.3 in the first edition) contains two substantive changes. Paragraph (b) now states that it is "unprofessional conduct" for a prosecutor to imply greater power to influence the disposition of a case than he or she actually possesses. The first edition states only that a prosecutor "should avoid" such implication.

The other change in this section was mandated by the Supreme Court's decision in *Santobello v. New York*.[29] Paragraph (c) in the first edition permitted breach of a plea agreement by a prosecutor "unable to fulfill an understanding previously agreed upon," provided prompt notice was given to the defendant. In *Santobello* the Supreme Court held that when the prosecutor had breached an agreement to make no recommendation respecting sentence, the defendant was entitled either to withdraw the plea or to be resentenced. Failure to honor such an agreement casts doubt on the voluntariness of the guilty plea and may result in fundamental unfairness to the defendant. Such a breach would, under the second edition, subject the prosecutor to discipline by a professional association. Failure to comply with the agreement would be permitted, however, if the defendant fails to comply or if "other extenuating circumstances are present" (for example, discovery of new facts by the prosecutor).

Standard 3-5.7, on the examination of witnesses, has been amended by changing the basis a prosecutor must have for belief in the factual predicate implied in questions asked of a witness. Paragraph (d) of the first edition states: "It is unprofessional conduct to ask a question which implies the existence of a factual predicate *which the examiner knows he cannot support by evidence*." The revision would replace the italicized portion of paragraph (d) with "for which a good faith belief is lacking," a less stringent standard.

The last substantial change in this chapter is contained in Part VI on sentencing and concerns the role of the prosecutor at sentencing. The revised standard 3-6.1 presents the modern view that a prosecutor should, and in some cases must, offer a sentencing recommendation to the court. The previous standard stated that the prosecutor "ordinarily should not" make such a recommendation unless asked by the court or obligated by a plea agreement to do so.

27. Standard 14-3.1(a) contains the identical suggestion.

28. 400 U.S. 25 (1970).

29. 404 U.S. 257 (1971).

IV. CHAPTER 4—THE DEFENSE FUNCTION

The roles played by defense counsel exemplify some of the major difficulties inherent in our adversary system of justice. As a "servant of two masters" the defense attorney must often tread a narrow path between jeopardizing the interests of the defendant and failing to fulfill professional obligations as an officer of the court. The ambiguity is summed up in Canon 7 of the ABA Code of Professional Responsibility: "A lawyer should represent a client zealously within the bounds of the law."

An interesting example of the most extreme form the conflict can take appears in standard 4-7.7, concerning testimony by the defendant. The standards currently contain no final policy on this matter, as the ABA House of Delegates was unable to reach a consensus on what position to take with respect to the duties of a defense attorney whose client wishes to present perjured testimony. A full, scholarly, and insightful analysis of the professional dilemma posed by the perjurious client is set forth by Justice William Erickson in another section of this symposium.

Most criminal cases—as many as ninety-five percent in some jurisdictions—do not go to trial, so a large part of defense counsel's professional attention should go toward ameliorating the condition of the accused outside the courtroom. Before trial, for example, defense counsel can play a significant part in helping an accused maintain employment and other stabilizing relationships; in plea discussions which result in disposition without a trial the role of defense counsel can be critical.

Standard 4-1.1, which contains a general outline of the role of defense counsel, remains essentially unchanged from the first edition. The basic thrust of the section is to emphasize the obligations of defense attorneys to maintain the ethical standards required by the profession and not to compromise those standards even in the service of a client.

Standard 4-3.5 presents guidelines on handling potential conflicts of interest with which defense attorneys may be faced. Paragraph (b) deals with the problem of representing more than one defendant. Ordinarily a lawyer (or lawyers associated in practice) should not represent more than one defendant in a criminal case. In "unusual situations" such multiple representation may be permissible, but only after careful investigation has revealed: 1) that no conflict is likely; 2) that all defendants have given *informed* consent; and 3) that their consent is made a matter of judicial record. This last requirement was added in the second edition following the Supreme Court decision in *Holloway v. Arkansas*.[30] There the Court held that although joint representation is not prohibited, whenever impermissible joint representation occurs reversal is automatic and no particularized showing of prejudice is required. This avoids having to make difficult judgments on the actual impact of conflicts of interest on the representation of a client. The ABA standard has dealt with this problem by involving the trial judge in the initial determination of the permissibility of multiple representation. After requiring that consent be made a matter of judicial record, the standard goes

30. 435 U.S. 475 (1978).

on to spell out the duties of the trial judge in establishing that consent of the defendant is truly informed, that is, that the defendant understands the potential for conflict. In some cases, the standard continues, accepting or continuing employment by more than one defendant is "unprofessional conduct."

Standard 4-4.3 concerns relations of defense counsel with prospective witnesses. Like the corresponding section in the *Standards* relating to the prosecution function, paragraph (a) now authorizes reimbursement of expenses to witnesses for specified appearances other than in court. A more significant change in this standard appears in paragraph (b), which concerns the obligation of a defense lawyer to caution a prospective witness concerning possible self-incrimination and concerning the need for prospective witness counsel. Original paragraph (b) stated that it was "proper but not mandatory" for defense counsel to give such advice; the revised standard states that "[i]t is not necessary" to do so. The ABA has concluded that the giving of such a warning is inconsistent with the duties of a lawyer to a client as it may have the result of discouraging the witness from speaking with the defense attorney. The obligation of a prosecutor in this situation is distinctly different from that of defense counsel;[31] unlike defense counsel, a prosecutor cannot conceal information concerning law violations and must therefore take more care to protect the rights of the witness as potential defendant.

While the decision to plead is ultimately for the accused, the so-called *Alford* plea has altered defense counsel's obligations under the *Standards*. Standard 5.3 from the first edition has been deleted. That first edition standard required a defense attorney to notify the court in the event that a defendant insisted on pleading guilty despite the existence of facts which negated guilt. After the first edition was approved, however, the Supreme Court decided *North Carolina v. Alford*,[32] which made it clear that a trial court may accept a guilty plea even though a defendant claims innocence. Failure of defense counsel to reveal the defendant's private claim of innocence should not produce a different result. Furthermore, such a revelation will undoubtedly damage the attorney's relationship with his or her client. As a matter of practice, it is believed that adherence to original standard 5.3 by defense counsel was virtually nonexistent.

Standard 4-6.1 deals with the important area of defense counsel's duty to explore disposition without trial. Paragraph (b) has been amended and no longer requires the conclusion by counsel that "conviction is probable" before plea discussions are begun. There may be advantages to the defendant from disposition of a case without trial, and the initiation of discussions early in the proceedings may result in swift disposition, which is beneficial to all parties. This paragraph continues the requirement, contained in paragraph (c) of the first edition, that "ordinarily" the consent of the defendant should be obtained before plea discussions are engaged in, since the decision

31. *See* discussion of companion standard 3-3.2 relating to the Prosecution Function p. 31 *supra*.

32. 400 U.S. 25 (1970).

of whether to accept a plea is ultimately one to be made by the defendant.[33] Another addition to this section is the statement that "[u]nder no circumstances should a lawyer recommend . . . acceptance of a plea unless a full investigation and study of the case has been completed."

Standard 4-7.3, relations with jury, contains a number of modifications. Among these is a change in the required grounds for communicating with a jury following the verdict. Under the revision, "[i]f the lawyer believes that the verdict may be subject to legal challenge" then the lawyer may properly communicate with jurors (assuming no statute or rule to the contrary). Under the first edition the lawyer had to have "reasonable grounds to believe" such challenge available. Further, under the revision, notice to opposing counsel and the court is not required.

Standard 4-7.6, examination of witnesses, has two changes—one a change in emphasis and the other a change to conform the standard to accepted usage. Paragraph (b) concerns cross-examination of truthful witnesses. In the first edition that paragraph cautioned against "misuse" of the power to discredit or undermine a witness. The second edition, recognizing that use of such cross-examination may be an important part of a good defense, recommends that the truthfulness of the witness "be taken into consideration." Paragraph (d) of the revised standard requires "good faith belief" in the factual predicate implied by questions asked of a witness.[34]

This discussion highlights the major changes contained in the second edition. Users of the *Standards* should know, however, that standard 4-7.7 as it appears in the second edition remains only a provisional standard and has not been adopted by the ABA House of Delegates. This standard is the subject of Justice Erickson's article on the perjurious defendant.

V. CHAPTER 5—PROVIDING DEFENSE SERVICES

This set of standards has been among the most influential of the entire group, and most states have adopted key elements of them since their initial approval in 1968. In the period between the first edition (1968) and final approval of the second edition in February, 1979, the areas of law and procedure covered by this chapter have undergone dramatic change, resulting in significant substantive revisions in the second edition. As will be seen, however, these changes serve to reaffirm and strengthen the fundamental premises upon which the entire first edition rested. Also, they build upon the extensive growth and acceptance of organized defender programs. Finally, the changes seek to flesh out an evolving recognition of the need for defenders, as well as assigned counsel, to be absolutely independent of judicial and political interference.

In order to appreciate better the significance of the changes, the reader should bear in mind the roots of our common law system of justice, which comprise these basic assumptions: 1) that an accused person is presumed

33. *See* STANDARDS, *supra* note 1, § 4-5.2, control and direction of the case.

34. *See* discussion of companion standard 3-5.7 relating to the Prosecution Function, p. 33 *supra*.

innocent; 2) that guilt must be proven in an adversary proceeding in which the prosecutor as charging authority carries the burden; and 3) that the two adversaries may be aided by advocates capable of rendering effective assistance.[35]

Early in the system, emphasis was only on the right to retain counsel, without a guarantee that counsel would be provided to those unable to secure it. In 1932, the Supreme Court in *Powell v. Alabama*[36] first recognized the constitutional right of an accused to have counsel appointed by the court. In 1963, in the landmark case of *Gideon v. Wainwright*,[37] the Supreme Court took the giant step of holding that the fourteenth amendment fully incorporated the sixth amendment right and thus required states to provide counsel for indigent defendants in all serious (felony) cases.

Against the preceding sketchy backdrop, let us now examine the revisions in the second edition.

In the first edition, standard 5-1.1, entitled "Objective," reads that "the bar should . . . ensure the provision of competent counsel to all persons who need representation in criminal proceedings . . . ." Reference to the bar has been deleted in the second edition because the necessity of guaranteeing legal representation is shared with society as a whole. The revised standard, however, retains a provision that the bar should educate the public to the importance of this objective. Also, as revised, this standard stresses "quality" rather than merely "competent" representation, thus furthering both the spirit and the letter of the sixth amendment. The choice of the adjective "quality" contemplates providing to the accused the same caliber of legal services that a defendant of financial means could retain. The vital issue of what is adequately effective assistance of counsel has been a subject of sharpening focus since the first edition. Justice William H. Erickson of the Colorado Supreme Court reviewed the emerging case law in the light of its constitutional underpinnings, and argued that the want of a precise standard for assessing the competency of defense counsel continues to be a source of confusion within both state and federal courts.[38]

Standard 5-1.2 ("Plan for Legal Representation") has been changed substantially. The first edition stated that either a defender or assigned counsel system should be utilized in each jurisdiction. The second edition recommends that both should be available in all jurisdictions. This change gives recognition to the enormous growth and acceptance of defenders during the past decade. Another new provision in this standard states that "neither defender nor assigned counsel programs should be precluded from representing any particular type or category of case." Of course, no lawyer should undertake to provide representation in any case for which he or she lacks sufficient knowledge or experience to provide "quality" assistance. However, the thrust of the revision is to overcome prohibitions in jurisdic-

35. STANDARDS, *supra* note 1, at 5.4-.5.

36. 287 U.S. 45 (1932).

37. 372 U.S. 335 (1963).

38. Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233 (1979).

tions that automatically disqualify defenders from being counsel in specified categories of cases (for example, homicide). The revision is intended to eliminate unjustified perceptions of defenders as less capable than private practitioners, a factor which had deterred some lawyers from seeking employment in defender offices.

Several substantive changes in standard 5-1.3 ("Professional Independence of Counsel for Defense") are designed to emphasize and lend strength to this important aspect of defense services. Standard 5-1.3 is the same standard as first edition standard 1.4, but contains important revisions. First, it states that "the selection of lawyers for specific cases should normally not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender and assigned-counsel programs." This should help allay suspicion that might arise with judge-appointed counsel that those appointed may not be fully and independently committed to their clients. Second, also added to this standard is language recognizing that a board of trustees can serve as "an effective means of securing professional independence for defenders." Third, this new sentence has been added to the standard: "A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction."

Standard 5-1.5, which deals with funding for defense services, and which will be discussed below in its other ramifications, has also been phrased in the second edition to protect against the misuse of the power of the purse to undermine the vital independence of the system.

In the same way, standard 5-2.4 has been changed to reflect that compensation paid to assigned counsel "should be approved by administrators of assigned-counsel programs," another insurance against possible judicial control or influence.

Standard 5-3.1, dealing with the chief defender and staff, includes a new provision which prohibits the selection by judges of the chief defender and staff as a means of assuring independence.

The first edition of standard 5-3.2 recognized the possibility of both full-time and part-time defenders. This was changed and now reads: "Defense organizations should be staffed with full-time attorneys. All such attorneys should be prohibited from engaging in the private practice of law." The change thus recognizes a trend during the period since the first edition, as well as the inherent difficulties with part-time personnel.

Standard 5-3.3, pertaining to removal of counsel, is new in substance. By providing that "removal of counsel . . . should not occur over the objection of the attorney and the client," it seeks to promote further desirable complete independence.

Standard 5-4.1 ("Criminal Cases") has also been revised. The first edition stated that counsel should be provided for all offenses punishable by a loss of liberty "except those types of offenses for which such punishment is not likely to be imposed . . . ." Following the first edition, the Supreme Court handed down the landmark opinion in *Argersinger v. Hamlin*,[39] which

39. 407 U.S. 25 (1972).

extended the right to counsel in misdemeanor and petty offense cases. The second edition has thus been revised, and the phrase containing the exception deleted because it conflicts with *Argersinger*'s requirement that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[40]

A new provision has also been added to this standard, to make clear that the right to counsel extends to offenses which, although not themselves carrying a penalty of incarceration, may later be used as a basis for imposing imprisonment in the event of a second conviction.

Standard 5-4.3 ("Workload") is a completely new standard. It is designed to limit the caseload of defender organizations as well as that of assigned counsel to manageable levels. Historically, one of the most troublesome impediments to quality representation for the poor has been the excessive caseload of counsel. All too often in defender organizations, attorneys are asked to assume too many cases, leading to attorney frustration, disillusionment by clients, and weakening of the adversary system.

A new provision in standard 5-5.1 ("Initial Provision of Counsel") is to make clear that counsel should be provided upon request to persons in need even in situations where formal custody has not yet begun. For example, counsel should be available to persons summoned before a grand jury who believe their testimony might be incriminating. Counsel should also be available to persons required to participate in pre-arrest nontestimonial identification procedures. In this new extension, the standard admittedly goes beyond Supreme Court holdings that the right to counsel attaches at "critical stages" prior to trial. Reasons for the expansion of the right to counsel include the fact that counsel's early presence in the case may convince the prosecutor to dismiss unfounded charges or to charge the accused with a lesser offense. More importantly, earlier provision of needed counsel to those unable to afford representation would eliminate discrimination between such defendants and those of financial means.

Standard 5-5.2 ("Duration of Representation") is also a revised standard. This standard originally stated that counsel initially provided "should continue to represent the defendant through all stages of the proceedings unless a new appointment is made because geographical considerations or other factors make it necessary." Because developments have generated considerable disagreement over the wisdom of that policy, the standard has been changed in the second edition to provide that counsel continue "throughout the trial court proceedings," including the filing of post-trial motions where necessary. The standard, however, does not take a position on whether trial counsel should also provide representation on appeal, but the commentary sets out the competing arguments for guidance to jurisdictions confronted with a choice.[41]

Several significant revisions were made in Part VI ("Eligibility For

40. *Id.* at 37.

41. STANDARDS, *supra* note 1, § 5-5.2, commentary at 5.55-.56.

Assistance") in the second edition to clarify and make more meaningful and practical the provision of defense services.

Standard 5-6.1 retains the first edition basic yardstick of eligibility for counsel to persons financially unable to obtain adequate representation without substantial hardship to themselves or their families, but adds a new provision that "supporting services necessary to an adequate defense should be available . . . to all persons . . . financially unable to afford necessary support services." Several cases subsequent to the first edition have held that financial resources of spouses or relatives should not be considered in determining eligibility.[42] Although a study indicated that about seventy percent of judges surveyed considered the defendant's ability to post bond to be an important factor in determining eligibility,[43] this has been condemned by some appellate courts.[44]

Standard 5-6.2 concerns ability to pay partial costs and make reimbursement for counsel or services provided. The second edition deletes from the first edition a statement that "the provision of counsel may be made on the condition that the funds available for the purpose be contributed to the system pursuant to an established method of collection." This deletion was not intended to preclude contributions; rather, it was prompted by an assessment of experience with contribution programs which reflected that administration costs substantially exceeded minimal collections.

Finally, the second edition made a substantive change in standard 5-6.3 by deleting a provision from the first edition which provided that the eligibility determination "should be made as soon as feasible after a person is taken into custody," and it should be made by "the judge or an officer of the court selected by him." The new standard is that eligibility "should be made by defenders or assigned counsel, subject to review by a court at the request of a person found to be ineligible." The new standard should help prevent delay of entry of counsel into the case, and thus will tend to implement standard 5-5.1, which recommends that "counsel be provided as soon as feasible after custody begins."

VI. CHAPTER 6—SPECIAL FUNCTIONS OF THE TRIAL JUDGE

The first edition was approved in two segments, in July 1971 and in August 1972. The title of the first edition was "The Function of the Trial Judge"; that of the second, "Special Functions of the Trial Judge". In these two differences we find the major key to understanding most of the changes encountered in the second edition, and, although not substantive, such changes appreciably increase the value and overall utility of this chapter.

The history must be reviewed to understand these changes. In 1969, after the Advisory Committee on the Judge's Function had been drafting standards covering the entire area, the nation was beset with a series of instances involving disruptive defendants in criminal trials. The President of

42. Sapio v. State, 223 So.2d 759 (Fla. Dist. Ct. App. 1969); People v. Gustavson, 131 Ill. App. 2d 887, 269 N.E.2d 517 (1971). *See also* Annot., 51 A.L.R.3d 1108, 1114-16 (1973).

43. NATIONAL DEFENDER SURVEY, THE OTHER FACE OF JUSTICE 41 (1973).

44. *See, e.g.*, People v. Valdery, 41 Ill. App. 3d 201, 354 N.E.2d 7 (1976).

the American Bar Association requested that priority in attention be given to guidelines for handling such disruptions.[45] In July 1971, the House of Delegates approved for publication a set of "Standards Relating to the Judge's Role in Dealing with Trial Disruptions." Thereafter the committee returned to its original task, intending when finished to integrate the first segment into the total report. Thus, when the House of Delegates in August 1972 approved the remaining standards covering the trial judge's function, approval was given to integrate the earlier segment, provided only necessary editorial but no substantive changes were made.[46] This was done, and thus the first edition constituted the only set of ABA Criminal Justice Standards relating to The Function of the Trial Judge.

Another recourse to history explains the limiting change in title made in this chapter. The original *Standards* project divided the criminal justice spectrum into eighteen functional areas and assigned a manageable number of these to each of seven drafting committees. Although their work was closely coordinated by a parent committee, the most feasible procedure was for each set of *Standards* to be completed and submitted for House of Delegates approval, and thereafter publication, on a piecemeal basis. Thus, some duplication became unavoidable; yet in other instances the other standards remained somewhat general when alluding to the trial judge's role in given situations, and assumed that the user would seek recourse to the volume covering the judge's function. However, in the area of the judge's role in plea discussions and plea agreements, the piecemeal process resulted in a conflict in policy between the Pleas of Guilty and Functions of the Trial Judge standards. The reconciliation was accomplished in the second edition, as described below.

Because of the superior methodology made possible by the project governing the second edition, chapter 6 probably received the most beneficial overhaul, yet suffered least in substantive amendments. Two categories of major deletions from chapter 6 may at first glance suggest wholesale emasculation, but it is necessary to know why they were made.

The larger group of deletions corrected the overlapping and duplication that was unavoidable in the first edition. These deletions were made because the particular standard was already articulated in one of the other chapters. In some of these instances, where that particular chapter did not adequately define the judge's role, the deleted standard was transplanted to accomplish the need. In any case, these deletions served to strengthen the entire second edition.

Now a word of explanation about the other major category of deletions. The first edition had devoted four standards to areas of the judge's function relating to facilities and staff. Thus, original standard 2.1 dealt with the necessity of providing judicial manpower; standard 2.2 concerned adequacy of courtroom facilities and supporting staff; standard 2.3 articulated the trial court's obligation to seek or compel adequate support; and standard 2.4 cov-

45. ABA STANDARDS FOR CRIMINAL JUSTICE, THE FUNCTION OF THE TRIAL JUDGE, Appendix at 103 (1st ed. 1972).

46. *Id.*

ered the duty to have the staff properly trained. These standards were more properly the domain of overall judicial administration, but current standards had not been formulated when the *Criminal Justice Standards* project began. In the interim, however, the Commission on Standards of Judicial Administration was created by the ABA, and in 1976 the ABA approved the Commission's Standards Relating to Trial Courts. Consequently, some of the standards that were in the first edition were deleted from the second because they were more appropriate subjects for the judicial administration standards, and equally applicable to civil as well as criminal trial courts.

Following a similar rationale, the entire topic of procedures regarding judicial misfeasance, nonfeasance, and disability has been deleted from the second edition because of the issuance in February 1978 of Standards Relating to Judicial Discipline and Disability Retirement, formulated by the ABA Joint Committee on Professional Discipline.

In view of the rather extensive pruning of the first edition and transplanting of many of its standards into other chapters, the decision was made to rename the chapter by adding the word "Special" to the title. The remaining major divisions in Chapter 6 are: Part I, Basic Duties; Part II, General Relations with Counsel and Witnesses; Part III, Maintaining the Decorum of the Courtroom; and Part IV, Use of the Contempt Power.

It now remains to be seen what substantive changes were made in the standards now comprising Chapter 6.

Standard 6-3.6 articulates guidelines for the defendant to represent himself at trial. To the original standard, which remained unchanged, the following subsection was added: "(b) When a litigant undertakes to represent himself or herself, the court should take whatever measures may be reasonable and necessary to ensure a fair trial."

The thrust of the original standard was that the right of a defendant to proceed in the trial of a criminal case without the assistance of counsel is qualified, not absolute. Since the approval of the first edition, the right was confirmed by the United States Supreme Court in *Faretta v. California*,[47] in federal law,[48] in rule 44 of the Federal Rules of Criminal Procedure, and in many state constitutions.[49] *Faretta* also confirmed, however, that a defendant's sixth amendment right to assistance of counsel cannot be abrogated unless knowingly and intelligently waived; also, the interest of the public in an orderly, rational trial is entitled to consideration. The indicated addition of subsection (b) was designed to establish an affirmative duty on the part of the trial judge. The second edition retained, without substantive change from the first edition, standard 6-3.7 pertaining to standby counsel for a *pro se* defendant.

Standard 6-3.11 covers the matter of attorneys from other jurisdictions and the increasingly important subject in our ever more mobile society of *pro hac vice* admission of attorneys from other jurisdictions. The second edition

47. 422 U.S. 806 (1975).
48. 28 U.S.C. § 1654 (1976).
49. *See, e.g.*, PA. CONST. art. 1, § 9.

standard is unchanged, except stylistically, from the first. The standard provides that a trial judge may deny permission to appear *pro hac vice* on grounds that the attorney has engaged in misconduct, or he may grant permission on condition that the petitioning attorney associate with a local attorney as cocounsel and that the defendant consent.

On January 15, 1979, the Supreme Court handed down its opinion in the case of *Leis v. Flynt*.[50] Larry Flynt and "Hustler" magazine had been charged with dissemination of obscene materials to minors. Defendants' lawyers from out of state were denied the right to appear *pro hac vice*, whereupon suit was filed under the Civil Rights Act asserting denial of sixth and fourteenth amendment rights without a due process hearing. The federal district court enjoined the continuation of the state criminal prosecution pending the granted due process hearing. On certiorari, the Supreme Court reversed, holding per curiam that the asserted right to appear *pro hac vice* is not one of the constitutionally protected due process rights under the fourteenth amendment.[51] The Court did not address the question of the right of Flynt and "Hustler" to the assistance of counsel of their choice under the sixth amendment, although Justice White argued this be granted certiorari and set for argument.[52]

Justices Stevens, Brennan, and Marshall dissented from the majority, contending that a lawyer's interest in pursuing his profession is protected by the due process clause of the fourteenth amendment.[53]

Although the majority supports standard 6-3.11 as written, the Criminal Justice Section's governing council recommended that the ABA Standing Committee on Criminal Justice Standards give consideration to recommending to the House of Delegates an amendment to 6-3.11.[54] The thrust of the proposed amendment would be to condition denial of *pro hac vice* on a due process hearing and on a finding of courtroom misconduct that had resulted in either punishment for contempt or censure by a bar disciplinary authority, or a pending disciplinary proceeding provided that the misconduct would provide sufficient basis to disqualify an attorney licensed in the jurisdiction of the court from representing the defendant. The ABA litigation section favored an even broader policy. The House of Delegates in August 1980 declined to approve any change.

It is thus apparent that there currently is insufficient consensus to justify conclusions as to what, if any, change might finally be recommended in standard 6-3.11. Furthermore, since the Supreme Court has not yet seen fit to entertain the sixth amendment issue, any wholesale proposed revision may be premature. The matter remains under active consideration by the Standing Committee, pursuant to its mandate for continual monitoring of the standards.[55]

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50. 439 U.S. 438 (1979).
51. *Id.* at 443-44.
52. *Id.* at 445.
53. *Id.*
54. *See* Report with Recommendations to the House of Delegates, American Bar Association, 1980 Annual Meeting, Report 112A.
55. ABA CONST. AND BYLAWS § 30.7.

VII. CHAPTER 10—PRETRIAL RELEASE

The issue of bail and the companion issue of crime committed by those released on bail pending trial are problems that have received the careful scrutiny of the ABA. These are not new issues and the introduction to chapter 10 of the *Standards* acknowledges the melancholy history of bail reform:

> Unfortunately, the bail reform movement never accomplished all that was hoped for it. A decade later, our jails remain crowded with pretrial detainees, many judges continue to impose monetary conditions, compensated sureties still thrive in many jurisdictions, and pretrial crime and abscondence remain serious problems. Nor have experiments with preventive detention been notably successful.[56]

While the central thrust of the ABA's thirty-one separate standards dealing with Pretrial Release favors bail for persons accused of crime pending adjudication, the standards also recognize that some restraints on the defendant's liberty may be necessary. Standard 10-5.9 deals specifically with pretrial detention and provides a procedure for pretrial detention, which may be triggered by a finding by a judicial officer on clear and convincing evidence that: 1) a defendant is likely to flee; 2) a defendant has willfully violated a condition of release designed to protect the community; 3) a defendant has committed a crime while on pretrial release; or 4) a defendant has threatened or intimidated, or attempted to threaten or intimidate witnesses.

The final three triggering events set forth relate to a defendant's dangerousness. The Pretrial Release Standards recognize the fact that some defendants on bail pending trial may commit additional offenses and the legal community shares the concern over this problem with both law enforcement agencies and the public. The denial of bail is a serious step, however, which materially decreases a defendant's ability to assist counsel in preparing an adequate defense. In recognition of that fact, the *Standards* provide for the setting of detailed conditions for release, including the setting of any reasonable restriction designed to assure the safety of the community.[57] The *Standards* also provide that violation of those conditions of release can subject the defendant to arrest and require either the setting of new conditions or the scheduling of a pretrial detention hearing within five calendar days.[58]

The second edition Pretrial Release Standards have been considerably tightened. When the first edition *Standards* were adopted in 1968 the nation's criminal justice system was in the midst of a general bail reform movement. The Federal Bail Reform Act of 1966[59] enunciated a firm policy favoring pretrial release. That policy found affirmation in the ABA's first edition *Standards* and reaffirmation in the 1980 second edition.

Still, some noteworthy changes occurred in the second edition. The major changes are reflected in two new standards: 1) standard 10-5.3 dealing

56. STANDARDS, *supra* note 1, at 10.5.
57. *Id.* § 10-5.2.
58. *Id.* § 10-5.7.
59. 18 U.S.C. § 3146 (1976) (amending 18 U.S.C. §§ 3041, 3141-3143, 3568).

with pretrial services agencies; and 2) standard 10-5.9 dealing with pretrial detention, as discussed above. Standard 10-5.3 calls for the establishment of pretrial services agencies in every jurisdiction. The agencies envisioned in this standard would be charged with the responsibility for monitoring and assisting defendants on pretrial release. Such agencies are especially important in performing monitoring functions and in reporting violations of release conditions.

If we are to maintain allegiance to one of our criminal law's fundamental precepts—the presumption of innocence—we must accept the fact that there are those who may well commit additional crimes or abscond while they are on pretrial release. Nonetheless, those incidents can be minimized through a vigorous implementation of the ABA Standards on Pretrial Release, standards which afford adequate safeguards for the community's safety consistent with constitutional requirements.

VIII. CHAPTER 11—DISCOVERY AND PROCEDURE BEFORE TRIAL

The first edition, approved in October 1970, began with the statement that it "proposes more permissive discovery practices for criminal cases than is provided by applicable law in any jurisdiction in the United States."[60] Second, it proposed a "procedure prior to trial which is designed not only to accommodate such discovery but to correct certain general dissatisfactions with criminal litigation."[61]

The first edition focused on pretrial procedures as the centerpiece of its effort. It reasoned that three major impediments to criminal justice could be largely overcome by reforms in procedure prior to trial. These three impediments were: 1) the increasingly cumbersome and exasperatingly time-consuming motion practice, made even more complex by the recent multiplication of issues demanding decision prior to trial; 2) the recent expansion of the right to assigned counsel, causing an influx of lawyers relatively inexperienced in defense work, and aggravated by the concomitant constitutionally articulated demands of "effective assistance" from such counsel; and 3) increasing difficulties in achieving finality in convictions because of greater permissiveness of courts in granting postconviction relief.[62] The drafting group admitted having no delusions that the standards it fashioned would be wholly sufficient to eradicate these impediments, yet it hoped its mechanisms would at least substantially assist in opening the path.[63] As proof of the soundness of the first edition's thrust and success of its frontier-clearing effort, the second edition, approved in August 1978, retains and extends the approach of the original *Standards*.

No substantive changes were required or made in the threshold standard, 11-1.1, which articulated the procedural needs prior to trial, the objectives, and how those needs can be served by: 1) full and free discovery; 2)

60. STANDARDS (1st ed. 1970), *supra* note 45, DISCOVERY AND PROCEDURE BEFORE TRIAL 1.

61. *Id.*

62. *Id.* at 24.

63. *Id.* at 27.

simpler and more efficient procedures; and 3) procedural pressures for expediting the processing of cases. The commentary observes that when the first edition was approved, the specific procedures advanced to meet the objectives set forth in what was then standard 1.1 differed from the then current practice; yet, in the intervening eight years, pretrial procedures have generally evolved toward that model. Still, there is progress to be made, because many jurisdictions continue to have limited discovery as well as cumbersome or slow procedures.

Standard 11-2.1, pertaining to prosecutorial disclosure, has been substantively changed in the second edition to provide for open-file disclosure upon the defendant's request. This is a major change from the first edition, which limited the prosecutor's obligation to a list of specifically enumerated items. The list has been carried into the second edition, but with the caveat that the list is only illustrative. The shift to open-file discovery is attributed to changing attitudes, in part, coupled with greater assurance that protective orders are an appropriate method for coping with the occasional case in which pretrial disclosure might jeopardize victims, witnesses, or evidence. Standard 11-4.4 authorizes protective orders. Also, open-file disclosure is a more effective way to respond to speedy trial requirements, minimizes the need for judicial supervision of basic discovery, and avoids the delays of motion practice and wrangling over the discoverability of particular items. It also contributes to compliance with other constitutional goals, to the defendant's ability to enter a knowing and intelligent guilty plea, and to increased finality of convictions by reducing or eliminating error generated by inadequate information.[64]

Note, however, that open-file disclosure is available only upon a defense request. Defense needs for, and interest in, prosecution disclosures may vary widely; thus, the requirement of request helps the prosecutor obtain a clear idea of information wanted, and avoids wasteful collection of information not useful to individual defendants.

The original standard limited discovery of a co-defendant's statements to cases in which the defendant and co-defendant were to be jointly tried; but that limitation has been omitted from chapter 11 in line with the shift to open-file disclosure.[65]

Standard 11-2.1(b) adds a new subsection (iv) requiring that when the information is within the prosecutor's possession or control, he shall inform defense counsel "if the prosecutor intends to offer (as part of the proof that the defendant committed the offense charged) evidence of other offenses." This serves to ensure pretrial litigation of an issue that might otherwise interrupt the trial.[66]

Standard 11-2.3 provides for additional disclosures upon request and specification. It adds to original standard 2.3 the requirement that the prosecutor shall disclose, upon request, information about lineups, showups, and pictures or voice identification of the accused, as well as other procedures

64. STANDARDS, *supra* note 1, at 11.17-.18.
65. *Id.* at 11.21.
66. *Id.* at 11.27.

described in standard 11-3.1(a)[67] (dealing with the accused). This requirement has been added to make certain that all matters which routinely generate suppression applications will be treated in such a way that collateral issues can be fully investigated and thoughtfully resolved prior to trial.[68]

Standard 11-3.1 contains a significant substantive change from the first edition. Subsection (a) provides that the prosecutor can obtain the defendant's fingerprints, photographs, handwriting exemplars, or voice exemplars merely by requesting defendant to appear for that purpose, whereas the original 3.1 required all such discovery to be subject to judicial supervision. Subsection (b) provides for the judicial officer to order the defendant to provide additional non-testimonial disclosures when the prosecutor meets certain requirements intended to protect fourth and fifth amendment rights. Subsection (c) outlines the discovery procedures the judicial officer may order, relating them to subsection (b). Subsection (d) requires the judicial officer to specify the precise conditions under which such procedures are to be conducted; thus it is intended to prevent the generation of issues that might interfere with prompt disposition of the case or jeopardize the finality of subsequent convictions.

Standard 11-3.2, covering medical and scientific reports, governs prosecutorial discovery of such made by experts engaged by the defense. Paragraph (a) conditions prosecutorial discovery on the fact that the defense has requested and obtained discovery from the prosecution; paragraph (b) exempts the work product of defense counsel and the communications of the defendant; paragraph (c) bars the introduction into evidence either of the fact that disclosures were made or the substance thereof, and also bars the use at trial of information derived from disclosures except to refute the matter disclosed.

Standard 11-3.3 deals with nature of the defense. The original standard called for defense disclosure of the nature of any defense; as revised, it requires the defense to give notice only of witnesses whose testimony bears on the issues of alibi or mental capacity. Also, paragraph (b), patterned after rule 423(a) of the Uniform Rules of Criminal Procedure, bars the introduction into evidence of the fact that disclosures were made and the substance of the disclosures, in addition to barring their use at the trial except to refute testimony of a witness testifying on alibi or insanity.[69]

Standard 11-4.8 is new. It is entitled "third-party disclosures," and is derived from something which had been implicit in original standard 2.5 relating to discretionary disclosures. The new standard clearly distinguishes the mutual discovery between the defense and prosecutor from third-party discovery available to either. Third-party disclosures at court direction require careful judicial supervision to avoid unnecessary intrusion into third-party privacy interests; thus, there are requirements of reasonableness and relevance.[70]

67. *Id.* § 11-2.3(c).
68. *Id.* at 11.33.
69. *Id.* at 11.56.
70. *Id.* at 11.69.

IX. CHAPTER 12—SPEEDY TRIAL

The first edition of this set of standards was given final approval by the House of Delegates in February 1968. Chapter 12 of the second edition was approved in August 1978. It is a tribute to the quality of craftsmanship in the original that no substantive changes in the policy positions comprising the bold-face standards were needed or recommended. This is not to say that nothing happened in this subject area during the intervening decade; to the contrary, a great deal occurred to document the soundness of many of the pioneering principles set forth in the first edition. The reader is urged to review the rich updated commentary to chapter 12 for complete documentation.

A very sketchy summary of the structure of chapter 12, and highlights of developments between the first and second editions, might be merited. In 1967, almost on the eve of presenting the final tentative draft of the first edition for approval, the United States Supreme Court issued its opinion in *Klopfer v. North Carolina*.[71] This landmark case held that the fourteenth amendment made the sixth amendment guarantee of speedy trial applicable to the states. The Court in that case did not have before it the precise issue of which criteria should be used to determine in each case whether the guaranteed right has been violated, for *Klopfer* involved an effort by the state to postpone indefinitely the trial over the defendant's objection. Accordingly, it was not until *Barker v. Wingo*[72] that the Supreme Court prescribed a test to determine constitutional violations. In the intervening five years, the Court had issued two opinions on narrower issues of the problem. One held that a state was not relieved of its speedy trial responsibility just because the defendant was incarcerated in another jurisdiction;[73] the other clarified the fact that the constitutional right does not extend to time prior to arrest or formal charge.[74] Except for one statement in the *Barker* opinion raising a possible question as to the propriety of the standard's proposed "absolute discharge" of a defendant whose speedy trial right has been violated, all four of the Supreme Court's opinions buttressed the first edition. Subsequent to *Barker*, the Supreme Court held in *Strunk v. United States*[75] that "[i]n light of the policies which underlie the right to a speedy trial, dismissal must remain . . . the only possible remedy."[76]

To the credit of the trail-blazing work of the first edition, the Federal Speedy Trial Act of 1974[77] became law on January 3, 1975. Although the bill as finally enacted differs from the position of standard 12-4.1 calling for

71. 386 U.S. 213 (1967).

72. 407 U.S. 514 (1972).

73. Smith v. Hooey, 393 U.S. 374 (1969).

74. United States v. Marion, 404 U.S. 307 (1971).

75. 412 U.S. 434 (1973).

76. *Id.* at 440.

77. 18 U.S.C. §§ 3161-3174 (1976). The Act provides that absolute discharge is at the option of the court, which must consider the seriousness of an offense, the facts and circumstances surrounding dismissal, and the impact of a reprosecution on the administration of justice. *Id.* § 3162(a)(2).

absolute discharge, the overall Act is otherwise generally consistent with Chapter 12.

X. CHAPTER 13—JOINDER AND SEVERANCE

Joinder and severance are procedural issues that affect only a very small percentage of criminal cases, primarily because they are trial issues and relatively few criminal cases go to trial. Of the cases that do go to trial, only those involving either multiple offenses or multiple defendants are affected by joinder and severance rules.

The difficulty in developing rules of joinder and severance stems in large part from the large number of factors that go into the decision of a prosecutor or a defendant to choose to join or sever trials. For example, in one case a prosecutor might decide that a joint trial would be too complicated for a jury to follow, but in another might conclude that the inconvenience to witnesses of multiple trials would require joinder. A defendant who wants to testify as to one charge but not another might prefer separate trials, while another who wants to avoid the expense, delay, and harassment of multiple trials might prefer a single trial.

Considered by many lawyers to be the most technically oriented of all the *Criminal Justice Standards*, the Joinder and Severance Standards, approved by the ABA in August 1968, have been among the most successful in providing guidance to draftsmen of codes and rules in many jurisdictions.[78] The revised standards incorporate and extend the approach of the original standards. The standards in the second edition are, if anything, more interdependent than in the earlier edition. Thus, in any implementation of the *Standards*, they should be adopted as an integral unit and their provisions should be physically located in a continuing sequence.

The revised chapter consists of five parts. Part I, a new section of definitions which are based largely on concepts which appeared in the substantive sections of the first edition, introduces definitions of "related" and "unrelated" offenses. "Related" offenses are tied together in one or more ways and, as a group, correspond roughly with the class of offenses that have traditionally been joinable. Rule 8(a) of the Federal Rules of Criminal Procedure uses different terminology to identify substantially the same concept.[79]

Part II deals with joinder and includes matters which were largely contained in Part I of the first edition. It does, however, contain significant changes from the earlier edition, such as those in standard 13-2.1, joinder of offenses. The original standard (1.1) permitted joinder only of related offenses, while the revised standard would permit unlimited joinder of both related and unrelated offenses. This expansion, however, is subject to an absolute right to severance of unrelated offenses, by either prosecution or

78. Report With Recommendations to ABA House of Delegates, 1978 Annual Meeting, Report 108A at 12.

79. Related offenses are based "on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." FED. R. CRIM. P. 8(a).

defense, as set forth in standard 13-3.1(a).[80]

It should be noted that 13-2.1(a) requires that when offenses are joined in one accusatory instrument, each offense must be stated in a separate count. This requirement is based on constitutional concerns arising from the sixth amendment right to notice of the nature and cause of the accusation.

Standard 13-2.2, joinder of defendants, has been conformed to the change in standard 13-2.1 by the addition of authority for unlimited joinder of offenses and by the explicit authorization of applications, by either prosecution or defense, to join defendants for trial.

Part III deals with severance. A modification of standard 13-3.1 which would grant a right of severance to both the prosecution and the defense in those cases in which unrelated offenses have been joined for trial, is designed to conform this section to the changes in standard 13-2.1 and has been discussed above.

Part IV outlines the authority of the court to act on its own motion. Standard 13-4.1 is derived from first edition standard 3.1(a). The original standard provided that a judge could order consolidation of charges for trial if the offenses—and the defendants if there is more than one—could have been joined in a single charge. The revised standard limits the court's authority to join offenses or defendants *sua sponte* to cases in which no party objects, because the parties will be better able than the court to foresee the risks of prejudice from a joinder of offenses or defendants.[81]

Part V, dealing with the requirement for an adequate record, is new and contains only one standard. The standard adds the requirement that the court make a record of its reasons for granting or denying any motion. The failure of courts to articulate the basis for their decisions on joinder and severance issues makes it difficult for appellate courts to subject joinder and severance decisions to meaningful review and for trial courts to understand the factors that influenced the outcome in previous cases.

XI. CHAPTER 14—PLEAS OF GUILTY

The first edition of these standards was approved in 1968. At that time the ABA took the position that the practice of negotiating charge and sentence concessions, which accounts for over ninety percent of all criminal dispositions in some jurisdictions, served a useful function both for the criminal defendant and for society. While the second edition of the *Standards* has deleted consideration of the impact of plea negotiation on court dockets as a factor to be considered in final disposition of a plea,[82] the practice nevertheless has a beneficial impact on administration of the courts by freeing resources which would otherwise be devoted to the conduct of trials. Indeed, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving both the quality

80. *Cf.* UNIFORM R. CRIM. P. 471(d) (allowing joinder of unrelated offenses upon motion of defendant who makes showing that "failure to try the charges together would constitute harassment, unless the court determines that . . . joinder would defeat the ends of justice.").

81. *See* UNIFORM R. CRIM. P. 473(a).

82. *See* STANDARDS, *supra* note 1, § 14-1.8.

of the trial process itself and the meaningfulness of the presumption of innocence.

While recognizing the potential benefits of plea negotiations, however, the drafters of the first edition also recognized that often such discussions were conducted in a secretive manner that gave the appearance that justice was not being done. Anticipating the Supreme Court's 1971 declaration in *Santobello v. New York*[83] that plea bargaining is "an essential component of the administration of [criminal] justice,"[84] the first edition argued that the practice should be brought into the open and that effective procedures for control of the process should be developed. This position has been overwhelmingly accepted.

The second edition, while retaining the basic philosophy of the earlier standards, has been amended to reflect changes in the plea negotiation process during the past decade. These changes, which will be discussed in some detail below, include increased standardization of procedures and greater emphasis on ensuring understanding on the part of a defendant involved in the process. A major new emphasis in the second edition provides for judicial participation in the plea negotiation process.

Standard 14-1.1 ("pleading by defendant; alternatives"), like its first edition counterpart, deliberately omits reference to the judge's authority to refuse a guilty plea. Once a plea is determined to be knowing, voluntary, and accurate, there normally is no justification for the court to refuse it. Similarly, these standards do not take a position on whether courts should have authority to approve charge concessions of a prosecutor.

The second sentence of paragraph (a) requires the defendant personally to enter the plea. This requirement is a necessary corollary to decisions holding that a guilty plea must be rejected unless the defendant, in tendering the plea, intelligently and voluntarily relinquishes certain fundamental constitutional rights.[85]

The only change from the original edition is a provision that specifically recommends that the views of the victims be taken into consideration before a court accepts a plea of nolo contendere. This is consistent with the recommendation that in accepting a nolo plea "the views of the parties . . . and the interest of the public in the effective administration of justice"[86] should also be considered.

Standard 14-1.3 ("aid of counsel; time for deliberation") has been amended in paragraph (b). The Supreme Court has recognized the right of a defendant to proceed without legal representation.[87] In order to emphasize the need for valid waiver of counsel, however, the language of paragraph (b) has been amended. Paragraph (b) of the original standard referred to a defendant who is "without counsel"; that phrase has been amended to refer

83. 404 U.S. 257 (1971).

84. *Id.* at 260.

85. *See, e.g.*, Boykin v. Alabama, 395 U.S. 238 (1969); McCarthy v. United States, 394 U.S. 459 (1969).

86. STANDARDS, *supra* note 1, at 14.6-.7.

87. Faretta v. California, 422 U.S. 806 (1975).

to a defendant "who has properly waived counsel pursuant to these standards."

The original standard also stated that paragraph (b) should apply to a "serious offense." Reference to serious offenses has been deleted in the revision of paragraph (b) because the values expressed in this standard are considered fully applicable to both felony and misdemeanor prosecutions. Adherence to paragraph (b) is not deemed essential in petty offense cases where there is no possibility of incarceration.[88]

Standard 14-1.4 ("defendant to be advised") has been substantially expanded to ensure that a defendant who offers to plead guilty or nolo contendere is given all of the advice constitutionally required and other useful information as well. In addition to stylistic changes, a number of substantive changes have been made.

Paragraph (a) of standard 14-1.4 now contains the requirement that the court address the defendant personally in open court and determine that the defendant understand the matters under discussion.

Standard 14-1.4(a)(i) provides a more explicit statement of what the defendant should be told by using the phrase "nature and elements of the offense to which the plea is offered" rather than simply "nature of the offense" which appeared in the first edition. This change was mandated in certain cases by the Supreme Court decision in *Henderson v. Morgan*,[89] which held that a plea to second-degree murder was involuntary where the defendant had not been informed that intent to cause death was an element of the crime.

Standard 14-1.4(a)(iv) is new except for the requirement of a statement to the defendant that by pleading guilty he or she waives a right to a jury trial. The second edition requires that the judge make clear the fact that the defendant also waives other constitutional rights, waiver of which must be intelligent and voluntary.

Standard 14-1.4(a)(v) is also new and requires that the court notify the defendant that he or she waives the right to object to the sufficiency of the charging papers or to illegally obtained evidence (unless such right is reserved).

Standard 14-1.4(b) is new as well. It is intended to ensure that the defendant understands the procedures and directs the court either to ask the defendant to restate the information being considered, or to take "such other steps as may be necessary to assure itself that the guilty plea is entered with complete understanding of the consequences."

Standard 14-1.4(c), also a new paragraph, directs the court to refuse a plea when it appears that a defendant who is represented by counsel has not had effective assistance of counsel.

Three changes have been made in standard 14-1.5 ("determining voluntariness of plea"). First, there has been added to the second sentence the phrase "the defendant," thus making it clear that the court should inquire of

88. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972).
89. 425 U.S. 637 (1976).

the defendant, as well as of defense counsel, concerning possible plea discussions and plea agreements. In addition, the second sentence of the standard now specifically requires that the parties disclose "what [plea] discussions were had." Finally, the third sentence of the standard has been rewritten. In the first edition, this sentence stated that the court should advise the defendant that charge and sentence recommendations that are a part of a plea agreement are not binding on the court. This provision was misleading, however, because the defendant, according to original standard 3.3(b), was accorded an absolute right to withdraw a guilty plea in which charge and sentence concessions, recommended by the prosecutor and initially concurred in by the court, were later rejected. As revised, the third sentence contains a cross-reference to standard 14-3.3(g), with the recommendation that the defendant be advised consistent with this provision. Standard 14-3.3(g) sets forth the circumstances in which withdrawal of a plea is allowed when charge or sentence concessions recommended by the prosecutor are disapproved by the court.

Standard 14-1.6 ("determining accuracy of plea") has been revised to require the finding of a factual basis for the nolo contendere plea as well as for the plea of guilty. Paragraph (b), which is new, states that the judge may require the defendant to make a statement concerning the commission of the offense when such a statement is necessary in order to establish a factual basis. Paragraph (c), which is also new, requires that special care be taken in those circumstances in which the defendant enters a plea but denies culpability.

Several refinements have been made in standard 14-1.8 ("consideration of plea in final disposition"). The first emphasizes that a plea of guilty or nolo contendere should not, by itself alone, be considered by the court as a mitigating factor in imposing sentence. This represents the shift in the second edition to greater consideration of the factors relating to an individual defendant in disposition of a plea. Although the first edition was silent on the effect of a plea on the severity of the sentence imposed, the major factor to be considered was "the effective administration of criminal justice." By contrast, the factors in the second edition are "the protection of the public, the gravity of the offense, and the needs of the defendant." Thus, although congestion in criminal court calendars in many parts of the country remains a significant problem, these standards no longer express the view that it is permissible to grant charge and sentence concessions to defendants solely for the purpose of processing cases through the system.

A minor substantive change in standard 14-2.1 ("plea withdrawal") provides that "the court *should* allow" withdrawal of a plea before sentence where the defendant's reasons are fair and just and the prejudice to the prosecutor is minimal. The first edition stated that "the court in its discretion *may* allow" withdrawal of such a plea. This change in emphasis reflects the belief that prior to sentencing, when there is a basis for the defendant's motion and an absence of compelling prosecutorial reason for its denial, withdrawal of a plea of guilty or nolo contendere normally should be allowed.

Three clauses, none contained in the first edition, have been added to

standard 14-2.2 ("withdrawn plea not admissible"). First, the standard now provides that "any statements made by the defendant in connection with entering such a plea of guilty or nolo contendere" may not later be used against the defendant if the plea is either not accepted or withdrawn.

A second new clause provides an exception to this general rule. Thus, the standard permits statements of a defendant made while entering an unaccepted or withdrawn plea to be admitted against a defendant in a subsequent "criminal proceeding for perjury or false statement if the statements were made by the defendant under oath, on the record, and in the presence of counsel." This change parallels the Federal Rules of Criminal Procedure.[90]

The third new clause, "or civil action or administrative proceeding," was added to make this standard consistent with other standards dealing with the inadmissibility of plea discussions and plea agreements when the underlying plea is either not accepted or is withdrawn.

There are several changes in standard 3.1 ("propriety of plea discussions and plea agreements"), the first of which makes it clear that "[t]he prosecuting attorney may engage in a plea discussion with counsel for the defendant for the purposes of reaching a plea agreement." This revision reflects the widespread acceptance of plea discussions between prosecution and defense.

Also, a new subparagraph has been added which recommends that the views of victims and law enforcement officials be considered before the prosecutor enters into plea agreements. This is regarded as an essential requirement, lest victims and police lose their respect for the criminal justice system and become unwilling to cooperate fully when needed.

Standard 3.3 ("responsibilities of the judge") has undergone considerable changes, many of which, however, involve nothing more than the incorporation of provisions which had appeared in the first edition of the Function of the Trial Judge. Several paragraphs of the standard, however, are almost entirely new.

The thrust of these new provisions is to allow a limited role for the judge in the plea-negotiation/plea-agreement process. The parties may request to meet with the court either to present or to discuss a plea agreement. If the court consents to a plea conference, appropriate persons may be required to testify, including the defendant and alleged victim. Finally, when a plea agreement has not been reached, the judge may inquire of the parties whether plea discussions have taken place and, if not, may adjourn the proceedings to enable such discussions to occur. These provisions are contrary to the first edition, which stated that "[t]he trial judge should not participate in plea discussions."

In the original edition, the defendant was permitted to withdraw a guilty plea or plea of nolo contendere whenever the court tentatively concurred in contemplated charge or sentence concessions and later changed its mind. This revised edition contains a much more detailed provision related to plea withdrawal when anticipated concessions are not received. The stan-

90. FED. R. CRIM. P. 11(e)(6).

dard contemplates that the defendant will be expressly advised when the plea is entered whether withdrawal of the plea will be permitted if the charge or sentence concessions are rejected.

XII. CHAPTER 15—TRIAL BY JURY

The first edition was approved in 1968, and the second edition in August 1978. During that decade, much occurred to provide experience and data to assist in supporting a number of substantive changes in the original standards. The total product represented by this particular chapter is an especially valuable reference which could not help but serve as a constant tool for judges, prosecutors, and defenders alike.

The introduction to the first edition[91] begins by telling the reader that the Trial by Jury standards start with the threshold question of when there should be a right to jury trial and conclude with the question of when impeachment of the jury's verdict should be permitted. The introduction emphasized the importance of guidelines as to when the jury can or must be used, how jurors are selected, how the trial should be conducted to facilitate the jury's proper role, how to assist the jury's deliberations and yet have essential controls, and whether the jury's verdict need be unanimous. Despite the fact that the bulk of criminal cases are processed without jury trial, usually the most controversial and far-reaching involve jury trials. In many which do not wind up in a jury trial, the very fact that the potential of a jury trial looms in the picture will often be a critical factor in disposition. Also, of course, article III and the sixth amendment to the Constitution preserve the right of jury trial.

The second edition retains the major structure of the first edition, except for the deletion of original Part III pertaining to Juror Orientation and Compensation. The two standards under that heading were eliminated in deference to the fact that since the approval of the first edition, the ABA Commission on Standards of Judicial Administration had formulated standards relating to Trial Courts which were approved by the House of Delegates in 1976, and which appropriately embraced the subject for both civil and criminal cases.[92]

Major changes were made in standard 15-1.1 ("right to jury trial"), the keystone of the chapter, so that it now reads as follows:

> Jury trial should be available to a party, including the state, in criminal prosecutions in which confinement in jail or prison may be imposed. The jury should consist of twelve persons, except that a jury of less than twelve (but not less than six) may be provided when the penalty that may be imposed is confinement for six months or less. The verdict of the jury should be unanimous.

In this brief standard, the significant revisions include: 1) deletion of an earlier recognition of the propriety, barring constitutional restriction, of denial of jury trial for "petty offenses"; 2) deletion of acceptance of trial of

91. STANDARDS (1st ed. 1968), *supra* note 45, TRIAL BY JURY, at 1-2.
92. *See* STANDARDS, *supra* note 1, at DT-31.

lesser offenses without a jury; 3) limiting the use of juries of less than twelve to petty offenses; 4) imposing a minimum of six members for any jury less than twelve; and 5) elimination of the possibility of less than unanimous verdicts, except where parties properly consent. Each of these substantive revisions merits examination of its rationale.

When the first edition was already in page proofs, the United States Supreme Court decided *Duncan v. Louisiana*,[93] holding the sixth amendment right to jury trial applicable to states through the fourteenth amendment. In effect this meant entitlement to jury for "serious crimes" but not "petty offenses." It did not precisely draw the line between those categories, but indicated that in the federal system petty offenses are those punishable by no more than six months in prison and $500 fine.[94] In 1970, *Baldwin v. New York*[95] confirmed the matter by holding that no offense could be considered petty if imprisonment of more than six months could result.[96]

As revised, the standard no longer recognizes the propriety of denying jury trials in lesser offenses, even if the accused is accorded a right to trial de novo upon appeal. The main reason for the change in posture of the standard was the adoption in 1976 of a new policy that there should be a right of jury trial in all criminal prosecutions in which the penalty of jail or prison may be imposed. It was contended that such punishment should rest on a finding of guilt satisfying the conscience of the lay citizenry.

The change in the standard regarding size of the jury is primarily to accommodate decisions of the Supreme Court that were handed down between the first and second editions.[97]

As to the matter of unanimous verdicts, the revised standard was mandated by a change in ABA policy in 1976, based upon the recommendation of the ABA Commission on Standards of Judicial Administration. Given that the *Standards* are suggestive rather than mandatory, however, and given that the Supreme Court has clearly recognized that states need not require unanimous verdicts,[98] the change will probably be of limited persuasion.

Standard 15-1.2, covering waiver of trial by jury, contains only one substantive change from the first edition, namely to include approval of the prosecutor as one of the conditions for waiver. It should be noted that standard 15-1.2 still permits waiver by an oral statement for the record; this is consonant with the Uniform Rules of Criminal Procedure, but contrary to the Federal Rules of Criminal Procedure.

Related to the subject of standard 15-1.2 is standard 15-1.3 dealing with waiver of either a full or unanimous jury. The change made here is to add a provision for waiving the requirement of a unanimous verdict by the defendant. A requirement of prosecutorial concurrence has not been included be-

93. 391 U.S. 145 (1968).
94. *Id.* at 161.
95. 399 U.S. 66 (1970).
96. *Id.* at 73-74.
97. *See, e.g.*, Ballew v. Georgia, 435 U.S. 223 (1978); Williams v. Florida, 399 U.S. 78 (1970).
98. Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972).

cause the same considerations as exist with standard 15-1.2 are not present. Waiver under this standard is a possibility in three situations: 1) pretrial; 2) during trial; or 3) when one or more jurors have been excused either during trial or during deliberation.[99]

Part II articulates standards relating to selection of the jury. Standard 15-2.1, dealing with selection of prospective jurors, retains without change the basic principle that names of those who may be called "should be selected at random from sources which will furnish a representative cross-section of the community."

Subsections (c) and (d) of standard 15-2.1 have been revised from the first edition to take advantage of interim experience and to make more specific the grounds for eligibility of individual prospects for jury service, as well as the grounds for excusing persons and granting temporary deferrals. For example, one revision extends eligibility to those who have a criminal record but are not "serving a criminal sentence or on probation or parole, and are not defendants in a pending prosecution for an offense other than an infraction"; thus, unlike the first edition, standard 15-2.1 would not *per se* exclude a convicted felon no longer incarcerated or on probation or parole. However, trial judges should look with favor on prosecutors' challenges for cause of any particular prospective juror with a felony record who, as an individual, does not appear to be acceptable as a prospective juror.

Standard 15-2.2 concerns the list of prospective jurors, and contains three revisions of the first edition standard: 1) dropping the requirement that the parties must request the list as a condition to receiving it; 2) expanding the information included; and 3) designating the time period within which the parties must receive it.

Standard 15-2.4 deals with voir dire examination. A very substantial change has been made in the second edition, in that the standard now makes it clear that direct questioning by counsel is a right. The crucial part reads: "Interrogation of jurors should be conducted initially and primarily by the judge, but counsel for each side should have the opportunity, subject to reasonable time limits, to question jurors directly, both individually and as a panel . . . . It is the responsibility of the judge to prevent abuse of voir dire examination."

One other standard in Part II deserves mention. Standard 15-2.6 concerns peremptory challenges, and in the first edition it simply read: "The number of peremptory challenges and the procedure for their exercise should be governed by rule or statute." To this, the second edition added two subsections as follows:

> Standard 15-2.6. Peremptory challenges
> (a) Peremptory challenges should be limited to a number no larger than ordinarily necessary to provide reasonable assurance of obtaining an unbiased jury, but the trial judge should be authorized to allow additional peremptory challenges when special circumstances justify doing so.

99. Waiver of a unanimous jury was upheld in United States v. Vega, 447 F.2d 698 (2d Cir. 1971).

(b) The procedure for exercise of peremptory challenges should permit challenge to any of the persons who have been passed for cause.

. . . .

These changes conform standard 15-2.6 to the policy established by the ABA in 1976 in the Judicial Administration Standards on Trial Courts, thus suggesting greater uniformity in limiting the number of such challenges by providing a flexible guideline based on the factors set forth.

Part III concerns special procedures during jury trial. Standard 15-3.1, covering custody and restraint of defendants and witnesses, contains a revision in paragraph (b) which now reads: "The trial judge should not permit a defendant or witness to appear at trial in the distinctive attire of a prisoner, unless specifically waived by the defendant." The revision specifically provides for waiver in order to comport with *Estelle v. Williams*.[100] The standard also is in harmony with *Illinois v. Allen*,[101] which was handed down after the publication of the first edition.

Standard 15-3.6, relating to jury instructions, contains one significant revision in that the following has been added: "Instructions to the jury should be not only technically correct but also expressed as simply as possible and delivered in such a way that they can be clearly understood by the jury." This section implements the ABA's increasing concern that jury instructions are too legalistic and too often unintelligible to a lay jury. This concern was also heightened by findings of a research group which reported studies of jurors in Florida, indicating, among other things, that an average of only 70% of the instructions tested were comprehended.[102]

In all other respects the additional portions of the first edition standard on this vital subject area remain the same, although the commentary of the second edition contains excellent data summarizing developments in the state of the art during the intervening ten years.

Part IV, covering jury deliberations and verdict, represents the final substantive change in Chapter 15. This occurs in standard 15-5.1 which covers the taking by jurors of materials into the jury room. A new clause has been added to permit copies of jury instructions to be sent to the jurors at the judge's discretion if both parties consent. The rationale favoring this change in the standard is that access to written instructions generally helps the jurors to refresh their recollections as to issues, as well as to the applicable law, if they sense a need for such.

XIII. CHAPTER 18—SENTENCING ALTERNATIVES AND PROCEDURES

The first edition of this set of standards was approved in August 1968. A separate volume relating to probation was approved in August 1970. Both of these, for reasons of logic and interrelatedness, have been merged into chapter 18, which received final ABA aproval in August 1979. This chapter has proven to be one of the most important in the entire series of *Criminal*

100. 425 U.S. 501 (1976).
101. 397 U.S. 337 (1970).
102. Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUD. 478, 482 (1976).

Justice Standards, for it deals with the ultimate question of the criminal justice process—what happens to the convicted or guilt-pleading defendant?

In the decade between the first and second editions of the standards comprising chapter 18, much has happened in that subject area. There is probably no other area of criminal justice that has sparked as intense a debate over fundamental assumptions. The debate has included the basic questions of the purpose of sentencing, the length of sentences, where the decision to sentence should lodge, how to deal with disparities in sentencing, and whether parole should be abolished.

Notwithstanding this ferment, chapter 18 is characterized by continuity rather than change. The response has been conservative for two reasons: 1) the continuing validity of the premises that shaped this first edition; and 2) the greater need for reform in practice than in theory.

Despite the ABA's conservative posture against scrapping basics of the original edition, there remain valid criticisms of contemporary sentencing practices, including: 1) the pervasiveness of sentencing disparities; 2) the excessive length of sentences; 3) the standardless character of the discretion given to sentencing courts; 4) the informal nature of the presentence investigation as well as the limited penetration of due process safeguards into the sentencing process; and 5) the dangers of using the uncertain standard of rehabilitative progress as a measure for determining the length of confinement. Consensus has largely supplanted the debate on these matters, and the evidence amply documents unrealistic expectations placed on the "individualized treatment model" of sentencing.[103]

It would be confusing and counterproductive to attempt to catalog all of the individual changes made in chapter 18. This particular chapter exceeds 550 pages. The updated commentary is encyclopedic in its comprehensive treatment and rational disposition of the myriad developments in the sentencing area during the period between editions. It would likewise be a disservice to purport to summarize its contents in any manner which might imply that there is no need to study carefully the material in its entirety. In fact, the very nature and importance of the problems in sentencing should make such a study vital to interested representatives of the legislative, judicial, and executive branches, as well as to members of the public who have entertained and voiced concerns in this field. Consequently, in this section, the effort will be limited to highlighting major retentions as well as changes and suggesting the more significant rationale supporting such.

Part I articulates ABA policy as to where the sentencing authority should lie. Despite the ferment of a decade since the first edition, chapter 18 reiterates the ABA policy against jury sentencing and reaffirms its stand that sentencing properly should remain essentially a judicial function.[104] Thus, standard 18-1.1 explicitly provides that "the jury's role should not therefore extend to the determination of the appropriate sentence." Added, however, is this qualifier: "These standards do not deal with whether the death pen-

103. STANDARDS, *supra* note 1, at 18.6.

104. *Id.* § 18-1.1.

alty should be an available sentencing alternative and, if so, who should participate in its imposition."[105]

Part II of chapter 18 outlines the statutory structure of sentencing and articulates the principles and policy positions which the *Standards* recommend. Part III covers the sentencing guideline drafting agency recommended in Part II and incorporates what the ABA endorses as essential principles to guide the drafting agency in providing needed assistance to sentencing courts in the exercise of their discretion. Because these two parts are interdependent, they will be considered together.

Standard 18-2.1 restates the recommended limited role of the legislature carried over from the first edition, including the ABA's long-standing policy against legislatively mandated sentences. The use of the word "limited" is a change in emphasis rather than philosophy, yet deemed essential in light of the recent trend toward determinate sentencing, for judicial and parole officials should be vested with discretion to respond to the substantial variety of offense and offender combinations that inevitably arise.[106] This standard also reiterates the ABA's recommendation that "[a]ll crimes should be classified by [the legislature] for the purpose of sentencing into a small number of categories which reflect substantial differences in gravity. For each such category, the legislature should specify the sentencing alternatives available for offenses which fall within it. The penal codes of each jurisdiction should be revised where necessary to accomplish this."[107] This is an essential starting point for reform in any jurisdiction. The major substantive change in standard 18-2.1 is to recommend that legislatures establish a centralized sentencing guideline drafting agency to develop specific sentencing criteria.

Standards 18-3.1 through 18-3.5 (Part III) are designed to provide for the guideline drafting agency proposed in Part II and are completely new, except to the extent that they incorporate principles enunciated in Part II. Basically, the agency is to be in the judicial branch. Its authority is to "promulgate presumptively appropriate sentencing ranges within the statutory limits,"[108] in order to shape judicial discretion, not replace it with mechanical rules.

Standard 18-3.1 also outlines essential criteria to apply to whatever sentencing guidelines are drafted, such as recognition that deserved punishment need not always consist of institutional confinement; hence guidelines should embrace a variety of alternatives, including probation, "split sentences," fines, restitution, community service, and other intermediate sanctions. These guidelines should focus on more than the fact of conviction, and should seek to relate appropriate combinations of offense-offender characteristics to presumptive sentencing ranges. They should also seek to reflect current community consensus about the relative gravity of offenses.

Standard 18-3.2 details a set of principles to guide both the drafting agency and the sentencing court in exercising their respective discretions. It

105. *Id.*
106. *Id.* at 18.27.
107. *Id.* § 18-2.1(a).
108. *Id.* § 18-3.1(a).

also includes numerous illustrative factors—mitigating as well as aggravating—to assist the sentencing court in applying such difficult elements to applicable guideline ranges in appropriate cases.

Although standard 18-3.2 is new in articulating an ABA policy advocating legislative authorization for, as well as guidance in structuring discretion for, both sentencing guidelines and the sentencing function, the principles recommended are not all new. Some are well-established ABA policies carried over from the first edition, while others are modifications of earlier positions adjusted to accommodate intervening case law or other developments deemed authoritative. It is significant to note that standard 18-3.2's rejection of the offender's need for rehabilitation or treatment as a justification for incarceration is a major substantive change from the first edition. However, this rejection of the "rehabilitation model" should not be construed as the ABA's rejection of rehabilitation as a proper goal for corrections, but it does mean that chapter 18 takes the position that the concepts of punishment and treatment should be kept separate; thus, the length of confinement in the sentence should not relate at all to any consideration of rehabilitation.[109]

Standard 18-2.4 articulates principles governing a range of sentencing alternatives between supervised probation and total confinement. Here, the only change is to accord greater emphasis to community service orders and restitution. Since the original edition there has been a noteworthy legislative trend toward use of intermittent confinement[110] and community service as an alternative to prison for the nondangerous offender. Similarly, restitution as a sanction is currently receiving unprecedented attention as a byproduct of the shift in focus to crime victims.

Sentences involving total confinement, including special enhanced terms for habitual or dangerous offenders, are addressed in standard 18-2.5, and two noteworthy substantive modifications from the first edition have been made. First, as previously indicated, rehabilitation has been deleted as a justification for total confinement. Second, the standard has been modified to track the concept developed by the National Commission for Reform of Federal Criminal Law (Brown Commission) which proposes federal criminal code provisions covering enhanced terms for special offenders.[111]

The first edition has recognized that, notwithstanding some public perceptions to the contrary, sentences within the United States tend to be excessively long. This was attributed in part to a natural legislative desire to authorize sufficiently harsh or long penal terms where the offender was deemed dangerous, habitual, or what some might label a professional criminal.[112] Despite legislative motives, sentencing courts, lacking more precise legislative guidance, tended to gravitate toward the statutory midrange of

109. *Id.* at 18.63-.67.

110. At least 17 states have legislation authorizing intermediate sanctions, and 42 states and the proposed federal criminal code now authorize work release programs for felons. *Id.* at 18.104-.105.

111. Id. at 18.118.

112. STANDARDS (1st ed. 1968), *supra* note 45, § 2.5(b).

the authorized term where the offender appeared to lack either mitigating or aggravating factors.

To confront this problem, the first edition advocated a two-tier statutory sentencing structure, with longer sentences designed for offenders deemed to fall in the special categories. The first edition conditioned endorsement of the two-tier statutes on adequate legislative provisions to delineate the special offenders, yet the chapter 18 Task Force found evidence that existing statutes reflect such shortcomings as overbreadth, vagueness, and improper criteria. Moreover, there have been increasing signs of difficulty or impossibility in assessing dangerousness, which have created serious problems.

Standard 18-2.5(b) now states: "that a sentence in excess of a specified percentage of such maximums could not be imposed in the absence of a specific finding by the court that the offender constituted a dangerous or persistent offender as defined by it." Also, this standard specifies that, rather than the legislature shaping its penal code to focus on special offenders, it should incorporate in the statute instructions to the sentencing guideline agency to develop the essential criteria for use by the sentencing court in distinguishing such special offenders from the broader spectrum of offenders.

It should be noted that there is one very troubling type of special offender legislation still existing in about half of the jurisdictions in the United States, which the framers of chapter 18 admittedly have not addressed adequately through its revisions. These are the so-called sexual psychopath statutes. The commentary to standard 18-2.5 summarizes the broad spectrum of problems, indicating that they transcend the procedural concerns with which the standards primarily deal.[113] Since publication of the second edition, however, the ABA Standing Committee on Association Standards for Criminal Justice has received private foundation funding and has already launched Phase I of a major project which envisions as its final product a comprehensive set of criminal justice standards in the mental health area.[114]

Standard 18-2.8, entitled "organizational sanctions," is a completely new addition to chapter 18, except for the incorporation of parts of the first edition standard 2.7(g) authorizing special enhanced-fine schedules for corporations. It is quite comprehensive and deals with the numerous special problems of imposing sentences for crimes committed by organizations, commonly referred to as "white collar" crimes. The widespread surfacing of illegal corporate conduct during the decade following the first edition created the need to articulate standards to cope with special problems not adequately embraced in sentencing persons, as distinguished from organizations. Some of the problems stem from the magnitude of the offenses, their national and even international aspects, their longstanding, continuing nature, and the nature and numbers of victims. Examples of such crimes are consumer fraud, environmental harm, domestic and foreign bribes as incidents of doing business, endangerment to workers, and securities fraud. A

113. STANDARDS, *supra* note 1, at 18.131-.136.

114. Information obtained from ABA Standing Committee staff headquarters, Washington, D.C.

highlight summary of the approach taken by this new set of standards will serve to indicate aspects of the uniqueness and complexity of the problems.

Standard 18-2.8(a) sets the stage by stating that "[t]he interests of society and the need for fairness to the defendant require greater coordination of criminal and civil remedies and greater flexibility in the discretion accorded sentencing authorities to fit the punishment to the crime." Examples of existing sentencing alternatives that require such legislative clarification and codification are: restitution, special enhanced-fine schedules, disqualification of corporate officials from office in the specific organization, notice of conviction to persons affected, and continuing judicial oversight.[115]

Finally, standard 18-2.8 contains three conditions to which all of its enumerated sanctions are made subject: 1) restitution, special fines, and continuing judicial oversight should not be imposed in cases, such as arise under antitrust or securities laws, where statutory provisions for civil actions seeking equitable relief, money damages, or civil penalties exist "to accomplish the remedial or deterrent purposes of such sanctions"; 2) the imposition of such sanctions should be preceded by a full adversary hearing as outlined in standard 18-5.4, using the "preponderance of the evidence" standard as the burden of proof; and 3) appellate review as to the reasonableness of penalties and conditions imposed will be available "to the same extent it applies to other sentences generally under these standards."

Part IV focuses on the use of total confinement. Most of the standards are restatements of the first edition, modified only by stylistic changes or minor fine-tuning to accommodate the second edition's new concept of sentencing guidelines. However, one standard is new and involves major policy positions on the controversial subjects of indeterminacy and whether parole should be eliminated. This is standard 18-4.1, which provides as follows:

> Excessive indeterminacy now characterizes many penal codes and tends to produce both unwarranted disparities among offenders and unnecessary anxiety on their part about the time of their release. However, because both "indeterminate" and "flat time" sentencing structures in their extreme forms are seriously defective, the legislature should exercise caution in curtailing indeterminacy in order to prevent determinate sentencing reforms from increasing the average time actually served by most offenders. In particular, two precautionary principles should be observed in any penal code revision:
>
> (a) An early release mechanism independent of the sentencing court should be retained to achieve a variety of purposes which require an agency having a general oversight capacity; and
>
> (b) It is desirable that the proportion of indeterminacy in the sentence increase as the sentence's length increases. To implement this principle standard 18-4.3 proposes criteria with respect to the degree of indeterminacy recommended for sentences of increasing length.

Chapter 18 endorses a compromise position with respect to indetermi-

115. *See* STANDARDS, *supra* note 1, at 18.161-.163.

nacy and to the continued use of parole agencies. The sentencing court, acting in accordance with sentencing guidelines, will establish a sentence which will fix the range of indeterminacy; the parole authorities, acting pursuant to a separate but compatible set of guidelines promulgated by them, will determine the offender's release. It is assumed that a presumptive release date—to minimize undesirable uncertainty—will be set by the parole agency at an early point in the offender's confinement.

Part V deals with the informational basis for the sentence. Although this segment contains what appear to be only modest revisions to the first edition version, an examination of these revisions and the rationale therefor will indicate that their implementation could have tremendous impact upon reforming the sentencing process.

Standard 18-5.1 enumerates the general principles that should govern presentence reports. Subsection (b) adds to the first edition a statement that the legislative authorization for the court to call for a presentence investigation and report in every case, and the requirement for such in certain categories (enumerated in the original standard), should be observed "unless the defendant or defense counsel waives production of the report and the court specifically finds that it has sufficient information to exercise the discretion accorded to it."

Another substantive change is the addition of subsection (c) which requires that all material information in the report should be factual and verified by its preparer, who should be available at the presentence conference to respond to challenges to the verification. According to the standard, the inability to establish verification should cause the court to refuse to consider that information at the sentencing hearing.

Subsection (d) also is new, and consists of detailed standards covering the format, contents, and written presentation of presentence reports. It includes both short-form and full reports as well as guidelines for when each is appropriate. Related to (d) is subsection (e), also new, which covers the precise preparation and format of presentence reports in jurisdictions where a guideline drafting agency exists. This includes requirements that information about the offender and offense, as well as mitigating or aggravating factors, be expressly keyed to the guidelines criteria. Chapter 18 has added yet another subsection which seems to be targeted to the parole agency which chapter 18 favors retaining:

> (f) The format of the presentence report should be designed with a view to the likelihood of its use by dispositional agencies other than the sentencing court that are dependent on the information developed at sentencing. In turn, the report should also apprise the sentencing court of the likely impact of any guidelines utilized by the agency administering early release upon the case of the offender before the court.

These additions were motivated by several factors. First, the recommended guideline system requires careful integration of the data gathered with the criteria specified in the guidelines. Second, it was considered essential that the probation officer make an independent evaluation of the offense

and all aggravating as well as mitigating factors. A third consideration was that the "general retreat from a rehabilitative model" which has occurred since the first edition necessitates reconsideration of the nature and scope of the presentence inquiry.

Part VI, pertaining to sentencing procedures, requires only brief mention regarding the changes between the first and second editions. The most significant substantive revisions occur in standard 18-6.4 which covers the sentencing proceeding, which is to be held "[a]s soon as practicable after the determination of guilt and the examination of any presentence reports." Basically, the revisions are designed to incorporate minimum procedural standards for the sentencing hearing. Standard 18-6.4 also provides for a hearing—not to become a minitrial—on "all material factual disputes arising out of any presentence reports or the evidentiary proffers of the parties." Another substantive modification is the suggestion in standard 18-6.4(c) that the court use "the preponderance of evidence" standard on all controversial issues, although standard 18-6.5 adopts a more rigorous "clear and convincing" evidence standard for sentencing hearings involving exceptional offenders subject to special long-term guidelines.

Part VII covers standards dealing with "Further Judicial Action," such as authority to reduce sentences,[116] modification of sentences not involving confinement or involving partial confinement;[117] modification of sentences involving fines, nonpayment, or other violations of sanctions;[118] and finally, revocation of probation.[119] The last mentioned is new, incorporating applicable standards from the first edition probation standards, but containing substantial modifications to accommodate the United States Supreme Court decision of *Gagnon v. Scarpelli*,[120] which came some years after the first edition. In brief, this case extends to probation revocations the same procedure made mandatory for parole revocations by *Morrissey v. Brewer*.[121]

The final segment of chapter 18 is Part VIII, entitled "Development of Sentencing Criteria," which continues the first edition endorsement of sentencing councils, but modifies the standard to indicate they should fill a role as a "useful supplement" to the guideline drafting agency.

XIV. Chapter 20—Appellate Review of Sentences

The first edition was given final approval by the House of Delegates in February 1968. The second edition, represented by this chapter and bearing the same title, was approved in August 1978, with three major policy or substantive changes. First, standard 20-1.1(b) and (d) provided for appeal of sentences by either the prosecutor or the defendant, or both. Furthermore, the power to initiate prosecution appeals was reserved in an officer with statewide responsibility for the administration of criminal justice. Second,

116. *Id.* § 18-7.1.
117. *Id.* § 18-7.3.
118. *Id.* § 18-7.4.
119. *Id.* § 18-7.5.
120. 411 U.S. 778 (1973).
121. 408 U.S. 471 (1972).

standard 20-2.1 modified the position in the first edition by eliminating the provision that the highest court in a three-tiered court system should not review appeals of sentences. Third, standard 20-3.3(b) prohibited a sentencing review court from imposing a harsher sentence than that appealed from when the defendant alone appeals; such increases, permitted by the first edition, were eliminated as a counterbalance to the change in standard 20-1.1 permitting prosecution appeals designed to seek an increase in sentences deemed too lenient. However, on February 4, 1980, the House of Delegates, at the initiation of the Section of Corporation, Banking and Business Law, approved a resolution opposing government appeal of sentences on the ground that they are too lenient;[122] thus, the 1978 approval of the change in standard 20-1.1(b) and (d) was reversed, and the second edition has been revised to reflect that.

In the remaining analysis of this chapter, we will take a closer look at the major changes that had been proposed, and also examine the overall philosophy and thrust of the concept of appellate review of sentences during the decade between editions.

The premise upon which the first edition was based remains as firm as ever for the second edition. The goal of the chapter is to remedy the disparity between the substantial procedural protections afforded defendants in the guilt determination phase of the trial and the traditionally weaker protections available in the sentencing phase.

The standards emphasize that a system of sentence review would provide a means by which grossly excessive sentences can be corrected. Sentence review would also force the important sentencing decisions more into the open, thus exposing errors and at the same time building a needed base for the prevention of future mistakes. More importantly, such a system would help greatly to eliminate many needless technical appeals which, absent a system of sentence review, are all too often a covert attempt to induce reversals to rectify unduly harsh sentences.

Part I enunciates the general principles. It was here that the changes in standard 20-1.1 were addressed. The first edition took no official position on the matter of government appeal of sentences; however, in the commentary, there is indication that both the task force which drafted the standards and the Special Committee which completed the drafts entertained doubts and even some more certain feelings that there might be constitutional problems based on double jeopardy.[123]

The restrictive portion enunciated in standard 20-1.1(d) of the second edition was designed to place the power to authorize a prosecution appeal in someone other than the prosecutor who tries the case; thus it would provide a safeguard against the possibility of a retaliatory cross-appeal by the government on the sentence which might create an undesirable cloud on a defendant's decision whether to seek review of the conviction itself. This restriction was analogous to the Senate version of the proposed Federal

122. Report with Recommendations to ABA House of Delegates, 1980 Midyear Meeting, Report 119; Summary of Action of the ABA House of Delegates, 1980 Midyear Meeting 13.

123. STANDARDS (1st ed. 1968), *supra* note 45, APPELLATE REVIEW OF SENTENCES 3, 56-57.

Criminal Code, then undergoing consideration in the Congress, which would allow the United States to appeal a sentence only if the Attorney General or a designee authorized it in a specific case.[124]

On August 6, 1979, the United States Court of Appeals for the Second Circuit held in the case of *United States v. DiFrancesco*[125] that prosecution appeal of a sentence under the Organized Crime Control Act violated the double jeopardy provisions of the constitution.[126] Notwithstanding the recommendation of the Standing Committee to defer action until the Supreme Court disposed of the *DiFrancesco* case[127] which it had accepted on certiorari,[128] the House of Delegates in February 1980 approved a resolution which "as a matter of principle, opposes government appeal of sentences on the grounds that they are too lenient."[129] Accordingly, paragraphs (b) and (d) of standard 20-1.1 have been revised.

Interestingly, on December 9, 1980, the Supreme Court decided the *DiFrancesco* case, reversing the Second Circuit and holding that government appeal does not violate the double jeopardy clause of the fifth amendment.[130]

In connection with the issue of prosecution appeals, it is appropriate to consider the change in the second edition relating to the powers of the reviewing court. Standard 20-3.3(b) provides that when an appellate court reviews a sentence on appeal by a defendant, the court should not be permitted to impose a sentence more severe than the sentence appealed from. Similarly, if a reviewing court remands such a case for purposes of resentencing, the trial court must not impose a sentence more severe than the sentence originally imposed.

The first edition provided that a power to increase sentences should exist in defendant appeals, the rationale being that it is as appropriate to correct an excessively low sentence as an excessively high one. However, when the second edition was being formulated, and the decision was made to include provision for government appeal, a corollary decision was also made to eliminate the first edition provision on increases when only the defendant appeals. These two changes, however, were not made interdependent; thus, when the ABA reversed the change permitting prosecution appeals, the change in standard 20-3.3(b) remained. Standard 20-3.3(b) would not bar an increase in the sentence if the prosecution had properly taken an appeal on grounds other than leniency, such as, for example, that the sentence is invalid as a matter of law.

The remaining change in chapter 20 which merits consideration occurred in standard 20-2.1, which refers to the reviewing court. It now provides: "Each court that is empowered to review the conviction should also

124. S. 1722, 96th Cong., 1st Sess. (1979).
125. 604 F.2d 769 (2d Cir. 1979), *rev'd*, 449 U.S. 117 (1980).
126. *Id.* at 786.
127. Report with Recommendations to ABA House of Delegates, 1980 Midyear Meeting, Report 111.
128. 444 U.S. 1070 (1980).
129. *Id.*, Report 119.
130. United States v. DiFrancesco, 449 U.S. 117 (1980).

be empowered to review the disposition following conviction. Specialized courts should not be created to review the sentence only." Eliminated from the first edition was the suggestion of precluding appellate review by the highest court in jurisdictions having a three-tiered court system. The reasoning for the change is that a prime objective of appellate review of sentences is to reduce disparity by developing a uniform approach within jurisdictions. As a practical matter, where a jurisdiction has intermediate appellate courts, the likelihood of sentence review being exercised by the highest court would be minimal; still, it was believed beneficial to permit the prerogative to remain.

XV. CHAPTER 21—CRIMINAL APPEALS

The first edition of the standards on Criminal Appeals was approved in August 1970; the second was approved in August 1978. The appeal stage in the criminal process had received little intensive consideration when the first edition *Standards* were formulated. In the eight years between editions, criminal appeals occupied a much greater position in the workload of appellate courts. The revisions in chapter 21 reflect the byproducts of this increased prominence of criminal appeals. Nonetheless, the substantive changes required were comparatively few, and even those did not warrant disturbance of the fundamental norms pioneered in the first edition.

The threshold standard is standard 21-1.1, which affirms unconditionally the right of convicted criminal defendants to one level of appeal; however, as modified in the second edition, standard 21-1.1(b) adds the phrase "[o]rdinarily a decision to take an appeal is made by the defendant" to the single statement of the first edition that "[a]n appeal is not a necessary and integral part of every conviction." There may be some categories of criminal convictions in which appellate review is required by interests of society deemed to transcend choices of the defendants. For example, the apparent trend in death penalty statutes is to include provisions for automatic appeal.[131]

It needs to be emphasized, however, that the concept of elective appeal in the standard presupposes that such an election will be predicated on reasonably arguable, rather than frivolous, grounds. There is general acceptance today that too many appeals are being taken without a reasonable basis. Such problems are addressed in other parts of chapter 21.

Standard 21-1.3, covering limitations on defendants' appeals, final judgments, and interlocutory appeals, contains substantive changes. It recognizes a wider range of issues on which interlocutory appeals may be proper. Use of interlocutory appeals is a difficult matter in any context, but there are special aspects of the problem in criminal cases. In general, the standard adheres to the principle that it is preferable to complete proceedings in the trial court before questions are taken to a higher court. The standard recog-

131. In its decision upholding the constitutionality of recently enacted statutes authorizing imposition of the death penalty, the Supreme Court of the United States emphasized, as one factor, the safeguard of automatic appeal in those acts. Gregg v. Georgia, 428 U.S. 153, 204-06, 222-24 (1976); Proffitt v. Florida, 428 U.S. 242, 258-59 (1976).

nizes three categories of decisions as meriting exceptions to this general principle: 1) where the defendant's rights can be vindicated only through interlocutory appeal, such as to avoid double jeopardy or to have a review of an adverse decision as to bail pending trial; 2) where questions exist concerning the competence of the trial court to hear a pending case; and 3) where trial courts want to certify questions they deem worthy of appellate review before trial. In the view of this standard, none of these exceptions carries the concept of interlocutory appeal as a matter of right; rather, such should be discretionary with the appellate court.

The standard continues to oppose interlocutory appeals in a fourth category of issues commonly decided by pretrial rulings in trial courts. This provision has been made more explicit in the second edition by standard 21-1.3(c) which states as follows:

> Where the only contested issues in a prosecution can be raised and determined by decisions on pretrial motions, such as motions to suppress evidence, motions to exclude confessions, and motions challenging the sufficiency of the charging papers to state an offense, a procedure should be established to permit entry of a final judgment of conviction, on the basis of a guilty plea or a stipulation of the facts necessary for conviction, without foreclosing subsequent appeals on the contested issues.

Standard 21-1.4 pertains to prosecution appeals and contains a valuable modification to reflect clarification by recent Supreme Court cases in the application of the double jeopardy clause. This modification occurs in paragraph 21-1.4(a) to make clear that appeal by the prosecution is proper on certain trial court rulings whether made before trial or after the fact-finding process of the trial is concluded. The timing of the trial court's decision should not control appealability. As long as the procedure does not raise constitutional questions under the double jeopardy clause of the constitution, appeal by the prosecution should be permitted. Several United States Supreme Court opinions subsequent to the first edition have been incorporated in the modifications to subsection (a).[132]

Standard 21-2.3 covers unacceptable inducements and deterrents to taking appeals. Paragraph (b) is new and contains substantive changes. It enumerates the following as examples of unacceptable inducements for defendants to appeal:

> (i) absence of any risk that a financial obligation may be imposed on an appellant who pursues a frivolous appeal;
> (ii) automatic release from custody, on bail or recognizance, following a sentence to a term of confinement; and
> (iii) automatic detention of the appellant who is confined pending appeal in a facility substantially different in quality and regimen from those in which inmates serving sentences are normally held.

New subparagraph (i) was intended to reflect a growing realization that

132. *See, e.g.*, Serfass v. United States, 420 U.S. 377 (1975); United States v. Jenkins, 420 U.S. 358 (1975); United States v. Wilson, 420 U.S. 332 (1975).

even indigent defendants may have certain financial resources with which to pay for certain services. Thus, this new provision would authorize an appellate court to assess certain costs against a defendant who, although meeting the technical eligibility for indigency, nevertheless has funds. For example, the defendant may have savings from inmate work that was compensated, and such assessment of costs or a portion may have been justified because of aspects of frivolity in his appeal. Thus, the standard is designed to confront in part at least a "nothing to lose" attitude of some indigents. The formulators of this amendment were acutely conscious that numerous Supreme Court opinions in the past decade have had the effect of substantially removing the obstacles of indigency as a constraint on criminal appeals.[133] In the wake of those decisions, the number of such appeals has risen sharply. Thus, the thrust of subparagraph (i) is to provide a counterincentive which will be consistent with the equal protection constitutional guarantees. A Supreme Court opinion in 1974 lends support to this approach.[134]

Paragraph 21-2.3(c), which enumerates examples of unacceptable deterrents to defendants' appeals, has been modified to reflect subsequent decisions of the United States Supreme Court.[135] Thus, it conforms to constraints on the sanctions on reprosecution which the Court has articulated. Defendants with substantial grounds for appeal from a conviction should not be deterred from appealing because of the possibility that if they succeed they face renewed prosecution that could result in a heavier sentence.

Standard 21-2.5 deals with release pending appeal and stay of execution. Paragraph (d) contains a substantive change designed to limit the scope of its counterpart in the first edition, and now reads as follows: "Dilatory prosecution on an appeal through acts or omissions of appellant or appellant's counsel should be grounds for termination of the release of appellant pending appeal." Even if the release was appropriate when the appeal commenced, the decision is subject to reconsideration on the above grounds, but the change in the paragraph was intended to limit terminations to cases in which fault for delay lies with the defendant or counsel representing the defendant.

XVI. CHAPTER 22—POSTCONVICTION REMEDIES

The first edition of the Postconviction Remedies Standards, approved in 1968, provided procedural guidelines in an area of great and increasing need. As the introduction to that edition observes, postconviction review had become an established part of the criminal process within "the past few years." It was a byproduct, in part, of the changes in criteria governing criminal prosecutions wrought by the Supreme Court of the United States.

133. *See, e.g.*, Draper v. Washington, 372 U.S. 487 (1963); Douglas v. California, 372 U.S. 353 (1956); *cf.* Ross v. Moffitt, 417 U.S. 600 (1974) (state need not provide appeal for indigents and if appeal is provided for, state does not necessarily have to provide counsel).

134. Fuller v. Oregon, 417 U.S. 40 (1974).

135. *See, e.g.*, Blacklege v. Perry, 417 U.S. 21 (1974); North Carolina v. Pearce, 395 U.S. 711 (1969).

The standards in the second edition, approved in 1978, are substantially similar to the originals, but they enjoy a considerable body of support from their decade in the marketplace. As we examine chapter 22, we shall see that there have been some noteworthy improvements made, some of substantive dimensions, and some primarily designed to clarify or emphasize principles already in the first edition.

Before examining specific changes, an overview of the scope of this segment of standards might be helpful. First and foremost, these particular standards are intended to be purely procedural, as distinguished from any attempt to articulate either substantive criminal law or related principles of constitutional law. Thus, one should not expect to find in either the first or second editions any effort to define the grounds for postconviction relief.

Another basic concept in the *Standards* is that the procedure should be capable of handling all postconviction claims in a single form. Yet the *Standards* do not recommend that all postconviction litigation be consolidated in a single statewide court, or that an officer of the government with statewide jurisdiction need represent the respondent. The *Standards* aim for the principle of finality, and, to help achieve that, the *Standards* contain guidelines to prevent abuse of process, and to provide for denial of relief when abuse is proved.[136]

Finally, the standards articulate guidelines for preparation of applications for postconviction relief and for resources available to applicants, for standardized application forms, for helping to ensure against false applications, and for guiding courts as to imposition of financial liability on applicants in cases where the applicants are adjudged to have taken undue advantage of postconviction remedies.

Highlights of the changes made in chapter 22 will now be addressed, together with the rationale prompting them.

Standard 22-1.3 pertains to the proper parties to postconviction proceedings, one of whom is referred to as the respondent, defined in standard 22-1.3(a) as "the entity in which name the original prosecution was brought, for example, State, People, Commonwealth, or the United States of America." Paragraph (b) has been modified to permit either a statewide officer or the local prosecutor to appear as counsel for the respondent. The first edition fixed this responsibility in all cases on a statewide official, who might in turn delegate functions to local prosecutors.

Standard 22-1.4, dealing with jurisdiction, venue, and assignment of judges, has been revised in paragraph (a) to permit proceedings for postconviction relief to be vested in any trial court of general criminal jurisdiction, as opposed to the single statewide court called for in the original *Standards*.

Standard 22-2.2 covers prematurity of applications for postconviction relief, and postponed appeals. Subsection (a) has been revised to permit flexibility in the time for processing an appeal from the prosecution phase of a case when an application for postconviction relief is filed before such appeal has been concluded. This change is designed to encourage consolidation of

136. STANDARDS, *supra* note 1, at 22.5.

postconviction claims and claims of error in proceedings leading to conviction.

Standard 22-3.1 pertains to preparation of applications for postconviction relief, as well as to resources available to applicants. The first edition version of this standard accepted as a premise that most potential applicants for postconviction relief would be confined in prison and would be compelled by circumstances to commence proceedings without assistance of counsel and with only limited legal materials. The revision proceeds from the entirely different premise that counsel should be available, either through attorneys practicing as part of in-prison programs or through supervised law students. The fundamental principle of the standard has been broadened to cover the situation of persons not in confinement, although the need for legal services is most acute within custodial institutions.

Despite numerous decisions, the Supreme Court has not established a right to counsel beyond the first level of appellate review of convictions; thus, there is no right to counsel recognized under the fourteenth amendment for inmates, or for persons not in custody, who contemplate postconviction proceedings.[137] Nonetheless, standard 22-3.1 concludes that there should be a system supported by public funds to make professional advice and professional assistance available.

Recommendations for publicly supported legal assistance notwithstanding, the standards provide in 22-4.7(a)(iii) that the applicant bear some risk through the potential of a postjudgment assessment of costs or the like, which would serve to deter a prospective applicant from indiscriminate filing in disregard of professional advice of the type contemplated. The power of the court to assess costs represents a change in the second edition. With the emerging pattern of compensating inmates for work in prisons, even those who otherwise lack financial resources can be held accountable for some part of the postconviction litigation expense. A comparable principle is contained in the chapter on Criminal Appeals.[138]

Standard 22-5.3(a), concerned with processing appeals, adopts the philosophy of the revised chapter on Criminal Appeals[139] that there should be a diversified and flexible processing of appellate cases. The standard encourages appellate courts to consider all pertinent legal issues on their merits insofar as possible, in order to reach a final determination of the entire criminal case.

Standard 22-6.1 deals with finality of the judgment of conviction and sentence. The original standard concerning abuse of process has been modified here to take into account criminal procedure rules that regulate the time for presenting certain defenses or objections in the course of prosecution proceedings. Where an applicant raises in a postconviction proceeding an issue which might have been, but was not, presented in a timely manner in the proceeding leading to judgment of conviction, the burden is placed on the

137. *See* Bounds v. Smith, 430 U.S. 817 (1977); Ross v. Moffitt, 417 U.S. 600 (1974); Younger v. Gilmore, 404 U.S. 15 (1971); Johnson v. Avery, 393 U.S. 483 (1969).

138. STANDARDS, *supra* note 1, § 21-2.3(b)(i).

139. *Id.* §§ 21-3.1-3.4.

applicant to show cause for the failure to comply with the rules of procedure.[140]

The final standard in chapter 22 involves a change which deserves mention because of some intervening case law. Standard 22-6.3 covers renewal of prosecution against a successful postconviction applicant. Paragraph (b) provides: "Credit should be given toward service of the minimum and maximum terms of any new prison sentence for time served under a sentence successfully challenged in a postconviction proceeding."

If the original sentence under the invalidated judgment was for less than the statutory maximum applicable to the renewed prosecution, the question arises whether a more severe sentence can be imposed. The prophylactic rule of *North Carolina v. Pearce*[141] largely controls this question. Thus, the provision in the original standard for a ceiling on sentences has not been carried forward into the second edition.

CONCLUSION

As has been demonstrated, the second edition of the *ABA Standards for Criminal Justice* is marked by both continuity and change. Many of the standards are either unchanged or changed only stylistically. On the other hand, many of the second edition standards reflect major substantive changes. The changes are due, in large part, to the case law between the first and second editions.

Despite what are hoped to be major advances in the *Criminal Justice Standards*, we do not pretend that they are in any sense the last word in criminal justice. Just as the first edition was revised to benefit from advances between the first and second editions, the second edition will, no doubt, eventually be supplanted by a third. The best we can hope for is that, in practice, the implementation of the second edition *Standards* results in the desired improvements, and that our experience with the second edition *Standards* provides a firm base from which to design a better third edition.

140. *Id.* at 22.62-.63.
141. 395 U.S. 711 (1969).