

AMERICAN BAR ASSOCIATION PROJECT ON
STANDARDS FOR CRIMINAL JUSTICE

STANDARDS RELATING TO

*The Prosecution Function
and
The Defense Function*

This volume contains the Tentative Draft of March 1970 and the Supplement of March 1971. The standards in the Tentative Draft, with amendments as shown in the Supplement, were approved by the ABA House of Delegates in February 1971, and may be cited as "Approved Draft, 1971."

INSTITUTE OF JUDICIAL ADMINISTRATION

AMERICAN BAR ASSOCIATION PROJECT ON
STANDARDS FOR CRIMINAL JUSTICE

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*The Prosecution Function
and
The Defense Function*

Amendments recommended by the

SPECIAL COMMITTEE ON STANDARDS FOR
THE ADMINISTRATION OF CRIMINAL JUSTICE

William J. Jameson, Chairman

and concurred in by the

ADVISORY COMMITTEE ON THE PROSECUTION AND
DEFENSE FUNCTIONS

March 1971

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

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Office of Criminal Justice Project
Institute of Judicial Administration
40 Washington Square South
New York, New York 10012 (212) 777-1510

Proposed Revisions of Standards with Commentary

Introduction

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

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

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

THE PROSECUTION FUNCTION

PART I. GENERAL STANDARDS

1.1 The function of the prosecutor

(a) The office of prosecutor, as the chief law enforcement official of his jurisdiction, is an agency of the executive branch of government which is charged with the duty to see that the laws are faithfully executed and enforced in order to maintain the rule of law.

....

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

Commentary

The addition to subsection (a) brings forward into the first general standard a notion already expressed in section 3.1(a).

In subsection (e) the change in the first sentence reflects the fact that some of the conduct denoted “unprofessional conduct” is already the subject of disciplinary rules in the Code of Professional Responsibility, as well as the fact that other conduct so designated by the standards is being recommended for incorporation in the Code.

The amendments to the third sentence of subsection (e) avoid the implication that disciplinary proceedings could be predicated upon violation of a standard, in lieu of a Disciplinary Rule.

1.2 Conflicts of interest.

[(a)] A prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties. In some in-

stances, as defined in the Code of Professional Responsibility, his failure to do so will constitute unprofessional conduct.

[(b) A conflict of interest may arise when, for example,

(i) a law partner or other lawyer professionally associated with the prosecutor or a relative appears as, or of, counsel for a defendant;

(ii) a business partner or associate or a relative has any interest in a criminal case, either as a complaining witness, a party or as counsel;

(iii) a former client or associate is a defendant in a criminal case.]

Commentary

The addition to subsection (a) alerts the prosecutor to the fact that there are some conflict-of-interest situations which violate the Disciplinary Rules. See ABA Code DR 5-101(A).

Subsection (b) is deleted because it carries the misleading implication that it is exhaustive. It may appropriately be regarded, instead, as commentary.

1.3 Public statements.

(a) . . .

(b) The prosecutor should comply with the ABA Standards on Fair Trial and Free Press. In some instances, as defined in the Code of Professional Responsibility, his failure to do so will constitute unprofessional conduct.

Commentary

The addition to subsection (b) alerts the prosecutor to the fact that some of the Fair Trial-Free Press standards have been incorporated as disciplinary rules in the Code of Professional Responsibility. See ABA Code DR 7-107.

PART II. ORGANIZATION OF THE PROSECUTION FUNCTION

2.3 Assuring high standards of professional skill.

(a) . . .

(b) Wherever feasible, the offices of chief prosecutor and his staff should be fulltime occupations.

(c) . . .

[(d) Except when seeking re-election, a prosecutor who is a candidate for elective office should resign, or at least obtain leave of absence during the period of a political campaign, and should do so as soon as he announces his candidacy.]

[(e)] (d) In order to achieve the objective of professionalism and to encourage competent lawyers to accept such offices, compensation for prosecutors and their staffs should be commensurate with the high responsibilities of the office and comparable to the compensation of their peers in the private sector.

[(f) Where the prosecutor is an elected official, it is desirable that the statutes providing for election require that the candidates run without party designation.]

Commentary

The amendment to subsection (b) makes the standard more flexible, consistent with the fact—recognized in section 2.2(a)—that it would be an improvement if units of prosecution could be redesigned to warrant even one full time prosecutor.

The deletion of subsection (d) reflects the recognition that the standard, as originally drafted, may impose undue hardship upon a prosecutor because he must declare himself as much as a year in advance of the general election, so that, unless he has independent financial resources, it would be virtually impossible for him to take a leave of absence during the entire time he is campaigning for office. Moreover, in some places, the size of the prosecutor's office may be such that absence of the prosecutor would result in the office being virtually untended. The Special Committee believes, therefore, that,

while a prosecutor should always avoid situations in which he may be tempted to abuse his office, this matter, on balance, should be left subject to the general standard on conflict of interest (section 1.2).

Subsection (f) is deleted because political conditions vary too greatly from jurisdiction to jurisdiction to justify a national standard on this subject.

2.8 Relations with the courts and the bar.

...

(c) [The prosecutor should not] It is unprofessional conduct for a prosecutor to engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before him [, except that evidentiary material may be submitted to the judge for his inspection in camera, upon notice to defense counsel, when such inspection is authorized by law].

...

Commentary

The proposed change brings the standard in line with the Code of Professional Responsibility, which already condemns unauthorized ex parte discussions. See ABA Code DR 7-110(B). Since the exception stated in the standard is only one of several, it has been deleted, in order to focus on the issue of whether the discussion is authorized by the Disciplinary Rule.

2.9 Prompt disposition of criminal charges.

(a) [It is unprofessional conduct for a] A prosecutor should not intentionally [to] use procedural devices for delay for which there is no legitimate basis.

(b) ...

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

Commentary

The change in subsection (a) reflects the view that the standard would be too difficult to enforce as a disciplinary rule, and that the disciplinary rule to be relied upon for enforcement should be the prohibition against misrepresentations to the court. The amendment to subsection (c) makes it clear that culpability is required for imposition of a disciplinary sanction.

PART III. INVESTIGATION FOR PROSECUTION DECISION

3.1 Investigative function of prosecutor.

(a) . . .

(b) It is unprofessional conduct for a prosecutor knowingly to use illegal means to obtain evidence or to employ or instruct or encourage others to use such means.

(c) A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct for the prosecutor to advise any person or cause any person to be advised to decline to give [information] to the defense information which he has the right to give.

. . . .

(f) Whenever feasible, the prosecutor should avoid interviewing a prospective witness except in the presence of a third person unless the prosecutor is prepared to forego impeachment of [a] the witness by the prosecutor's own testimony as to what the witness stated in [an] the interview or to seek leave to withdraw from the case in order to present his impeaching testimony.

Commentary

The addition of "knowingly" to subsection (b) makes it clear that culpability is required for imposition of a disciplinary sanction.

The amendment to the first sentence of subsection (c) clarifies its scope. The amendment to the second sentence takes into account the

fact that there may be occasions when it will be the duty of the prosecutor to advise a person that he should not give information to the defense, *e.g.*, when the person is a government investigator or dissemination of the information is restricted by law.

The addition to subsection (f) constitutes recognition of the fact that in very small prosecution offices the prosecutor may have to take the risks which the standard would have him avoid.

3.6 Quality and scope of evidence before grand jury.

....

(e) **The prosecutor should not compel the appearance of a witness before the grand jury whose activities are the subject of the inquiry if the witness states in advance that if called he will exercise his constitutional privilege not to testify, unless the prosecutor intends to seek a grant of immunity according to the law.**

Commentary

These amendments are intended for clarification of the scope of the standard—that the prosecutor may subpoena the witness so long as he does not compel the witness's appearance before the grand jury and that he may even compel the witness's appearance there if he intends to seek a grant of immunity.

3.9 Discretion in the charging decision.

(a) [In addressing himself to the decision whether to charge, the prosecutor should first determine whether there is evidence which would support a conviction.] **It is unprofessional conduct for a prosecutor to institute or cause to be instituted criminal charges when he knows that the charges are not supported by probable cause.**

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence may exist [exists] which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;
- (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
- (iv) possible improper motives of a complainant;
- [(v) prolonged non-enforcement of a statute, with community acquiescence;]
- [vi](v) reluctance of the victim to testify;
- [vii](vi) cooperation of the accused in the apprehension or conviction of others;
- [viii](vii) availability and likelihood of prosecution by another jurisdiction.

....

Commentary

The change in subsection (a) incorporates the language of the Code of Professional Responsibility, as set forth in ABA Code DR 7-103(A).

The deletion of subparagraph (v) from subsection (b) is because the justification for exercise of discretion not to prosecute which it provides could be construed to go beyond the cases envisioned by the Advisory Committee, *e.g.*, obsolete "blue" laws, to embrace matters which amount to dereliction of duty, *e.g.*, illegal gambling.

3.11 Disclosure of evidence by the prosecutor.

(a) It is unprofessional conduct for a prosecutor to fail to [disclose] make timely disclosure to the defense [at the earliest feasible opportunity] of the existence of evidence, known to him, [which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment] supporting the innocence of the defendant. He should disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment at the earliest feasible opportunity.

....

Commentary

The amendments conform this standard to DR 7-103(B) of the Code of Professional Responsibility. The first sentence sets a more limited scope to the evidence which must be disclosed and the timing of disclosure and emphasizes culpability, because of the disciplinary sanction attached. The second sentence retains the higher standard of the original on both timing and scope, but not at the level where failure to comply would be unprofessional conduct.

PART V. THE TRIAL

5.6 Presentation of evidence.

(a) It is unprofessional conduct for a prosecutor knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

....

Commentary

The amendment makes it clear that the obligation not to rely upon false evidence is a continuing one.

5.7 Examination of witnesses.

....

(c) [It is unprofessional conduct for a] A prosecutor [to] should not call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege. In some instances, as defined in the Code of Professional Responsibility, doing so will constitute unprofessional conduct.

(d) 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.

Commentary

The amendment to subsection (c) makes clear that this conduct is at the level of unprofessional conduct only in those jurisdictions and in those situations in which an inference may not properly be drawn from the claim of privilege. It conforms the standard to ABA Code DR 7-102(A)(8) and DR 7-106(C)(7).

The addition to subsection (d) clarifies its scope and recognizes the necessity for culpability in a standard whose violation may result in disciplinary sanction.

THE DEFENSE FUNCTION

PART I. GENERAL STANDARDS

1.1 Role of defense counsel; function of standards.

...

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

Commentary

The purpose of this amendment is the same as that of section 1.1 of The Prosecution Function.

1.2 Delays; punctuality.

(a) ...

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

(c) [It is unprofessional conduct for] Defense counsel should not intentionally [to] use procedural devices for delay for which there is no legitimate basis.

(d) ...

Commentary

The purpose of these amendments is the same as those of section 2.9 of The Prosecution Function.

1.3 Public statements.

(a) . . .

(b) The lawyer should comply with the ABA Standards on Fair Trial and Free Press. In some instances, as defined in the Code of Professional Responsibility, his failure to do so will constitute unprofessional conduct.

Commentary

The purpose of this amendment is the same as that of section 1.3 of The Prosecution Function.

PART II. ACCESS TO COUNSEL

2.3 Prohibited referrals.

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

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

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

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

Commentary

See Commentary to section 2.4, *infra*.

2.4 Recommendation of professional employment.

The lawyer should be alert to and comply with the requirements of the Code of Professional Responsibility regarding recommendation of professional employment.

Commentary

The deletions in section 2.3 and the addition of this section are made for the purpose of deferring to the more comprehensive treatment of the subject in the Code of Professional Responsibility, DR 2-103.

PART III. LAWYER-CLIENT RELATIONSHIP

3.3 Fees.

....

(c) It is unprofessional conduct for a lawyer to [overreach his client in setting the fee] enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

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

(e) It is unprofessional conduct [to undertake the defense of a criminal case on the understanding that the fee is contingent in any degree on the outcome of the case] for a lawyer to enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

Commentary

These changes conform the standards to the provisions of the Code of Professional Responsibility without changing their substance. See ABA Code DR 2-106(A) and (C), 2-107, 3-102(A).

3.4 Obtaining [literary] publication rights from the accused.

It is unprofessional conduct for a lawyer, [consulted by or representing an accused to negotiate with the accused to secure, either as part of his compensation or as a condition of the employment, right to publish books, plays, articles, interviews or pictures relating to the case] prior to conclusion of all aspects of the matter giving rise to his employment, to enter into any agreement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

Commentary

This amendment conforms the standard to the language of the Code of Professional Responsibility, in DR 5-104(B).

3.5 Conflict of interest.

(a) ...

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

(c) In accepting payment of fees by one person for the defense of another, a lawyer should be careful to determine that he will not be confronted with a conflict of loyalty since his entire loyalty is due