

PROSECUTORS

Both the American Bar Association (ABA) and the National District Attorneys Association (NDAA) have published prosecution standards. Among the standards set forth are:

- a) The primary function of the prosecution is to see that justice is done, not merely to convict. (NDAA, *National Prosecution Standards: Second Edition*, "The Prosecution Function" Sec. 1.1; ABA Criminal Justice Section, "Prosecution Function Std. 3-1.2(c)
- b) The prosecutor is the advocate for the people and must place societal rights and public safety paramount, while at the same time protect the rights of the individual. (NDAA, Sec. 1.3)
- c) The prosecutor must exercise sound discretion in the performance of his or her duties. (ABA Std.3-1.2(b))
- d) An important function of the prosecutor is to seek reform and improvement of the administration of justice. When inequalities or injustice in the justice system come to the attention of the prosecutor, he or she should initiate efforts to correct the inequality or injustice. (ABA. Std. 3-1.2{d})
- e) At all times a prosecutor should know and abide by the all codes of professional conduct, ethical codes, and the law applicable in his or her jurisdiction. (NOAA, Sec. 1.5; ABA, Std. 3-1.2(e))
- f) Whenever possible the office of prosecutor and staff should be full-time occupations. (NDAA Sec. 1.4; ABA Std. 3-2.3(b))
- g) Adequate funding for competitive compensation, expert assistance, continuing legal education, and other resources should be provided. (ABA Std. 3-2.3(e), Std. 3-2.4, Std. 3-2.6)
- h) Training programs should be established within the prosecutor's office, and continuing legal education programs should be expanded. (ABA Std. 3-2.6)
- i) Each prosecutor's office should develop a statement of general policies to guide the exercise of prosecutorial discretion and procedures of the office. Such standards and procedures should be maintained in an office handbook, and except for provisions marked "confidential", should be available to the public. (ABA Std. 3-2.5)
- j) The governor or other elected official should be empowered by law to or substitute special counsel in the place of local prosecutor in a particular case upon a public finding that this is required for the protection of public interest. (ABA Std. 3-2.10(b))

The ABA Criminal Justice Section Standards. "Prosecutor Function" (1992) is at http://www.abanet.org/crimjust/standards/pfunc_blk.html

The *National District Attorneys Association, National Prosecution standards: Second Edition* is at http://www.ndaa.org/pdf/ndaa_natl_prosecution_standards_2.pdf

PROSECUTOR

Links

National District Attorneys Association (NDAA): <http://www.ndaa.org/>

National College of District Attorneys: http://www.ndaa.org/ncda/ncda_home.php

Texas District and County Attorneys Association (TDCAA) <http://www.tdcaa.com/>

GENERAL PRINCIPLES

.Standard 11.1.1 Objectives of pretrial procedures

- (a) Procedures prior to trial should be consistent with the constitutional rights of the defendant:
 - (i) promote a fair and expeditious disposition of the charges, whether by diversion, plea, or trial;
 - (ii) provide the defendant with sufficient information to make an informed plea;
 - (iii) permit thorough preparation for trial and minimize surprise at trial;
 - (iv) reduce interruptions and complications during trial and avoid unnecessary and repetitive trials by identifying and resolving prior to trial any procedural, collateral, or constitutional issues;
 - (v) minimize the procedural and substantive inequities among similarly situated defendants;
 - (vi) effect economies in time, money, judicial resources, and professional skills by minimizing paperwork, avoiding repetitive assertions of issues, and reducing the number of separate hearings; and
 - (vii) minimize the burden upon victims and witnesses.

- (b) These needs can be served by:
 - (i) full and free exchange of appropriate discovery;
 - (ii) simpler and more efficient procedures; and
 - (iii) procedural pressures for expediting the processing of cases.

National Prosecution Standards

Second Edition

National District Attorneys Association Alexandria, Virginia

(1991)

Functions/Relations

THE PROSECUTION FUNCTION

1.1 Primary Responsibility

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

1.2 Civil/Criminal Jurisdiction

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

1.3 Societal Rights

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

1.4 Full-Time/Part-Time

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

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

1.5 Rules of Conduct

At a minimum~ the prosecutor should abide by all applicable provisions of the Rules of Professional Conduct or Code of Professional Responsibility as adopted by the state of his jurisdiction.

1.6 Inconsistency in Rules of Conduct

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

COMMENTARY

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

The standard recognizes that there are many part-time prosecutors in the United States, both elected prosecutors and staff attorneys. This is an economic fact of life created by the overriding benefit of local accountability and control. Where the position is part-time, it is usually because the sparse population, geographic size of the jurisdiction, budget, and caseload do not warrant that the

position be approached as a full-time position. The position of the standard is that the office be approached on a full-time basis, *insofar as that is possible in any given jurisdiction*. While the standard favors the concept of a full-time position (resulting in reduced potential for conflicts of interest, greater availability, and increased accountability), the existence of the position as part-time due to the considerations enumerated, is not forbidden by the standard. The standard merely means that the concept of full-time can be considered a goal where such is not presently feasible.

Whether full-time or part-time, the position should be approached as a career and not as a stepping-stone or sideline. This means that the prosecutor is prepared to bring to his public duties an orientation of *primacy*. No matter what other activities the prosecutor is involved in, his public duties come first. The fostering of such an attitude will not only serve the immediate public interest but also the prosecutor's professional responsibility in resolving problems that may occur where a potential conflict of interest exists.

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

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

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

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

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

Trial Act reaffirms the requirement for study of criminal justice and, in particular, calls for plans to achieve the speedy trial limits to be phased in according to the terms of the law. The statute details the required contents of each plan. Since it is clear that the reduction of trial delay remains a major problem in the 1990s, the standards urge the courts and legislatures to continue their studies to seek ways-including court rules and legislation-to solve it.

PROPRIETY OF PLEA NEGOTIATION AND PLEA AGREEMENTS

66.1 Propriety

Where it appears that the interest of the state in the effective administration of criminal justice will be served, the prosecution, while under no obligation to negotiate any criminal charges, may engage in plea negotiation for the purpose of reaching an appropriate plea agreement.

66.2 Types of Plea Negotiations

The prosecution, in reaching a plea agreement, may agree to one or more of the following dispositions, depending on the circumstances of the case:

- a. To make or not oppose appropriate recommendations concerning the sentence which may be imposed if the defendant enters a plea of guilty or *nolo contendere*; or
- b. To seek or not to oppose dismissal of an offense or offenses charged if the defendant enters a plea of guilty or *nolo contendere* to another offense or offenses supported by the defendant's conduct; or
- c. To seek or not oppose dismissal of other charges or potential charges against the accused if the defendant enters a plea of guilty or *nolo contendere*; or

d. To seek or not oppose dismissal of the offense charged, or not to file potential charges, if the accused, when counseled by his attorney) agrees not to pursue potential civil causes of action arising there from against the victim, witnesses, law enforcement agencies or personnel, or the prosecutor or his staff or agents.

66.3 Uniform Plea Opportunities

Similarly situated defendants should be afforded substantially equal plea agreement opportunities.

Commentary follows standards on page 196.

AVAILABILITY FOR PLEA NEGOTIATION

67.1 Prosecution Availability

The prosecutor should make known a policy of willingness to consult with the defense concerning disposition of charges by plea and should set aside times and places for plea negotiations. In addition to pre-trial hearings. The prosecution should be available for plea negotiations but need not enter into such discussions on the telephone and may require the setting of a definite appointment.

Commentary follows standards on page 196.

FACTORS FOR DETERMINING AVAILABILITY AND ACCEPTANCE OF GUILTY PLEA

68.1 Factors to Consider

Prior to negotiating a plea agreement) the prosecution should consider the following factors:

- a. The nature of the offense(s)
- b. The degree of the offense(s) charged;
- b. Any possible mitigating circumstances;
- c. The age, background, and criminal history of the defendant; e. The attitude and mental state of the defendant at the time of the crime, the time of the arrest, and the time of the plea discussion;
- d. Sufficiency of admissible evidence to support a verdict;
- e. Undue hardship caused to the defendant;
- f. Possible deterrent value of prosecution;
- g. Aid to other prosecution goals through non-prosecution;
- h. A history of non-enforcement of the statute violated; k. The age of the case;
- l. Unlikelihood of prosecution in another jurisdiction; m. Any provisions for restitution;
- n. The willingness of the defendant to waive his right to appeal; and
- o. The willingness of the defendant to waive (release) his right to pursue potential civil causes of action arising from his arrest, against the victim, witnesses, law enforcement agencies or personnel~ or the prosecutor Or his staff or agents, where such willingness is concurred in and recommended by the defendant's counsel.
- p. With respect to witnesses, the prosecution should consider the following:
 - (1) The availability and willingness to testify; (2) Any physical or mental impairment;
 - (3) Certainty of identification;
 - (4) Credibility of the witness;
 - (5) The witness's relationship with the defendant; (6) Any possible improper motive of the witness; (7) The age of the witness;
 - (8) Undue hardship of the witness caused by testifying.
- q. With respect to victims, the prosecution should consider those factors identified above and the following:
 - (1) The existence and extent of physical injury and emotional trauma suffered by the victim; and
 - (2) Economic loss suffered by the victim.

68.2 Unique Circumstances

The prosecution should be certain that all cases are determined individually and on their own unique facts and circumstances and not solely on the basis of a policy pertaining to the offense or the offender.

68.3 Police Input

The prosecution should examine and take into consideration the circumstances of the arrest and the attitude of the arresting officer, which may include:

- a. The time and place of the arrest; and
- b. Whether the arrest was made pursuant to a warrant, after several attempts to find the accused, or the accused surrendered individually.

68.4 Innocent Defendants

The prosecutor should always be vigilant for the case where the accused may be innocent of the offense charged.

Commentary follows standards on page 196.

FULFILLMENT OF PLEA AGREEMENTS

69.1 Prosecutor's Limits

The prosecution should not make any guarantee concerning the sentence which will be imposed or concerning a suspension of sentence; the prosecution may advise the defense of the position prosecution will take concerning disposition of the case, including a sentence that the prosecution is prepared to recommend to the court based upon present knowledge of the facts of the case and the offender (including his criminal history). If the facts known to the prosecution change materially prior to sentencing, prosecution is not bound by such representation.

69.2 Implication of Authority

Prosecution should avoid implying a greater power to influence the disposition of a case than prosecution actually possesses.

69.3 Inability to Fulfill Agreement

If the prosecution is unable to fulfill an understanding previously agreed upon in plea negotiations, the prosecution should give prompt notice to the defendant and cooperate in securing leave of court for the defendant to withdraw any plea and take such other steps as would be appropriate to restore the defendant and the prosecution to the position they were in before the understanding was reached or plea made.

69.4 Rights of Others to Address the Court

The prosecutor should make clear that he has no control over the right of the victim or arresting police officers to make statements to the court at the time of the plea or sentencing, if they wish to do so.

Commentary follows standards on page 196.

RESPONSIBILITY OF COURT

70.1 Court's Role

The trial judge may participate in plea discussions.

10.2 Acceptance of Plea

The court should accept a plea negotiated by the parties when the interest of the public in the effective administration of justice would be served.

70.3 Court's Decision on Concessions

When such a plea is tendered and the accused is questioned, the trial judge should reject or accept the plea of guilty on the terms of the plea agreement. but notwithstanding a negotiated plea, the trial judge should reach an independent decision on whether to grant charge or sentence concessions.

70.4 Rejection of Plea Agreement

The court may postpone its acceptance or rejection until it has received the results of pre-sentence investigation. If the court rejects the plea agreement, it should so advise the parties in open court and then call upon the accused to either affirm or withdraw the plea.

Commentary follows standards on page 196.

RECORD OF THE PLEA AGREEMENT

71.1 Record of Agreement

Whenever the disposition of a charged criminal case is the result of a plea agreement, the prosecutor should make the existence and terms of the agreement part of the record.

It is recommended that the defendant acknowledge the voluntary, knowing, intelligent and understanding nature of the agreement in open court. The prosecutor should maintain the reasons for the disposition in his case file.

Commentary follows standards on page 196.

CONDITIONS FOR PLEA ACCEPTANCE

72.1 Conditional Offer

Prior to reaching a plea agreement and subject to the standards herein, the prosecutor may set conditions on a plea agreement offer, such as acceptance within a specified time period which would obviate the need for extensive trial preparation.

COMMENTARY

Plea bargaining is an essential component of the administration of justice. Properly administered, it is to be encouraged

It leads to prompt and largely final disposition of most criminal cases.

Chief Justice Burger, *Santobello v. New York*, 404 U.S. 257 (1971).

The plea negotiation process, operating as an exchange of prosecutorial, defense, and judicial

concessions for pleas of guilty has never been overly popular in the United States. The basic criticisms range from constitutional infringements to the need of a more efficient criminal court system capable of handling caseloads without the use of plea agreements; but largely, the thrust of the attack can be attributed to a lack of understanding by the general public.

The plea negotiation process operates as a viable, effective tool of the criminal justice system, but still demands greater visibility to and comprehension by the general public. Long recognized by those intimately involved with criminal law as a proper disposition of a violation against accepted behavior patterns of society, the plea agreement is too often publicly viewed as a closed-door "deal" worked out between the judiciary and the defendant by the prosecutor and defense counsel. Only through concerted effort by the prosecution, the defense, and the judiciary can plea negotiation gain the stature it deserves as one of the most efficient means of criminal disposition.

The standards deal in detail with a number of issues that impact on the interests of all participants in the process of plea negotiation. The prosecutor must consider all these interests when he engages in plea negotiation. This may necessitate a variety of prosecutorial roles. He may act as an administrator trying to dispose of each case in the fastest, most efficient manner. He may act as a judge by implementing what is best for the defendant in view of the circumstances or of the particular crime. The prosecutor may act as a guardian for unprotected victims. Finally, the prosecutor may act as a legislator, granting concessions where the law may be too harsh for all defendants. In all roles except the last, the prosecutor must determine on a case-by-case basis the concessions that he will offer to defendants who plead guilty. Also, the importance of each role may vary with each case. Thus, the prosecutor combines all of these roles in varying degrees in the prosecutorial function. This is an enormous responsibility because while the prosecutor is trying to maximize the benefits of conviction without trial, he is also trying to minimize the risks of unfair results.

Whether one views plea negotiating favorably or not may depend upon how one views the overall responsibility of the prosecutor's office. There are two general schools of thought concerning the prosecutor's responsibility. In one view, generally held by the public, the prosecutor is expected to objectively evaluate the defendant's past behavior in relation to a statutory criminal code. If the defendant's behavior matches the behavior prohibited by the statute, then under this view he should be prosecuted for violation of that particular statute. The second view of prosecutorial responsibility envisions the various statutes as weapons within the criminal code. If one statute does not work, then another might be successful in encouraging an offender to negotiate a surrender. The discrepancy between the two attitudes might be described as the traditional conflict between theory and practice.

Reason dictates that the one person who can best evaluate the functioning of a system is the one who is closest to the individual cases within that system. It is there, at the individual level, where all interests interwine. It is there where the prosecutor must consider the time, the manpower of the office, available financial resources, and the specific circumstances surrounding the defendant and the alleged crime, that the prosecutor must determine whether or not to negotiate a guilty plea. Legal commentators can write a thousand articles on the subject, but the prosecutor must learn largely from experience.

Several benefits are to be noted as a result of the utilization of the system of plea negotiation. Benefits that the state receives include reduction of the overall costs of the criminal prosecution, enhancement of the administrative efficiency of the courts, and capability of devoting more prosecutorial attention to cases of greater importance. Primarily, however, negotiated pleas permit the prosecutor more time to individualize punishment with an eye toward rehabilitation of a defendant. This is particularly

true in jurisdictions where plea negotiating centers essentially on the questions of what punishment the prosecutor will recommend to the court. Whether prosecutors, in fact, take the opportunity to "individualize" punishment or merely seek to "move the calendar" may be another question. Whatever benefit or combination of benefits one considers, the point is that, from the eyes of the prosecutor and the courts, plea negotiation is presently an absolute necessity and will likely remain such well into the twenty-first century. And it should be said unequivocally that it is *not* against principles of justice to plea negotiate with the reduction of an overburdened caseload as a goal. In point of fact, such goal is part of the present and foreseeable reality.

There are, of course, benefits the prosecutor alone derives from plea negotiations. The prosecutor is usually under pressure to reduce the caseload, or at least to process more cases in less time. These demands may be attainable by reliance on plea negotiations. The standards recognize this as proper. But these negotiations should not be used merely to enhance the prosecutor's conviction record or cleanup backlogs in his office. Even though the chance of convicting a defendant before a jury may often be high, the prosecutor should seek justice with a charge equal to the offense and a sentence or punishment/rehabilitation that is in line with the charge. As the probability of conviction at trial decreases, a prosecutor often becomes increasingly receptive to conviction of the accused through a guilty plea extracted via plea negotiations but 31S a prosecutor the responsibility is for a fair conviction, not a high conviction rate or easy caseload.

With these basic principles and considerations in mind, the prosecutor of the 1990s needs no further justification for continuation of the now time-honored institution of plea negotiation.

Whereas in past decades the prosecutor may have felt compelled to justify the process, he should now devote attention to refinement and improvement of the process. These standards will help the prosecutor attain that goal.

For an analysis of civil liability issues, see the commentary to Standard 42. Screening.