

The Role of Reporter for a Law Project

by RORY K. LITTLE*

Since late 2005, I have been the Reporter for an ABA Task Force asked to propose revisions to the Criminal Justice Standards for the Prosecution and Defense Functions.¹ When first asked, I said yes, even though I really didn't know what a "Reporter" was. Except that for law projects, it is not being a journalist.² Today, five years later, I'm still not sure I know. More interestingly, perhaps, I have

* Professor of Law, University of California, Hastings College of the Law. In addition to the thanks offered in my companion essay in the *Hastings Law Journal* for this unique two-issue joint project between that journal and the *Hastings Constitutional Law Quarterly*, see Rory K. Little, *The ABA's Project to Revise the Prosecution and Defense Function Standards*, 62 HASTINGS L.J. 1113, n.* (2011), I want to particularly thank Judge Marty Marcus, Chair of the ABA Standards Committee, and Susan Hillenbrand, the Director of the ABA's Criminal Justice Standards project, for their helpful comments on this essay. Thanks also to Ryan Cunningham, Hastings '11, for his tireless research assistance, and to Jeremy Hessler for his editing assistance and patience.

1. Little, *supra* n. *.

2. This essay presumes the reader is familiar with what a "law project" is. There is no precise definition. I take "law project" to mean any organized examination of a defined legal area of law, or legal issue or set of issues. Law projects often approach their task using a collaborative, group-analysis model. The group is generally comprised of individuals from diverse perspectives within the specified topical area of law (those interested in or affected by the issue being studied)—"stakeholders" to use a current term. For the past 80 years, the American Law Institute ("ALI") has provided the most familiar model of how best to approach law projects, from an organizational as well as perhaps funding perspective. See <http://www.ali.org/index.cfm?fuseaction=projects.main>. The ABA's model—of Task Forces that generate an initial draft, then referred to a Standing Committee which revises and finalizes, and then ultimately submitted for adoption by votes of the Criminal Justice Section and the national House of Delegates—is a close second to the ALI's model in terms of familiarity and success. This may not be coincidental—when the ABA's Standards project began in 1963, the then-Director of the ALI was invited to address the ABA to discuss development of the Standards. Kenneth J. Hodson, *The American Bar Association Standards for Criminal Justice: Their Development, Evolution, and Future*, 59 DENVER L.J. 3, 6 (1981). Not all reviews of the ALI processes are positive, however. See, e.g., Bayless Manning, *Principles of Corporate Governance: One Viewer's Perspective on the ALI Project*, 48 BUS. LAW 1319 (1993) (criticizing the 15-year process leading to an 822-page "Tome").

discovered that there is virtually no literature addressing the topic.³ While one can easily find references to “the traditional role of Reporter,”⁴ one cannot find detailed or candid discussion of what the role *is*. So I use the occasion of Hastings’ two-journal compendium of articles focusing on the current drafts of revisions to the Prosecution and Defense Function Standards, to write this brief essay considering what a “Reporter” to a law project is and does.⁵

When I agreed to be Reporter, I was asked to prepare a memo outlining developments in the criminal law and procedure since 1992 (when the last edition of the Prosecution and Defense Function Standards was finalized) that might influence the revision project. This is not unusual—one part of the role of Reporter for a law project often seems to be initially to provide scholarly or theoretical overviews and organization of law and authorities.⁶ I was also informed who would be on our Task Force, and was immediately intimidated by the stature and experience of the members.⁷ I thus

3. The source that comes closest is published by the American Law Institute, which has been in the business of law projects since 1923. See ALI, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK (2005) available at <http://www.ali.org/index.cfm?fuseaction=projects.main> [hereinafter ALI HANDBOOK]. The Handbook, however, focuses largely on drafting style and the development and review process, rather than on how a Reporter performs the role.

4. *E.g.*, Barry E. Hawk, “Antitrust in a Global Environment, Introductory Remarks,” 60 Antitrust L.J. 525 (1991); *cf.* ALI HANDBOOK, *supra* note 3, at 1 (“The task of an American Law Institute Reporter is to prepare a report”); Hodson, *supra* note 2, at 7 (noting reporters’ participation without description). Interestingly, and perhaps revealingly, Judge Hodson’s article does not mention the Reporters’ names.

5. This essay does not pretend to be, and is not, comprehensive or particularly theoretical. The topic could benefit from a more exhaustive, scholarly examination.

6. The ALI provides this generalized *ipse dixit* description: “The task of an American Law Institute Reporter is to prepare a report for adoption by the Institute, aiming at carrying out [the ALI’s] objectives in a particular area of the law that the Institute has chosen to address.” HANDBOOK, *supra* note 3, at 1. See also Geoffrey C. Hazard, Jr., et al., *Introduction to the Principles and Rules of Transnational Civil Procedure*, 33 N.Y.U. J. INT’L. L. & POL. 769, 772 (2001) (“the Reporters have come to identify both fundamental similarities and fundamental differences among procedural systems”); Michael Greenwald, *The American Law Institute Simplification Experience*, 105 DICK. L. REV. 225, 227 (“I was asked to prepare a kind of working plan and then . . . some actual writing”).

7. An ABA Task Force consists of voting members and non-voting “liaison” who are representative of various stakeholder groups. However, actual votes are rare, attendees are given equal voice at meetings, and the goal is to settle on language that can be agreed upon by consensus. Each liaison group has only one attendee, but over the three years of this Task Force, the individual liaison changed for some groups. The U.S. Department of Justice liaison in particular changed repeatedly, until Patricia Weiss finally

sought out guidance on how to *be* a Reporter, wanting to at least seem up to the job in our first meeting.

However, other than oral guidance from the experienced ABA Standards project Director, Susan Hillenbrand and a few other Standards Task Force chairs,⁸ there was little specific guidance to be had. Much of the advice I received was simply logistical. It became clear that the ABA had no written description of the position or its expectations. Actualization of the role varied from project to project and person to person, and plainly was determined largely by the personality of the Reporter, the scope of the project, and the dynamic that would develop between the Reporter, the project Chair, and other members and staff.

But law project reporters have been around for a long time and law professors generally publish. So I searched for some written account of the role and advice on how best to fill it. I was surprised to find virtually no law review writing about the role of Reporter, despite the fact that noted academics have held the position for almost a century.⁹

In 1968, Professor Herbert Wechsler published an article reviewing the ALI's Model Penal Code, for which he had famously served as Chief Reporter.¹⁰ The Model Penal Code has been widely

lent a helpful stability to that particular position. Our Task Force had the following members and liaisons: J. Vincent Aprile II, Richard Devine, Jan L. Handzlik; Ronald Goldstock; E. Michael McCann; Gerald Nora, Cynthia H. Orr; and Ellen Podgor. Liaisons: Edwin Burnette (SCLAID); Daniel Stiller (Federal Public Defenders); Ephraim Margolin (NACDL); John Wesley Hall (NACDL), Robert Fertitta (NDAA); Matthew F. Redle (NDAA); Benton Campbell (USDOJ), Gordon Young (USDOJ), Ruth Plagenhoef (USDOJ) and Patricia Weiss (USDOJ).

8. Guidance and advice I have received from Ron Goldstock of New York has been particularly useful, insightful, and generous.

9. The ALI Handbook, *supra* note 3, at vii, refers to the 1921 founder of the ALI William Draper Lewis, Dean of the University of Pennsylvania Law School, and "his first generation of Institute Reporters." Why are academics so often—but not always—chosen as law project Reporters? Presumably it is a combination of (1) a perceived large amount of "free" time to devote to work on the project; (2) ordinarily an absence of active legal practice thus avoiding "conflicts of interest" within the legal meaning of the term; and (3) a developed understanding, expertise, and intellectual interest in the substantive law area involved. The fact that the project often results in publication of legal articles that are the currency of legal academe is either another cause or a happy side effect.

10. Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968). Professor Wechsler was also, of course, the longtime Director of the ALI, from 1963 to 1984. *Herbert Wechsler 1909–2000*, ALI, http://www.ali.org/ali_old/R2204_Wechsler.htm (last visited April 8, 2011).

adopted and successful,¹¹ and Wechsler is one of the best known Reporters in legal academic circles. Yet his article was almost entirely descriptive of the project, not his role as Reporter; he recounted the procedural history of the project, described its content, and advocated for the substantive choices made in the MPC.¹² The extent of his discussion of his own role was to quote his prior article presenting “the object and approach of the [American Law] Institute,” as follows:

“[W]e mean to act as if we were a legislative commission, charged with construction of an ideal penal code—properly regardful of realities but free, as legislative commissions rarely are, to take account of long range values as distinguished from immediate political demands.”¹³

This is fine as far as it goes, but it still describes the role of Reporter only inferentially at most. What does a Reporter really *do*? *How* does he or she do it? How does the Reporter act to further this idealized goal of legislative perfection? What separates the Reporter from other members of the law project of committee?¹⁴ How is a Reporter to accomplish the goals that Wechsler described (and is it actually the role of the Reporter to “accomplish” anything substantive)? What guidance could I find when beginning on the path?

11. See STEPHEN A. SALZBURG, JOHN L. DIAMOND, KIT KINPORTS, THOMAS H. MORAWETZ & RORY K. LITTLE, *CRIMINAL LAW*, 47 (3rd ed. 2008) (noting that the MPC has been adopted at least in part in many U.S. States).

12. *E.g.*, Wechsler, *supra* n. 10, at 1425–28. What scarce literature I have found consists generally of Reporters defending the substance of their projects but offering little if any description of their role. *E.g.*, James A. Henderson Jr. and Aaron D. Twerski, *Arriving At Reasonable Alternative Design: The Reporters' Travelogue*, 30 U. MICH. J. L. REFORM 563 (1997); Robert W. Hamilton, *The Revised Model Business Corporation Act: Comment and Observation: Reflections of a Reporter*, 63 TEX. L. REV. 1455 (1985); Herbert Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 524 (1955); *see also* Patrick J. Kelly, *Introduction: Did The First Restatement Adopt A Reform Agenda?*, 32 S. ILL. U. L. J. 1 (2007) (discussing the roles of various early ALI Reporters in terms of whether they pushed reform or simply offered restatements of the law).

13. Wechsler, *supra* note 10, at 1427 (quoting Wechsler, *A Thoughtful Code*, *supra* n. 10, at 525).

14. Technically, and unlike Members, an ABA Reporter has no vote, in the tradition of a silent recorder of the proceedings. However, at least in my experience, the Reporter is often asked to opine on questions and is given significant voice, if not a vote, in the deliberations.

Another preeminent legal academic well known as “Reporter,” and in a substantive field somewhat closer to that of the Standards I was asked to work on, is Professor Geoffrey C. Hazard, Jr., my former law teacher and now my colleague at U.C. Hastings. As most know, Hazard was the Reporter to the ABA’s wildly successful Model Rules of Professional Conduct (1983),¹⁵ which have been adopted in whole or in part by each of the United States as well as in other jurisdictions.¹⁶ To the extent that the ABA’s Criminal Justice Standards similarly describe “ethical” guidance for prosecutors and defense lawyers (and that question itself is never fully resolved—many shy away from describing the Standards as “ethical rules”), perhaps Hazard’s dozens of books and articles would provide me guidance.¹⁷

So I went down the hall and asked him. (Happily, although Hazard has professed elsewhere, his office is now only steps away from my own.) Yet while Hazard was generous with advice (more on that below), he was somewhat at a loss for written source material. He referred me to his own published account of the Transnational Rules for Civil Procedure, a project for which he had served as a Reporter,¹⁸ recalling that while there might not be a lot there on the topic I was investigating, it was “probably the closest you’re going to find.” Unsurprisingly, Hazard’s memory proved accurate. Like Wechsler, Hazard and his co-Reporters wrote about the goals of their

15. Hazard also served as Director of the ALI after Wechsler, from 1984 to 1999. It should be noted that role of Reporter for the ALI is markedly more authoritative and directive than my experiences with the ABA model. An ALI Reporter is in “charge” of the project and “need not change anything” in response to comments or criticisms from advisory committee members. William T. Barker, *Process, Partisanship, and The Restatements of Law: Lobbying and the American Law Institute: The Example of Insurance Defense*, 26 HOFSTRA L. REV. 573, 576 (1998); accord, ALI HANDBOOK, *supra* note 3, at 15. By contrast, the ABA Reporter defers to the Chairs of the Task Force and Standards Committee and must defer to the group’s decisions, although she may first express forceful views if she has them. In this sense, the ABA Reporter is more of a scribe and less a decisionmaker than in the ALI model.

16. MODEL RULES OF PROF’L CONDUCT (2002); see also *Alphabetical List of States Adopting Model Rules*, ABA, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Mar. 20, 2011).

17. Professor Hazard’s “publications” webpage at Hastings lists 32 books and 154 law review articles that he has authored, as well as dozens of book reviews, newspaper and magazine articles, and other writings. Faculty Publications of Professor Geoffrey C. Hazard, Jr., U.C. HASTINGS, COLLEGE OF THE LAW, <http://library.uchastings.edu/library/bibliographies/faculty/Geoffrey-C.-Hazard,-Jr.>

18. Hazard, *supra* note 6.

law project and the design of their proposed rules, and advocated for some of the substantive suggestions made in their project. But they did not describe what Reporters *do* or how they did it, other than inferentially by describing what the project had done.

Fortunately the ABA has been tolerant of me “learning on the job,” and I have developed at least some “feel” for the role of Reporter over the past five years. So I now offer these brief thoughts on the role of a Reporter to a law project, both descriptive from my own experience, and normative by way of suggesting what anyone lucky (unlucky?) enough to be a Reporter should try to anticipate and do.

I. A Law Project Reporter Prepares

As the ALI Handbook states, the Reporter for a law project is often asked to prepare initial thoughts and research on the topic at hand, in advance of the project membership itself beginning study. Moreover, the Reporter is ordinarily expected to prepare memoranda or drafts for the group to work with at subsequent meetings, representing an assimilation of what transpired at the previous meeting as well as source material and research that has come to the Reporter from various other sources.

My experience is that virtually all the members of a law project are volunteers. They have other “day jobs” and cannot work continuously on the project—instead, they come back to the project sporadically as time, budgets and other events allow. Thus, for example, my own Task Force generally met in person once every three or four months, and on rare occasion supplemented this with telephonic conference calls. (Email chatter, of course, was a relatively frequent occurrence, but we generally did not find group discussions by email to be rewarding.)¹⁹

The in-person discourse and development of ideas is—and this was a bit of a surprise to me—remarkably effective in generating really deep thinking about the specific topics found in every section and subsection of a Criminal Justice Standard. While sometimes

19. I quickly learned that as Reporter, I would receive suggestions, legal citations and research, and other comments, not just from members and liaison in between meetings, but also from many other persons interested in the project. At times this was overwhelming, in terms of the detail and volume of materials. Sometimes these references were redirected to the Task Force, sometimes I relied on them in preparing memoranda for the next meeting, and sometimes they just sat in my inbox as I guiltily pondered what to do with them.

agonizingly slow—we could spend two or occasionally more hours on a single Standard—the end result was generally an extraordinarily thorough analysis of all sides and many possible hypotheticals related to a topic. In the end, the deceptively simple words of a revised Standard had been carefully chosen and picked over, and represented (or hid) a huge amount intelligent thinking.

I have no doubt that the product of this group analysis was more sophisticated and thorough than any single person's could be, and that such in-person group consideration is a vitally important component of any law project. No matter how intelligent and experienced members and the Reporter may be, a single writer cannot yield Standards as thorough and as acceptable as does group consideration. The Reporter can prepare the group to use its time most effectively, to narrow and direct its deliberations, and to try to answer general background legal questions that might otherwise delay the group. But while preparation is important, it cannot substitute for the spontaneous and creative synergy generated by the focused intelligent minds of a group meeting in person.

II. A Law Reporter Reports

I imagine the title of “Reporter” grew originally from the necessary role (before electronic recording) of simply recording, transcribing, and reporting back on the events of a lengthy group meeting. This aspect of the role continues today, in combination with the other aspects mentioned (preparation, etc.) That is, the Reporter “reports” on what the group did at its last meeting and on significant developments in the interim. This role is necessary because law projects are usually formed by groups of law practitioners who are volunteers and have day jobs, so they cannot meet continuously for days on end. “Secretary” to a group might be another label for this part of the role. James Madison famously acted as Secretary to the Constitutional Convention, and his notes have subsequently become viewed as helpful, if not authoritative, sources for understanding what that particular “law project” did—and importantly, why.²⁰ Would that we lesser Rporters could achieve anything like the immortality of Madison's Notes!

At this point I must reveal a simple technique for recording our drafting meetings that has proved a significant boon to the Standards process. At a meeting at her law school (Vanderbilt) in 2009,

20. James Madison, Notes of the Constitutional Convention of 1787.

Standards Committee member (and Assistant Reporter for the Federal Rules of Criminal Procedure) Nancy King did something that technology only recently permits: she projected our draft Standards on a large screen that all could see, and used “track changes” to record our editing process and decisions. Viola! Instant agreed upon record. Professor King deserves lasting credit for this now-seemingly obvious “genius” idea.

III. A Law Reporter Explains

A third part of the role is to report not just what happened, but why. That is, the Reporter explains the rationale for decisions that the project has made. This becomes important the longer a law project goes on, or the more influential (if at all) that its product ultimately becomes. Over the course of a years-long law project, some number of the individual members are likely to change.)²¹ New and old members alike will often want to know “*why* did we make that decision or choose that language or structure, which now seems important to us or which we are now considering reexamining?” As importantly, if the product of a law project is later advocated to a court or legislature, let alone adopted and used in litigation, interested parties are likely to want to know why various substantive choices were made. A Reporter who keeps a record, somewhat contemporaneous, of why choices are made and what the alternatives were, can be essential to such inquiries.²²

Admittedly, it may sometimes be better not to know how, exactly, the sausage was made. Moreover, Justice Antonin Scalia has famously argued that legislative history ought to be irrelevant to considering the “plain language” meaning of a statutory text (although he does believe history of the Constitutional Convention is relevant to informing our understanding of constitutional meaning).²³ So the Reporter and publishing authorities will exercise judgment regarding how much of a Reporter’s explanation they later want to

21. See *infra* Part V.

22. It must be acknowledged, however, that sometimes the most inquired-of decisions will be those that the membership did not examine or dwell upon at the time. That is, even the most conscientious Reporter’s notes will not answer some questions that later readers find important. Compare *Heller v. District of Columbia*, 128 S. Ct. 2783, 2789–2807 (2008) (majority opinion) with *Heller*, 128 S. Ct. at 2825–42 (Stevens, J., dissenting) (debating the original meaning of the Second Amendment).

23. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23–24 (1997).

publish. In addition, the Commentary to the ABA's Criminal Justice Standards, for example, must be manageably short,²⁴ and ought not "impeach" the meaning of the black letter Standards. But at least for internal purposes of the law project members, a Reporter should keep a record of significant choices and the alternatives that led to the adopted structure, ideas, and language.²⁵

IV. A Law Reporter Records

This point flows naturally from the first two. By preparing for meetings, reporting what has transpired, and keeping track of significant choices and their rationales, a Reporter for a law project creates a useful "record" to which s/he and others may subsequently refer. The significance of this is clear from the example of Madison's constitutional Convention notes (although again, I do not mean even to suggest comparability between the Constitution and our Standards). It is also simply a matter of reality and the fragility of human memory. In my own experience over the past five years, I have often found that I cannot recall with any real precision what exactly was our Task Force's rationale, what alternatives were considered and rejected, or why a particular final choice was made (or sometimes significantly, by whom). Initially I tried to keep it all in my head—I wish someone had bluntly told me at the beginning that that is impossible, and that I'd better write things down. In fact, I find that this remains a particular weakness of my own reporting: making a record, contemporaneously, of what has recently transpired. I would urge any future law project Reporter to take the time to record events immediately after they happen, and not to rely on fickle human memory.

V. A Law Reporter Provides Continuity

Most significant law projects will last for months or more likely, years. Members and staff²⁶ for a law project inevitably change, as life

24. I mean "manageable" for the average reader and busy lawyer or judge consulting the source, not just the size of the printed Commentary. Web publishing seems to loosen discipline as to length of some written sources—an unfortunate tendency that should be avoided if pragmatic use by litigators and courts is the goal.

25. This is a lesson the author did not fully appreciate until well into the Prosecution and Defense Functions revisions project.

26. It is important to note that in modern times at least, significant law projects have assigned "staff" from the sponsoring group that perform important, indeed essential, functions for the project. In the experience of the ABA Criminal Justice Standards, the

happens and people change careers and locations, lose interest or become preoccupied with other events, age, sicken or sadly, expire.²⁷ Hopefully the Reporter will suffer none of these, at least for the length of the project. But even if fate intervenes, one hopes that the Reporter's notes and reports, as well as continuous membership until the final product is approved or adopted, will provide a sense of continuity upon which the "final" approving body can rely.

Up to now I have merely been reporting what are, I hope, somewhat obvious aspects of law project reporters. Now I turn to points perhaps better described as aspirational.²⁸

VI. A Law Reporter Provides Expertise

It is to be hoped that the person chosen to be the Reporter for a particular law project will bring some prior experience, expertise, and interest in the subject, to the assignment. (Which raises the separate question, how is a law project Reporter chosen?²⁹) This is necessary for a number of reasons. First, the Reporter will need to understand and be able to follow the dialogue of the project's membership, and be able to quickly assess the merit or lack thereof in ideas proposed by members, commentators, and the ultimate audience for the project. In addition, the Reporter should be someone that the membership of the project can respect. And finally, to encourage creativity as well as industry and longevity, the Reporter should be a person who is intellectually as well as practically interested in the subject. Thus academics, with some published expertise as well as some law practice experience in the area, are often chosen as Reporters.³⁰

"project director" based at the Washington D.C. headquarters provides organizational support, logistical assistance (travel arrangements, reimbursement of expenses, securing meeting spaces and food and even pens and paper), and provides a "center" for the far-flung and diverse membership. She also provides substantive knowledge, expertise, and historical and organizational perspective that has proven invaluable on many occasions. In this capacity, Susan Hillenbrand is without doubt the unsung hero of the Criminal Justice Standards Project. She has supported innumerable lawyers, judges and academics on dozens of ABA law projects at a consistent level of excellence for many years having served the Criminal Justice Section since 1980. She does this quietly, patiently where most could not be, and with modest humility unfound in most lawyers. Indeed, she asked me to remove this footnote—but claiming Reporter's privilege, I declined.

27. See, e.g., Manning, *supra* note 2, at 1319 (noting the "untimely death" of the initial Reporter, Ray Garrett).

28. Cf. Hodson, *supra*, at 2 (noting the intentional choice of the ABA to promulgate aspirational Criminal Justice Standards, not just restatements of existing law).

29. See *infra*, Part XIII.

30. See *infra*, note 9.

VII. A Law Reporter Provides “Glue” and “Cover”

Perhaps these are two separate points, but they seem to me to be linked. The person chosen to be Reporter has to be able to get along with the membership of the project, and also be able to take criticism and announce difficult substantive suggestions. Professor Hazard's first advice to me as Reporter was³¹ “Forge a strong relationship with your Chair.”³² His second piece of advice was “figure out who ‘matters’ on your committee, and forge relationships there as well.” And his third piece of advice was “Figure out what you have to pay attention to, and what you can ignore or discount.” Professor Hazard pointed out that there is a huge, virtually unmanageable, flow of ideas coming from law project members, outsiders, and already published legal sources. You have to be able to quickly make decisions about separating the wheat from the chaff.

There is a personalized aspect to being Reporter that in retrospect seems obvious. The Reporter spends hours and hours with the law project members. While much of this is “business,” a fair amount is also just life: eating meals together, travelling, and talking during breaks. Yet for a project of any substance, there will be disagreements, sometimes strong ones, regarding the subject matter. The Reporter needs to be able to weather these intermittent storms, and retain the respect and pleasant relationships with all of the membership, so that the project as a whole can sail forward.

Members of the project are also likely to communicate privately with the Reporter, either to follow up on points made at the last meeting or anticipated at the next one, or to “lobby” for a particular point of view. Such communications are to be welcomed, as they can be of great value in moving the project forward, tamping out small disagreements, and enlarging on legal points that do not much interest the group as a whole but are important for the project. So

31. I hope it goes without saying that although I am using quote marks in what follows, these are my own paraphrases and syntheses of conversations I have had with Professor Hazard. It is unlikely that these are his exact words, and I have not asked him to, and he very well might not, endorse them.

32. Fortunately this was not difficult in my particular case, because while I had not previously met our Task Force chair, United States District Judge Jack Tunheim (D. Minn.), I found him immediately likable and, as importantly, strong and quietly decisive regarding our law project matters. As a former state Attorney General and trial and appellate advocate, Judge Tunheim also commands respect from practicing lawyers in the area. And happily, we found that we also share certain personal interests (*inter alia*, running (not too fast) and baseball). Certainly this Reporter could not have asked for a more tolerant, experienced, and committed Chair.

long as the Reporter avoids becoming embroiled in any personalized disputes, his or her role can be extremely enriching in terms of developing professional and personal friendships, and can also help the project along.

As for “cover,” sometimes it is the Reporter’s job to make difficult suggestions, and even choices, among heartfelt but competing positions. If the Reporter’s relationship with the Chair is strong, this can also be a very useful role, and important in terms of moving the project along. Members will often debate strongly held views for a very long time. But debate must end sometime, and decisions must be made, if the project is to produce something useful and close to timely. The Reporter can propose worthwhile ideas and solutions without necessarily exposing individual members to the spotlight. I believe a law project Reporter should understand that a portion of the role, once all views have been given voice, is to try to push the group to a resolution. If the Reporter is lucky, he will perceive a semantic “third way” to resolve competing viewpoints without necessarily rejecting one entirely. But the Reporter’s position, hopefully secure, allows the Reporter to suggest decisions that might make some members unhappy. Hopefully the “glue” role will quickly repair any temporary rifts that may result.

VIII. A Law Reporter Provides Legal Research and Assessment

One simple part of the role is for the Reporter to provide answers to “I wonder if there are any cases on this?” or “I wonder what the state’s laws are on this topic?” Between meetings, the Reporter should undertake, perhaps with staff, to address legal questions that have come up, and assess the results as they may be relevant to the project. Sometimes this will require reporting back to the group; sometimes it simply yields material for future Commentary. This aspect of the role is another reason that academics are often chose for the Reporter role.³³

IX. A Law Reporter Offers Substantive Suggestions

I do not think the Reporter should be just a “potted plant.” Assuming the Reporter has substantive expertise, practical experience, and the respect of the members, his or her voice on

33. See *supra*, note 9.

substantive questions can be valuable. Of course, the extent to which the Reporter actively participates in deliberations should be discussed in advance with the Chair and other staff and members, and if possible settled in advance. But the Reporter's substantive views are often valuable, and if advanced in a non-dogmatic way, can benefit the project.³⁴

X. A Law Reporter Synthesizes a Multiplicity of Views, and Advances the Ball

This point grows out of others above. Often a group discussion will produce a number views, many tentative, and no resolution. At some point in order to move the agenda, the Chair may say "Well, Reporter, do you have enough on this? Can you try to capture the sense of the group (maybe doing some research first), and get back to us?" That is an appropriate way to temporarily end a debate, and an appropriate task to set for the Reporter. The Reporter should relish such opportunities. It is a chance to try to consider thorny issues with some period of contemplation, and see if there is a "smart" way out that can be supported by law if any is available and logic at least. The goal is not just to report the debate or pick "one side," but rather to see if a synthesis that moves the project forward can be formulated.

This aspect of the role also requires the Reporter to, as perceptively as possible, evaluate what the membership "really" wants. Sometimes group discussions can be dominated by one forceful speaker or view, while others lapse into silence from either a sense of having already said their piece, or futility. The Reporter needs to know the membership and accurately (one hopes) estimate where the "true" group feeling rests. Again, the Reporter should run proposed solutions past the Chair, before springing them on the group. And the Reporter must resist imposing his or her own views onto the issues. Sometimes the Reporter "loses."³⁵ Although, as is

34. Note in this regard that the ABA's vision of the Reporter's role is not as aggressive, autonomous or authoritarian as the ALI's. *See supra*, note 9. Professor N.E.H. Hull recounts a particularly interesting example of the famous Professor Williston (as in "Williston on Contracts"), who threatened to resign as an ALI Reporter in 1929 if the Director thought that the Reporter was pushing too hard. Hull, *Restatement and Reform Redux: Comments for the AALS Open Source Program: "Did the First Restatement Implement a Reform Agenda?"* 32 S. ILL. U. L. J. 139, 143 (2007).

35. *See* Hamilton, *supra*, note 12 at 1464 ("There is a widespread belief that an academic reporter has broad power That is an inaccurate perception of the relation I had" as an ABA Reporter); *cf.* ALI HANDBOOK, *supra* note 3, at 15 ("The Reporter is not bound to follow the result of such a [committee] vote."). William Barker, *supra* note

sometimes said of prosecutors, the Reporter does not lose if justice—or at least a smart solution—is done.³⁶

XI. A Law Reporter Should Understand the Role and be Committed to the Project

Before signing on, a potential law project Reporter should understand two things as precisely as possible: what do the project organizers envision as his or her role, and what are the logistics (such as budget and how long the project is likely to last). A discussion regarding the role should include how often and how long and where the project meetings will occur (i.e., is travel involved). And the Reporter should be informed as clearly as possible regarding how long the project is envisioned to last, what timing constraints if any exist, what the final product is envisioned to be, and what the process for acceptance or publication (or whatever) will be at the end. Finally, if there is compensation available for the Reporter, that of course should be discussed—although many academics will take the job for nothing, because of the opportunity to influence the real world and the likelihood that scholarly product relevant to their day jobs will result. Still, budgetary issues should be discussed to the extent they will impact the project, including travel expenses and even supplies and printing costs.

I make these last practical points perhaps because of my personal experience with the Prosecution and Defense Function Standards Task Force. Little if any of the foregoing was explained to me, and I was silly (or eager) enough not to ask.³⁷ To some extent, this is because little of the information was known or anticipated by the organizers—for example, everyone has been surprised by how long it takes for a group to consider each Standard, how many smart ideas for structure, wording and revision of a single idea are possible, and how often we can each look at a particular Standard and want to go back and rewrite it once again. With four layers of ABA process—Task Force, Standards Committee, Criminal Justice Council, and

15, provides a particularly unhappy account of this authoritarian autonomy accorded to Reporters by the ALI. It should be apparent by now that I consider the ABA's consensus-driven model superior in this regard.

36. See *Berger v. United States*, 295 U.S. 78, 88 (1935) (The prosecution's interest "is not that it shall win a case, but that justice shall be done.").

37. In fairness, Susan Hillenbrand of the ABA, (*see supra* note 26) recalls that I was provided with more information than I myself remember—and Susan is almost always right on such things.

House of Delegates—I suppose we all should have known that a two to three year estimate was unrealistic. Still, the better informed the Reporter can be, the less likely there will be unhappiness regarding surprises along the way.

XII. A Law Reporter Remains Loyal to the Project and its Product

Initially I feared I was listing this only to make an even ten points. But now, with editing, I am at more than a dozen! Moreover, I am not sure it is a necessary, or even uniformly desirable, characteristic. But I feel it strongly regarding my own project, and thus felt it worth briefly writing out.

Drawing perhaps from conflict of interest rules, the Reporter should not stay in the position if he or she finds that personal disagreements or issues are interfering with a commitment to the project. That is, the law project is akin to the Reporter's "client," and it deserves loyalty.³⁸ Thus the Reporter should respect necessary confidentiality regarding the project, and at least check with the Chair and staff before publishing information not yet otherwise public. The Reporter should also not speak ill of the project, the sponsoring organization, or the members or staff. And as the project reaches conclusion and is subjected to evaluation by others, the Reporter should loyally explain its contours, virtues, objectives, and other aspects that the hurried or surface reader might not appreciate. The Reporter is not a "shill" for the product or the project. But the Reporter should be proud of it, both the process and the result. If you are unwilling to take on these commitments, or you feel such unwillingness develop at some point along the way, I think you owe it to your client to decline proceed further, and allow the organizers to find someone who can more sanguinely take it on.

XIII. A Reporter Defends

Once the final report or draft for a law project has been agreed upon by the drafting committee, it (hopefully!) will be submitted to

38. See ABA MODEL RULE OF PROF'L CONDUCT R. 1.7(a)(2): "[A] lawyer shall not represent a client if . . . there is a significant risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer"; *Id.*, cmt. [1]: "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." The ALI HANDBOOK, *supra* note 3, at 19, states that its Reporters must comply with a written policy statement on conflicts of interest. Although here I mean more "personal interest" conflicts than formal business representational conflicts.

some final body for approval or adoption. This might be the ABA's House of Delegates, for example, or a state legislature deciding whether to make the recommendations law. At this point, it is the Reporter who is often looked to for elucidation and defense of the drafting body's views and decisions. I think the Reporter must, at this point, fairly present and defend the body's rationale, even if the Reporter harbors personal opinions in tension or even direct conflict on subsidiary points. Perhaps this is merely an aspect of the previous "loyalty" section. But I think it is more than that. Often the drafting committee has disbanded and its members have moved on to other projects or, gratefully, their mortgage-paying day jobs. In some sense, the Reporter (and perhaps the Chair) is the only person left standing who has an institutional role still to play. That role is, I think, properly described as defender as well as explainer. The drafting body will rightfully count on the Reporter to persuasively present their views, and the Reporter should be prepared for this continuing, and not always smooth, role.³⁹

XIV. So, How Should A Law Reporter Be Chosen?

The process of selection of the Reporter for most law projects is a mysterious and usually not transparent one. As the foregoing suggests, the right "mix" of talents can be vital to the success of the project, and the selectors want to be careful not to make a mistake. Selecting a Reporter who does not "gell" with the Chair, members and staff, or who does not do the necessary work for the project to move forward, or who lacks commitment to the process, can be worse than no Reporter at all—it can slow things down, create extra work, and interfere with the quality of the ultimate product.

As indicated, the more information regarding the project's details and expectations, including logistical requirements and limitations, that can be shared with the potential Reporter in advance of selection, the better. Presumably the Chair should be selected first, and then the Chair and staff should be consulted regarding who to consider for Reporter. Look to persons with some prior experience with the sponsoring group, if possible. And the potential Reporter's substantive work should be reviewed if time and energy permits. However, because the Reporter job is usually not well-compensated

39. I am grateful to Judge Marty Marcus of the Brooklyn Supreme Court in New York, who has served both as an ABA Reporter and as Chair of the Standards Committee, for drawing out with me the ideas sketched in this section.

and can be quite time consuming, finding qualified academics or others who can volunteer the time and work is sometimes difficult. Sometimes simply being an expert who is available and willing to take on the job can be enough to qualify.

In the end, being a team player is perhaps as essential as any other characteristic. Flexibility and open-mindedness is key. The Reporter must be able to persuasively work with many different people along the way, and effectively advocate for the end product in various contexts (for example, votes for adoption by the sponsoring group, consideration of adoption by courts and legislatures, acceptance of the product by influential practitioners as well as academic commentators). The end product of a law project is not worth much if the wider audience does not find it useful and acceptable. The critique of “don’t let the perfect become the enemy of the good” comes to mind. Thus a Reporter who is a genius in the substantive area is useful—but a Reporter who can be a persuasive and friendly advocate is essential.

Conclusion

In defense of the Model Penal Code over half a century ago, Chief Reporter Wechsler closed by quoting Justice Holmes:⁴⁰ “I trust that no one will understand me to be speaking with disrespect of the law, because I criticize it so freely. . . . Law is the business to which my life is devoted, and I should show less devotion if I did not do what lies in me to improve it” I agree.

The foregoing presents an idealized, as well as perhaps idiosyncratic, account of the Role of Reporter to a law project. I cannot pretend that I have lived up to all these aspirational points. Yet my service as Reporter to the Criminal Justice Standards project has been an invaluable experience for me. I continue to learn as the project moves forward. I am grateful to the mysterious unknowns who invited me, five years ago, to play this role, as well as to the many members and staff who have put up with my flaws along the way. Ultimately, I look forward to adoption of revised Prosecution and Defense Function Standards that the profession and society as a whole will find useful and ethically pleasing. And to future Reporters I say: hang in there! Don’t let the process obscure the goal, and good luck!

40. Wechsler, *supra* note 12, at 530.

APPENDIX

ABA Standards for Criminal Justice: Proposed Revisions to Standards for the Defense Function (Draft as of Summer 2010)

Task Force Chair: The Hon. John R. Tunheim, US District Judge (D. Minn.). Reporter: Professor Rory K. Little, U.C. Hastings College of the Law, littler@uchastings.edu

Reporter's Note: What follows is a draft of revised Defense Function standards as they were proposed to be revised as of summer 2010. It is important to note that these are not the ABA's final revisions, and in fact they represent merely the preliminary work of a Task Force. It is certain that many of these standards will be substantially revised from what appears here, before the final (if any) submission of proposed revisions to the ABA's House of Delegates. These proposals do not represent the official views of the ABA or any component of the ABA—they are drafts, published now only for the purpose of public comment and critique.

Also, the following draft does not reprint the current (1993) Standards, but only the Standards as proposed to be revised. The current Defense Function standards can be found on the ABA's website at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_toc.html

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I. GENERAL STANDARDS

Standard 4-1.1 The Scope and Function of these Standards

(a) These Standards address lawyers acting as defense counsel in criminal matters. “Defense counsel” means any attorney—including privately retained, assigned by the court, acting pro bono or serving in a legal aid or public defender’s office—who acts on behalf of a person or entity being investigated or prosecuted for alleged criminal conduct or is seeking legal advice regarding an ongoing, potential or past criminal matter. For convenience the client of a criminal defense counsel is sometimes referred to as the “accused” or “defendant,” but criminal defense clients may also include persons who are merely suspected of or witnesses to crime. These Standards are intended to apply to lawyers acting as defense counsel not only in criminal prosecutions but also in any context where a lawyer would reasonably understand that a criminal prosecution could result. They may also apply to counsel in other quasi-criminal matters such as habeas corpus proceedings.

(b) These Standards are intended to provide guidance for the professional conduct and performance of defense counsel. They are not intended to serve as the basis for the imposition of professional discipline, nor to create substantive or procedural rights, nor to create a standard of care for civil liability. They do not modify a defense attorney’s ethical obligations under applicable rule of professional conduct. They may or may not be relevant in judicial evaluation of the validity of a conviction, depending upon all the circumstances.

Standard 4-1.2 Functions and Duties of Defense Counsel

(a) Counsel for the criminally suspected or accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case should be viewed as a tripartite entity consisting of the Court (including judge, jury, and other court personnel), counsel for the prosecution, and counsel for the accused. Criminal defense counsel have the delicate task of serving both as officers of the court and as loyal and zealous advocates for their client.

(b) The basic duties of defense counsel are to serve as the accused’s counselor and advocate with courage, devotion, and integrity; to ensure that constitutional and other legal rights of the defendant are protected; and to render effective, high-quality legal representation.

(c) Because the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused and, more specifically, by observing the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

(d) Defense counsel should support efforts to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, counsel should stimulate and support efforts for remedial action.

[Q. Should we insert from Pros Function 3-2.1(d) to make parallel? A. Defense counsel should recognize that they have an obligation to provide pro bono service to the community, including involvement in public service and Bar activities, public education, community service activities, and Bar leadership positions. A public defense organization should support such activities, and the office's budget should include funding and paid release time for such activities.]

(e) Defense counsel is the professional representative of the accused, not the accused's alter ego. Defense counsel, in common with all members of the bar, is subject to and should be familiar with standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. Defense counsel should act zealously within the bounds of the law on behalf of their clients, but has no duty to, and may not, execute any directive of the accused which violates the law or such standards. However, defense counsel may challenge the validity of such laws or standards, and may decline to comply as part of such challenge if done openly and with notice.

(f) Defense counsel should not knowingly misrepresent matters of fact or law to the court, opposing counsel, witnesses, or third parties.

(g) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.

Standard 4-1.3 Continuing Duties of Defense Counsel [New]

Some duties of defense counsel run throughout the period of representation and even beyond. Defense counsel should keep in mind the impact that these duties may have at all stages of a criminal representation, and on all particular decisions and actions that arise in the course of performing the defense function. These duties include:

(a) a duty of loyalty toward the client, including a formerly-represented client, with a particular obligation to avoid interests that may conflict with the client's or former client's interests, as described in these Standards and other applicable rules of professional conduct.

(b) a duty of confidentiality regarding information relevant to the client's representation, which duty continues after the representation ends;

(c) a duty of honesty toward the court and others, tempered by the duties of confidentiality and loyalty;

(d) a duty to keep the client informed and advised of options and potential outcomes;

(e) a duty to be well-informed regarding the legal options and developments that can affect client's interests in a criminal representation;

(f) a duty to continually evaluate, from the inception of a criminal representation until counsel is released, the impact that decisions and actions in the representation can have at later stages, including trial, sentencing, and appeal;

(g) a duty to keep an open mind regarding possible negotiated dispositions of the matter, including the possible benefits and disadvantages of cooperating with the government's investigation.

Standard 4-1.4 Improper Bias Prohibited [New]

Defense Counsel should not invidiously discriminate against, or in favor of, any person on the basis of constitutionally or statutorily impermissible criteria. Such criteria may include factors such as race, ethnicity, gender, religion, sexual orientation, political beliefs, age, or social or economic status.

Standard 4-1.5 Conflicts of Interest [See PF 1.6]

(a) Defense counsel should not permit his or her professional judgment or obligations regarding the representation of a client to be affected by loyalties or obligations to other, former, or potential clients; or by client obligations of his or her law partners; or by his or her own political, financial, business, property, or personal interests. Defense

counsel should know and abide by the ethical rules regarding conflicts of interest that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues.

(b) Defense counsel should disclose to the client defendant at the earliest feasible opportunity any interest in or connection with the matter, or with persons involved in the matter, or any other information that is reasonably relevant to the client's selection of counsel or counsel's continuing representation. Defense counsel should be forthcoming to requests from clients for information that is reasonably relevant to evaluating possible conflicts. Conflict of interest disclosures by counsel should ordinarily be in writing and include communication of information reasonably sufficient to permit the client to appreciate the material risks involved and reasonably available alternatives regarding any conflict or potential conflict of interest. Defense counsel should obtain informed consent from a client before proceeding with any representation where an actual or realistically potential conflict is present.

(c) Except where necessary to secure counsel for preliminary matters such as initial hearings or applications for bail, a defense counsel (or multiple counsel associated in practice) ordinarily should not undertake to defend more than one defendant in the same criminal case. Such multiple representation should be engaged in only in unusual situations, in which after careful investigation and consideration it is clear either that no unwaivable conflict is likely to develop at any stage of the proceeding, or that multiple representation will be advantageous to each of the clients represented and that the conflicts can be waived.

(d) In rare instances of permissible multiple representation,

(i) informed written consent should be obtained from each of the defendants, and

(ii) such consent should be made a matter of judicial record. Defense counsel should ensure that the court makes appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that defense counsel may encounter in defending multiple clients in the same matter.

(e) Defense counsel who has formerly represented a defendant (client?) should not thereafter use information related to the former representation to the disadvantage of the former client unless the information has become generally known or the ethical obligations of confidentiality and loyalty do not otherwise apply.

(f) In accepting payment of fees by one person for the defense of another, defense counsel should explain to the payor that counsel's loyalty and confidentiality obligations are owed entirely to the person being defended and not to the payor; and that the payor is not permitted

access to client information unless the ethics rules allow. Defense counsel should not permit a person who recommends, employs, or pays defense counsel to render legal services for another to direct or regulate counsel's professional judgment in rendering such legal services. In addition, defense counsel should not accept such third-party compensation unless:

- (i) the accused [client?] gives informed consent after full disclosure and explanation;
- (ii) defense counsel is confident there will be no interference with defense counsel's independence or professional judgment or with the client-lawyer relationship; and
- (iii) defense counsel is reasonably confident that information relating to the representation of the accused will be protected from disclosure as required by counsel's ethical duty of confidentiality.

(g) Defense counsel should not defend a criminal case in which counsel, or counsel's partner or other professional associate, is the prosecutor in the same jurisdiction, or in the same or a substantially related case.

(h) If defense counsel's partner or other professional associate was formerly a prosecutor in the same or substantially related case, defense counsel should not take on representation in that case unless appropriate screening and consent measures under applicable ethics rules are undertaken, and no confidential information of the client or of the government has actually been exchanged between defense counsel and the former prosecutor.

(i) If defense counsel is a candidate for a position as a prosecutor or judge, this should be disclosed to the client.

(j) Defense counsel who formerly participated personally and substantially in the prosecution of a defendant should not thereafter represent any person in the same or a substantially related matter, unless waiver is obtained from both client and the government. Defense counsel who acquired confidential information about a person when counsel was formerly a prosecutor, should not use such information in the representation of a client whose interests are adverse to that other person.

(k) Defense counsel whose current relationship to a prosecutor is parent, child, sibling, spouse, or sexual partner, should not represent a client in a criminal matter in which defense counsel knows the government is represented by that prosecutor. Nor should defense counsel who has a significant personal or financial relationship with a prosecutor represent a client in a criminal matter in which defense counsel knows the government is represented in the matter by such

prosecutor, except upon consent by the client after consultation regarding the relationship.

(l) Defense counsel should not act as surety on a bond either for an accused that he or she represents or for any other accused in the same or a related case, unless it is required by law or it is clear that there is no risk that counsel's judgment could be materially limited by counsel's interest in recovering the amount ensured.

(m) Except as law may otherwise permit, defense counsel should not negotiate to employ any person who is significantly involved as an attorney or employee of the government in a matter in which defense counsel is participating personally and substantially.

Standard 4-1.6 Delay; Punctuality; Workload

(a) Unless delay serves the client's interests and is not prohibited by applicable rule or law, defense counsel should act with diligence and promptness in representing a client and should avoid unnecessary delay in the disposition of cases. Defense counsel should not intentionally use procedural devices for delay for which there is no legitimate basis. Defense counsel should not accept a representation for the purpose of delaying a trial or hearing. On the other hand, defense counsel should not act with such haste that quality representation is compromised.

(b) Defense counsel should be punctual in attendance at court, in the submission of motions, briefs, and other papers, and in relations with opposing counsel, witnesses and others in the course of representation. Defense counsel should emphasize to the client and defense witnesses the importance of punctuality in court attendance.

(c) Defense counsel should not misrepresent facts or otherwise mislead the court or counsel when stating reasons for seeking delay, and should use procedural devices that will cause delay only when there is a legitimate basis for their use, and not to secure an unfair tactical advantage of personal benefit.

(d) Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers the client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations.

Standard 4-1.7 Relationship with Media [See PF 1.7]

(a) For purposes of this Standard, a “public statement” is any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication or media.

(b) Defense counsel’s public statements about the judiciary, jurors, [other lawyers] of the criminal justice system should be respectful, even if expressing disagreement.

(c) Subject to any exceptions authorized by law or rule, defense counsel should not make or authorize the making of a public statement that a reasonable person would know could have a substantial likelihood of materially prejudicing a criminal proceeding. Defense counsel should exercise reasonable care to prevent investigators, employees, or other persons assisting or associated with the defense from making public statements that defense counsel would be prohibited from making under this Standard or other applicable rules of professional conduct. Defense counsel should not place statements or evidence into the court record to circumvent this Standard.

(d) Defense counsel may respond honestly to public statements made by others in order to protect a client’s legitimate interests, unless there is a substantial likelihood of materially prejudicing a criminal proceeding, in which case defense counsel should approach the prosecution or the Court for relief. In addition, notwithstanding paragraph (b), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(e) Defense counsel should not allow the client’s representation be adversely affected by potential media contacts or attention for counsel.

(f) In making any public statement regarding a representation, defense counsel should comply with ethical rules governing client confidentiality.

(g) A criminal defense uninformed in a matter who is commenting as a media source should not ordinarily offer commentary regarding the merits of a specific ongoing prosecution or investigation, although defense counsel who is uninformed in a matter may offer generalized media commentary concerning a specific case that serves to educate the public about the criminal justice system and reasonably does not risk prejudicing a specific criminal proceeding [the following was eliminated from the Task Force revision of PF standard 1.7: “or when counsel is reasonably well-informed on the relevant facts and such commentary is plainly important to serve the overriding interests of justice.”]

(h) Defense counsel should not secretly or anonymously provide confidential information to the media without authorization from the client or other person or entity that has lawful authority to so authorize.

Standard 4-1.8 Advisory Groups and Communications for Guidance on Issues of Professional Conduct

(a) In every jurisdiction, a group of lawyers with recognized experience, integrity, and standing in the criminal defense bar should be established to consider problems of professional conduct in criminal cases. This group should provide prompt and confidential guidance and advice to defense counsel seeking assistance in the application of standards of professional conduct in criminal representations.

(b) Communications between an inquiring lawyer and an advisory group member should have the same attorney-client privilege for protection of the client's confidences as ordinarily exists between any other lawyer and client. A group member should be bound by statute or rule of court in the same manner as a lawyer is ordinarily bound in that jurisdiction not to reveal confidences of the client.

(c) In seeking advice from a group member, inquiring defense counsel should take steps to protect the client's confidences (for example, by the use of anonymous hypotheticals), and only reveal such confidential information as may be necessary. Inquiring defense counsel should initially ensure [take reasonable steps?] that the member from whom advice is sought does not have any conflicting interests. Inquiring counsel should follow these guidelines even if informally seeking advice regarding a representation from any other lawyer.

(d) Confidences may later be revealed, however, to the extent necessary in this context if:

- (i) the inquiring lawyer's client challenges the effectiveness of the lawyer's conduct of the case and the lawyer has relied on the guidance received from the group member, or
- (ii) the inquiring lawyer's conduct is called into question in an authoritative disciplinary inquiry or other adverse proceeding.

[*Q. Should there be a Training or CLE Standard for Defense Counsel?*
A. See PF 2.5]

Standard 4-1.9 The Bar's Duty to Make Qualified Criminal Defense Representation Available

(a) The Bar has a duty to make qualified criminal defense counsel available, including for the indigent, and to make lawyers' expertise available in support of a fair and effective criminal justice system.

(b) The Bar should encourage the widest possible participation in the defense of criminal cases by qualified lawyers. Unqualified lawyers should not be assigned the primary role in criminal representation, but interested lawyers should be encouraged to qualify themselves for participation in criminal cases by formal training and by experience as associate counsel. Law firms should encourage and support their interested attorneys to become qualified and then take on criminal representations.

(c) Such qualified defense counsel should be willing and ready to undertake the defense of a suspect or an accused regardless of public hostility or personal distaste for the offense or the client.

(d) Qualified defense counsel should not seek to avoid appointment by a tribunal to represent an accused except for good cause, such as: representing the accused is likely to result in violation of applicable ethical codes or other law; representing the accused is likely to result in an unreasonable financial burden on the lawyer; or the client or crime is so repugnant to the lawyer that it will likely prejudicially impair the client-lawyer relationship or the lawyer's ability to provide quality representation.

(e) Lawyers who are not qualified to serve as criminal defense counsel should (1) be encouraged to seek qualification if interested; (2) make their legal skills and expertise available to assist others in providing indigent criminal defense; and (3) provide or assist in obtaining financial assistance and political support for indigent criminal defense budgets and resources.

II. ACCESS TO DEFENSE COUNSEL

Standard 4-2.1 Access to Communication with Defense Counsel

(a) Every jurisdiction should guarantee by statute or rule [of court] the right of a criminally detained or confined person to prompt, confidential, affordable and effective communication with a lawyer throughout a criminal prosecution, appeal, or other quasi-criminal proceedings such as habeas corpus.

(b) All detaining or imprisonment institutions should provide reasonable, affordable access to a confidential telephone or other communication facilities in order to permit such communication between defense counsel and criminally-detained persons.

Standard 4-2.2 Right to Counsel at First and Subsequent Judicial Appearances [New]

A defense counsel should be made available in person to a [defendant or] criminally-accused person for consultation at or prior to any appearance before a judicial officer, including the first appearance. Unavailability of counsel should not, however, excuse noncompliance with relevant prompt hearing rules or law, nor should it be grounds for delaying the release of a criminally-accused person.

Standard 4-2.3 Referral Service for Criminal Cases

(a) To assist persons who wish to retain defense counsel, every jurisdiction should have a referral service for qualified defense counsel in criminal cases. The referral service should maintain a list of defense counsel willing and qualified to undertake the defense of a criminal case, and should be organized so that it can provide prompt service at all times.

(b) A defense referral service should employ an objective set of standards for defense attorneys to qualify for placement on the referral list, and should employ fair and neutral criteria for admitting qualified attorneys to the list, making referrals, and striking counsel from the list.

(c) The availability of the referral service should be publicized. Notices containing the essential information about the referral service and how to contact it should be posted in police stations, jails, and other locations in order to provide effective notice to criminally accused persons.

Standard 4-2.4 Prohibited Referrals

(a) Defense counsel should not give anything of more than nominal value to a person for recommending the lawyer's services, except that

(i) counsel may pay reasonable costs of advertisements, or the usual charges for a legal services plan or qualified lawyer referral service, as described in ABA Model Rule 7.2; and

(ii) counsel may maintain reciprocal referral arrangements with other lawyers that are otherwise uncompensated, if the client is fully informed [of the arrangement?] and the arrangement does not constrain defense counsel's independent professional judgment regarding the client's best interests.

(b) Even if referrals are uncompensated, defense counsel should not have an ongoing or regular referral relationship with any source (such as prosecutors, public defender programs, law enforcement personnel, victims, bondsmen, or court personnel) when such an ongoing relationship is likely to create conflicting loyalties for the lawyers involved, or an appearance of impropriety. In any case, defense counsel's relationship with the referral source should be disclosed to the client.

(c) Referrals to defense counsel should be based on merit, competence for the particular matter, and other appropriate considerations [move to commentary?], without favoritism unrelated to such merit.

III. LAWYER-CLIENT RELATIONSHIP AND DUTIES OF DEFENSE COUNSEL

Standard 4-3.1 Establishing and Maintaining an Effective Client Relationship

(a) Beginning with the first contact with an accused, defense counsel should seek to establish a relationship of trust and confidence with the accused that will aid in effective representation. Defense counsel should explain the necessity for frank and honest discussion of all facts known to the client in order to provide an effective defense. Defense counsel should explain that the attorney-client privilege strongly protects the confidentiality of communications with counsel.

(b) At an early stage, counsel should discuss the objectives of the representation and through what stages of a criminal matter the defense counsel will continue to represent the accused, including if there is an appeal.

(c) Counsel should take care to observe whether the client appears to be suffering from any mental or other disability or impairment that could affect the representation, although such a belief does not diminish defense counsel's obligations to the client. In such an instance, defense counsel should observe applicable ethical rules and should consider whether a mental examination or other protective measures are in the client's best interest.

(d) To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be provided for private, unmonitored discussions between defense counsel and an accused, in jails, prisons, courthouses, and other places where criminally detained persons must confer with counsel. Private facilities should also be provided for the review of evidence and discovery materials by counsel together with the accused. If an accused is in governmental custody, the detaining institution should also provide or allow counsel to provide the technology necessary for confidential and effective review of evidence by counsel together with the accused, and for joint preparation for court hearings.

(e) Absent a threat of immediate danger or violence, or advance judicial authorization, or other settled legal authority, persons working in jails, prisons, and other custodial institutions should be prohibited [by law or administrative regulations] from examining, monitoring, recording, or interfering with any privileged communication or correspondence between client and defense counsel relating to legal action arising out of charges or incarceration. Any potentially privileged interception should be initially reviewed by government personnel who are prohibited from communicating with prosecutors in the relevant criminal matter, and should be protected from further dissemination absent [clear] judicial approval.

(f) The obligation to maintain an effective client relationship is not diminished by the fact that the client is in custody. Defense counsel should actively work to maintain an effective and regular relationship with a detained client.

Standard 4-3.2 Seeking a Detained Client's Release from Custody *[New]*

(a) As promptly as possible, defense counsel should discuss with a detained client the client's custodial or release status, and determine whether release, a change in release conditions, or less restrictive custodial conditions, should be sought. Counsel should be aware of all alternatives less restrictive than full institutional detention, and should consider and consult with the client regarding the possibility of protective release conditions in every case, even the most serious. Counsel should investigate community and family resources that might be available to assist in these decisions.

(b) In addition to conferring with the client and supporters, counsel should investigate the factual predicate that has been advanced to support detention, and not assume its accuracy.

(c) Once defense counsel has a command of the facts, counsel should approach the prosecution to see if release, or a change in release conditions, can be negotiated.

(d) If the client's release cannot be negotiated and counsel and the client wish to seek release, counsel should submit to the court a statement of facts and legal criteria, as well as suggested conditions, that might support a release decision.

(e) If a court orders release on conditions and/or bond, counsel should fully explain these conditions to the defendant, as well as the consequences of their violation. Counsel should also assist the client and others acting for the client in understanding how to properly post assets or otherwise secure the release bond.

(f) If counsel is unable to secure the client's release, counsel should alert (with due regard to any relevant confidentiality concerns) the court and institutional personnel to any special medical, psychiatric, dietary, or security needs of the client while in government custody, and request that the court order the appropriate officials to take steps to meet such special needs.

(g) Counsel should reevaluate the client's eligibility for release, or changed release conditions, at all significant stages of a criminal matter, or when there is any relevant change in facts or circumstances, and should request reconsideration of detention or modification of conditions when in the client's best interests.

Standard 4-3.3 Interviewing the Client

(a) Unless not practicable, defense counsel should obtain and review available evidentiary materials before substantively interviewing the client. Counsel should share such evidentiary materials with the defendant at some point (consistently with the terms of any applicable protective order), but not necessarily at the first interview.

(b) [*Initially?*] Defense counsel should meet with the client in person unless impracticable, and very early in the representation interview the client in depth to determine all relevant facts known to the client, as well as the client's objectives for the representation. Counsel should interview the client as many times as is necessary for effective representation, which in all but the most simple and routine cases will ordinarily mean more than once.

(c) Early on in the representation, defense counsel should also consider, and discuss with the client, other relevant topics such as

- (i) the likely length and course of the pending proceedings;
- (ii) potential sources of helpful information and evidence;

- (iii) the range of potential outcomes, and punishments if convicted;
 - (iv) the possibility of a negotiated disposition, including the costs and benefits of cooperation with the government and the possibility of lesser-included offenses;
 - (v) fees, including the option of proceeding *pro se*.
- (d) When interviewing the client, defense counsel should discuss possible options and strategies, and seek relevant information without seeking to materially influence the substance of the client's factual responses. Defense counsel should encourage full and candid disclosure by the client to counsel. Counsel should not express any desire for "calculated ignorance," meaning that counsel should not express or intimate to the client that the client should not be candid in revealing facts for strategic or tactical reasons.

Standard 4-3.4 Fees

(a) Before or within a reasonably short time after commencing the representation, [nonpublic? or] retained defense counsel should discuss with the client the likely cost of the representation (including the attorney's fees, billing structure, and likely expenses), how it will be paid and any available options regarding the fee structure, what services and expenses the fees will cover, and to what stages of the matter (such as preliminary hearing, trial, sentencing or appeal) the fee does or does not extend.

(b) Once agreed upon, the amount, rate, and terms of the fee should be communicated to the client, in clear terms, without [significant?] delay and in writing unless impracticable.

(c) Defense counsel should not enter into an agreement for, charge, or collect an illegal or unreasonable fee. Nor should counsel allow the amount of compensation to interfere with providing effective representation to the client.

(d) In determining the amount of the fee in a criminal case, it is proper to consider the time and effort required, the responsibility assumed by counsel, the novelty and difficulty of the questions involved, the skill requisite to proper representation, the need for any special technology, experts, investigators, or other unusual expenses, the likelihood that other employment will be precluded, the fee customarily charged in the locality for similar services, the gravity of the charge, the experience, reputation, and ability of defense counsel, and the capacity of the client to pay the fee. Counsel may also consider what portion of the fee if any is a nonrefundable retainer, whether all of the fee is likely

to be spent, and the likelihood that the time required will actually exceed the amount of the fee.

(e) A publically paid criminal defender should not request or accept additional money or other compensation from nonpublic sources to represent a client in the appointed criminal case, unless the law clearly permits it.

(f) Defense counsel should not take as a fee or retainer assets that counsel reasonably believes are contraband or proceeds of crime, unless a fully-advised court allows otherwise.

(g) Retained defense counsel may accept compensation from third parties for the representation of a client, subject to counsel's loyalty and confidentiality obligations to the client and the criteria in Standard 4-1.4(f) above.

(h) Defense counsel may properly be retained for, in part, their particular experience with persons acting for the government in criminal matters. However, defense counsel should not state or imply that their compensation is for any unethical or secret influence; and no portion of the fee should be used for unethical or illegal services.

(i) Defense counsel should not divide a fee with a nonlawyer, except as permitted by applicable ethical codes of conduct.

(j) Defense counsel not in the same firm should not divide fees unless the division is in reasonable proportion to the experience, ability, and services performed by each counsel and is disclosed to the client; or by written agreement with the client each counsel assumes joint responsibility for the representation, the client is advised of and does not object to the participation of all counsel involved, and the total fee is reasonable.

(k) Defense counsel should not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case or a related forfeiture action premised on the client's alleged criminal conduct.

(l) A fee may be a one-time retainer or fee, or based upon hourly charges. A non refundable "flat rate" fee is permitted if fully explained in advance, although defense counsel should permit a client to recover all or part of the fee if unanticipated developments arise in the course of the representation such that a significant amount of anticipated work is not done by counsel.

(m) Defense counsel should not decline to provide the client with the client's file if requested, or cooperate with successor counsel, even if the client's fee is disputed or unpaid in whole or in part.

Standard 4-3.5 Literary or Media Rights Agreements Prohibited [See PF 1.8]

(a) Prior to the conclusion of all aspects of a criminal representation in which defense counsel participates, defense counsel should not enter into any agreement or informal understanding by which the defense counsel acquires an interest in rights to a literary or media portrayal or account based on counsel's confidential knowledge of or representation in that matter.

(b) Defense counsel should not allow interests in personal advancement or aggrandizement to affect judgments regarding what is in the best interests of the client in every case.

(c) A defense attorney has a lifelong duty of confidentiality regarding his or her professional representations which must be respected in any contract or work on a literary or media rights project, even if entered into after a matter is concluded or the client is deceased. However, after some reasonable period of time after a criminal matter or representation is concluded, the public's interest in accurate historical accounts of significant events should be presumed to outweigh the public's interest in maintaining confidentiality.

Standard 4-3.6 Prompt and Thorough Actions to Protect the Accused

(a) Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity, and promptly plan and timely take all necessary actions to vindicate such rights.

(b) Defense counsel should, as quickly as possible, request from the prosecution, obtain, and review evidentiary [discovery] materials relevant to the criminal matter.

(c) Unless not feasible or unnecessary, defense counsel should promptly develop an investigative and legal defense strategy, including a theory of the defense [case], and plan carefully how to proceed. Counsel should remain open-minded about and make adjustments to the investigative or defense strategy as the case proceeds.

(d) Defense counsel should promptly consider taking, in timely fashion, all procedural legal steps which are in the client's best interest and may be taken in good faith. Such steps may include motions for: the immediate preservation of physical evidence; pretrial release of the accused; potential benefits from cooperation with the government; investigative and expert services; obtaining psychiatric examination of the accused when a need appears; change of venue or continuance; discovery; access to and testing of physical evidence; suppression of

illegally obtained evidence; severance from jointly charged defendants; and for amendment or dismissal of the charges.

(e) Defense counsel should be creative in considering what procedural and investigative steps to take and motions to file, and should not be deterred from sensible or unpopular action merely because counsel has not previously seen a tactic used or taken. Defense counsel should discuss unusual criminal matters or events with other experienced counsel to ensure that all reasonable steps have been considered, while employing safeguards to protect confidentiality and avoid conflicts of interest.

Standard 4-3.7 Advice and Service on Anticipated Unlawful Conduct

(a) Defense counsel should always advise his or her clients to comply with the law.

(b) Defense counsel may advise concerning the possible meaning, scope, and validity of a law, but should not knowingly propose, advise, or assist in a course of conduct which defense counsel knows to be illegal or fraudulent, unless the client is contemplating a good faith test of the validity of the law. Counsel may, however, discuss the legal consequences of a proposed course of conduct with a client.

(c) Defense counsel should not enter into an arrangement with persons counsel knows [reasonably believes?] to be engaged in ongoing criminal conduct to provide representation on a regular basis to the participants. Counsel may, however, agree in advance to represent clients as part of a bona fide effort to determine the validity, scope, meaning, or application of the law, or incident to a general retainer for providing legal services to a person or enterprise engaged in legitimate activities.

(d) Consistent with defense counsel's general duty to maintain confidentiality, defense counsel may reveal information relating to representation of a client to prevent reasonably certain death, substantial bodily harm, or substantial financial or property harm that defense counsel's services have been or will be used to further.

Standard 4-3.8 Duty to Keep Client Informed and Advised

(a) Defense counsel should keep the client reasonably and currently informed of developments in and progress of the case, including [the course of?] pretrial investigation, discovery, plea negotiations and preparing the defense. Defense counsel should timely explain and discuss developments in the case with the client to the extent

reasonably necessary to permit the client to make informed decisions regarding the representation.

(b) Defense counsel should promptly comply with the client's reasonable requests for information about the matter, and for copies of or access to relevant documents unless the client's access to such information is restricted by law or court order. Counsel should ordinarily challenge restrictions on the client's access to information unless there is good reason not to do so. Even when access to evidence is restricted, defense counsel should convey any information that the client is permitted to receive.

Standard 4-3.9 Maintaining Continuity of Counsel [New]

At every stage of a criminal representation, defense counsel who leaves the representation should make efforts [take steps?] to ensure that the client will be continuously represented by some competent defense counsel, including through the pretrial, trial, verdict, post-trial motions, sentence, and appellate stages, so that the client's rights are not waived or unprotected due to lack of counsel.

Standard 4-3.10 Relationship Between Prior and Successor Counsel [New]

(a) Defense counsel should seek to establish and maintain a cooperative relationship with any prior, or successor, defense counsel in the representation, as a cooperative relationship is ordinarily in the client's best interests [*despite any personal reservations defense counsel may have?*].

(b) Prior counsel should act to protect the client's privileges, confidences and secrets, and seek a release from the client before sharing such information.

(c) With consent from the client, prior counsel should promptly provide the client's file to successor counsel. Prior counsel may seek a release from the client regarding the representation, but may not unreasonably withhold the client's file pending such release, or based on dispute regarding fees or other matters. The client's file belongs to the client.

[*Q. Should we have a separate Standard on "The Client's File"? A. This is a controversial topic within the Defense Bar. See also 4-3.4(m), "Fees," above.*]

IV. INVESTIGATION AND PREPARATION

Standard 4-4.1 Duty to Investigate

(a) Defense counsel has a duty to investigate in all cases, and to assure at least that there is a sufficient factual basis for all prosecution charges. The duty to investigate exists regardless of the apparent force of the prosecution's evidence, or a client's own admissions or even statements to defense counsel of facts suggesting guilt, a desire to plead guilty, or that there should be no investigation

(b) The scope and intensity of investigation may vary and should be guided by the circumstances of each case. Defense counsel should keep an open mind regarding his or her investigative assessment of the matter as the matter progresses, because the evidence, complexity, or seriousness of a matter can change.

(c) Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the case, potential dispositions, or sentencing issues in the event of conviction.

(d) Counsel's investigation should include independent investigation, as well as efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others. Counsel's investigation should include independent evaluation of the prosecution's evidence (including possible retesting or reevaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of government witnesses, and other possible suspects and alternative theories that the evidence may raise. Investigation also includes evaluation of the legal validity and force of the prosecution's case.

(e) If the client is unable to pay for investigation, counsel should seek funding for investigative costs from the court or government, or donated sources, and advise the court that at some point, the lack of investigation may render legal representation ineffective.

Standard 4-4.2 Illegal Investigation Prohibited

(a) Defense counsel should not use illegal or unethical means to obtain evidence or information, or employ, instruct, or encourage others to do so.

(b) Defense counsel should not seek to acquire possession of physical evidence, personally or through third parties, where defense counsel's purpose is to improperly obstruct access to such evidence.

Standard 4-4.3 Duty to Consider and Engage Experts and Investigators
[New]

(a) After evaluating the prosecution's evidence and case, defense counsel should determine whether the client's interests would be served by engaging fact investigators, forensic or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, seek to engage them. Counsel should make an evaluation for expert assistance at all stages of an investigation and prosecution, including pre-charge investigations, pretrial proceedings, trial, sentencing, and appeals and collateral attack.

(b) If the client lacks sufficient resources to engage such services, defense counsel should investigate whether such services might be donated or otherwise obtained at no cost, or make an application for funding from the court. Such application should be made *ex parte* if appropriate to protect the defendant's right to confidentiality.

(c) Public defender attorneys should advocate for resources sufficient to fund such additional expert services on a regular basis.

Standard 4-4.4 Relationship with Witnesses

(a) "Witness" in this Standard includes a potential or prospective witness.

(b) Defense counsel, in representing an accused, should not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of third persons.

(c) Defense counsel should not pay or provide a benefit to a witness in order to, or in an amount that is likely to, affect the substance of the witness's testimony. It is not improper, however, for defense counsel to reimburse an ordinary witness for the reasonable expenses of attending court, attending depositions pursuant to statute or court rule or order, or attending pretrial interviews. Payments to a witness may also encompass transportation and loss of income, and other reasonable expenses, provided that the payments are disclosed to the prosecution at an appropriate time.

(d) It is not necessary for defense counsel or defense counsel's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel. Defense

counsel should, however, follow applicable ethical rules that address dealing with unrepresented persons.

(e) Defense counsel should not discourage or obstruct communication between prospective witnesses and the prosecutor. Defense counsel should not advise any person other than a client, or cause such person to be advised, to decline to give to the prosecutor or defense counsel for codefendants information which such person has a right to give;

(f) Defense counsel should be cautious in deciding to interview any witness without a third-party present, in light of the possibility that a court might not later permit counsel to impeach such a witness by counsel's own testimony without withdrawal from the representation. Unless impracticable, defense counsel should have a third-party witness to all contacts with potential witnesses who counsel reasonably believes may be hostile to the defendant or otherwise likely to change their testimony.

Standard 4-4.5 Relationship with Expert Witnesses

(a) This section addresses persons engaged to assist the defense, not adverse witnesses. "Expert witness" can refer to any person who will offer expert nonpercipient opinion, advice, or testimony.

(b) Defense counsel may engage an expert for consultation on evidence and strategy, or an expert to prepare a report to be presented through the expert's testimony. Before engaging an expert, defense counsel should investigate the expert's credentials, relevant professional experience, and reputation in the field. Before offering an expert as a defense witness, counsel should investigate the scientific acceptance of the particular expertise about which the expert would testify.

(c) Defense counsel who engages an expert to prepare a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert's opinion on the relevant subject. Defense counsel should explain to the expert that a testifying expert's role in the matter will be to aid the fact finders and not act as a partisan, explain the manner in which the examination of the expert witnesses is likely to be conducted, and suggest likely impeachment questions the expert may be asked.

(d) Counsel should provide the expert with all information reasonably necessary to support a full and fair opinion.

(e) Defense counsel should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. Defense counsel should be aware of expert discovery rules and act to protect

confidentiality and the client's interests, for example by not sharing with the expert client confidences and work product that counsel does not want disclosed.

(f) Defense counsel should become familiar with ethical rules in the expert's professional realm, should examine a testifying the expert's background and credentials for potential impeachment issues, and should seek to learn enough about the substantive area of the expert's expertise to enable effective preparation of the defense expert, as well as cross-examination of the government's expert.

(g) Regarding compensation for an expert, defense counsel should determine the expert's normal rate, and the normal rate for other expert's in the field. Counsel should not attempt to influence the expert's opinion or testimony by any improper means, including not offering future work, or offering or paying an excessive fee for the purpose of influencing the expert's testimony. Defense counsel should also consider the perception of a jury regarding an expert's high rate of compensation. Defense counsel may not fix the amount of the fee contingent upon the testimony an expert will give, or on the result in the case.

Standard 4-4.6 Compliance with Discovery Procedure

Defense counsel should make a diligent effort to comply lawful discovery obligations, unless otherwise authorized by the court.

Standard 4-4.7 Handling Incriminating Physical Evidence

(a) Defense counsel should not tamper with, conceal, or destroy physical evidence which may incriminate the client, unless authorized by the court.

(b) Defense counsel who receives a physical item implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (e).

(c) Unless required to disclose, defense counsel should return the item to the source from whom, or place from which, defense counsel received it, except as provided below. In returning the item, defense counsel should advise the source of the possible legal consequences pertaining to possession or destruction of the item. Defense counsel should prepare a written record of these events and should maintain that record in the work-product file, but should not give the source a copy of such record.

(d) Defense counsel may receive such a physical item for a reasonable period of time during which defense counsel: (1) intends to return it to the owner; (2) reasonably fears that return of the item will result in its destruction; (3) reasonably fears that return of the item will result in physical harm to anyone; (4) intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or (5) is unable to return the item. Counsel should take steps to ensure that any testing does not alter the item or interfere with its later testing by the government. If defense counsel tests or examines the item, counsel should thereafter return it unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel does not return the item, the lawyer should not keep the item in a location with other clients' privileged materials, which could be exposed to governmental examination if a search is conducted. Rather, counsel should either retain the item in a clearly separate and independent manner, or deliver it to a third-party lawyer who will be obligated to maintain the confidences of the client and defense counsel. Defense counsel should not knowingly impede lawful efforts of law enforcement authorities to obtain the item.

(e) If the item received is contraband (that is, an item possession of which is in and of itself unlawful, such as narcotics), defense counsel may suggest that the client destroy it if there is no pending case or investigation relating to the evidence and if such destruction is clearly not in violation of any criminal statute nor obstructing any lawful law enforcement process. If such destruction is not permitted by law and defense counsel determines that the item cannot be retained, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.

(f) If defense counsel discloses the location of or delivers the item to law enforcement authorities, counsel should do so in a manner that protects the client's interests.

V. CONTROL AND DIRECTION OF LITIGATION

Standard 4-5.1 Advising the Accused

(a) When requested, as well as before all significant decision points, defense counsel should advise the accused with candor concerning all aspects of the case, including an assessment of possible strategies and likely and possible outcomes. Such advisement should

take place after counsel is as fully informed as is reasonably possible at the time, about the relevant facts and law. Counsel should advise the client of what more (if anything) needs to be done or considered before final decisions can be made.

(b) Defense counsel should exercise independent professional judgment when advising an accused, and may refer not only to law but to other considerations such as moral, economic, social or political factors that may be relevant to the client's situation.

(c) Defense counsel should provide the client with such advice sufficiently in advance of decisions to allow the client to consider the options, and avoid unnecessarily rushing the accused into decisions.

(d) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.

(e) Defense counsel should caution the client to avoid communication about the case with anyone, including victims or other possible witnesses, persons in custody, and any government personnel, except with the approval of counsel; to avoid any contact with jurors or prospective jurors; and to avoid either the reality or the appearance of any other improper activity

(f) Defense counsel should consider and advise the client of any potential benefits as well as negative aspects of cooperating with the government.

Standard 4-5.2 Control and Direction of the Case

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. Determining whether a decision is ultimately to be made by the client or by counsel is highly contextual, and counsel should give great weight to strongly held views of a competent client regarding decisions of all kinds.

(b) The decisions which are to be made by the accused (absent a disabling mental or other impairment) after full consultation with counsel include:

- (i) whether to proceed without counsel;
- (ii) what pleas to enter (including an insanity plea);
- (iii) whether to pursue plea negotiations and whether to accept a plea offer;
- (iv) whether to cooperate or provide substantial assistance to the government;
- (v) whether to waive jury trial;
- (vi) whether to testify in his or her own behalf;
- (vii) whether to ask for instructions on lesser-included offenses;

- (viii) whether to move for mistrial;
- (ix) whether to allocute at sentencing; and
- (x) whether to appeal.

(c) Strategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate. Such decisions include how to pursue plea negotiations, how to craft and respond to motions and, at hearing or trial, what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what motions and objections should be made, and what and how evidence should be introduced.

(d) If a disagreement on a significant matter arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, the client's views, and the resolution reached. The record should ordinarily be shown to the client and should be made and maintained in a manner which protects the client's confidentiality.

Standard 4-5.3 Assisting a Criminally Accused Person Who is Proceeding *Pro Se*

(a) An attorney who is assigned to work on behalf of a criminally accused person who has been authorized by a court to proceed *pro se* should attempt to scrupulously observe the accused's right to develop and present the accused's own case, while still attempting to advise the accused of potential benefits and dangers the attorney perceives in the course of the litigation. Such an attorney should be fully prepared about the matter in order to offer such advice.

(b) An attorney whose assigned duty is to actively assist a *pro se* accused should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case, while still providing the attorney's best advice.

(c) An attorney whose assigned duty is to "stand by" and assist a *pro se* criminally accused only when the accused requests assistance, may bring to the attention of the accused steps that could be potentially beneficial or dangerous to the accused, but should not actively participate in the conduct of the defense unless requested by the accused or as directed by the court.

Standard 4-5.4 Investigation, Advice and Consideration of Collateral Consequences [New]

(a) Defense counsel should investigate, determine, and advise the client of potential collateral consequences that may arise from plea or conviction such as, for example, immigration consequences. Such advice should be provided sufficiently in advance so that it may be fairly considered in a decision to pursue trial, plea, or other dispositions.

(b) Collateral consequences should be investigated under federal laws, state and local laws where the crime is charged, and laws applicable to the client's jurisdiction of residence if different.

(c) Defense counsel's advice should include advice regarding applicable procedures for obtaining relief from applicable collateral consequences, including mechanisms for expunging or sealing records of conviction and arrest, if available.

(d) Defense counsel should include consideration of potential collateral consequences in negotiations with the prosecutor regarding pleas and sentences, and in communications with the court or court officers regarding the appropriate sentence or conditions to be imposed.

[Q. Strike the following? Or include as an additional Standard in light of its widespread impact and importance? A. The Task Force did not come to agreement about this.]

Standard 4-5.5 Special Attention to Immigration Status and Consequences [New]

(a) Defense counsel should ask all clients their immigration status, assuring the client that such information is important for effective legal representation and that it should be protected from further disclosure by the attorney-client privilege.

(b) Upon learning that a client may not be a United States citizen, defense counsel should investigate the client's precise status, prior criminal record, and possible immigration consequences that might follow any particular criminal disposition. Consultation or association with an immigration law expert or knowledgeable advocate is advisable in these circumstances. Public defenders should either develop, or seek donation of or funding for, such immigration expertise within their office.

(c) Counsel should advise a noncitizen client of all potential immigration consequences of each step of the criminal process. Counsel should avoid actions that might alert the government to negative immigration information about the client.

(d) If a client is convicted of a deportable offense, defense counsel should advise the client of the serious consequences if the client illegally returns to the United States.

VI. DISPOSITION WITHOUT TRIAL

Standard 4-6.1 Duty to Explore Disposition Without Trial

(a) Defense counsel should be open to plea negotiations at every stage of a criminal matter, and be knowledgeable about possible dispositions that are alternative to trial or imprisonment. On the other hand, defense counsel should resolutely protect a client who professes innocence, and should ordinarily advise such a client to plead not guilty.

(b) Unless not feasible, defense counsel should explore the possibility of an early diversion of charges from the criminal process through the use of community agencies or other alternative dispositions.

(c) Absent rare and unusual circumstances, defense counsel should not recommend to a defendant acceptance of a plea offer unless and until appropriate investigation and study of the case has been completed, including an analysis of relevant law and the prosecution's evidence.

Standard 4-6.2 Conduct of Plea Discussions [See PF 5.7]

(a) Early in the representation, and preferably before engaging in plea discussions with the prosecutor, defense counsel should discuss with and advise the client about possible plea negotiations and options. Once discussions with the prosecutor are begun, defense counsel should keep the accused advised of relevant developments.

(b) Defense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor, while explaining that presenting the government's offer does not indicate an unwillingness to go to trial. Defense counsel should ensure that the client understands a proposed plea agreement, including the consequences and possible collateral effects. Defense counsel may make a recommendation to the client regarding plea proposals, but should not unduly pressure the accused to make any particular decision.

(c) Defense counsel should not knowingly make false statements concerning the evidence or law in the course of plea discussions with the prosecutor.

(d) Defense counsel should be aware of possible benefits from early cooperation with the government, but should not allow the

pressure to obtain speedy benefits from cooperation to obscure consideration of the client's long-term best interests. Counsel should fully consider and advise about such long term interests before recommending any cooperation-dependent plea agreement.

(e) Defense counsel should not allow benefits for one client to influence or encourage acceptance of less than optimal benefits for any other client.

(f) Although defense counsel should ordinarily not represent two or more clients in the same or related criminal case, in the rare case where such joint representation is permitted, defense counsel should not participate in negotiating an aggregated disposition unless counsel reasonably believes that counsel can effectively represent all joint clients without conflict, and each client consents after fully informed consultation, including disclosure of the existence and nature of all the claims, pleas, consequences and negotiated benefits involved.

(g) If after careful consideration, discussions with a victim appear to be beneficial for the interests of the accused in negotiating a disposition, defense counsel should be cautious in approaching and discussing the matter with victims, and avoid any appearance of attempting to unduly influence or intimidate a victim.

Standard 4-6.3 Plea Agreements and Other Negotiated Dispositions *[New]*

(a) Before entering into a plea agreement, counsel should attempt to ensure that the agreement is comprehensive and resolves all outstanding issues regarding the client. Counsel should ensure that any written plea agreement accurately and completely reflects all government promises and the precise terms of the agreement.

(b) Defense counsel should fully prepare the accused for any hearing before a court related to entering or accepting a negotiated disposition, and for any pre-plea or post-plea interviews conducted by the prosecution or by court agents such as presentence investigators or probation officers. Counsel should ordinarily accompany the client to any such interview and act to protect the client's interests there.

(c) In appropriate cases counsel should consider, and with the consent of the client, seek, entering a plea and proceeding immediately to sentencing without a presentence investigation.

(d) Defense counsel should investigate and be knowledgeable about sentencing procedures, law, collateral consequences and likely outcomes, and about the characteristics and practices of the sentencing judge, and advise the client on these topics, before permitting the client to enter a negotiated disposition. Counsel should also consider and

explain to the client how specific terms of an agreement are likely to be implemented.

(e) During any court hearing regarding a negotiated disposition, defense counsel should ensure that all relevant details of the plea agreement or negotiated disposition are placed on the record, and that the record fully reflects any factors necessary to protect the client's best interests.

(f) Defense counsel should bring to the attention of the court, on the record if necessary, prosecutorial conduct or conditions (such as unreasonably speedy deadlines or refusal to provide discovery) that counsel believes have impermissibly coerced a plea or suggest that the plea is not voluntary, or fully informed, or which prevented counsel from providing effective assistance of counsel.

Standard 4-6.4 Opposing Routine Waivers of Important Rights in Plea Agreements [New]

(a) Defense counsel should not, in plea agreements, routinely or automatically agree to waivers of important defense rights (such as the right to appeal (including sentencing appeals), to *Brady* discovery, to challenge the effective assistance of counsel or the failure to preserve evidence, or to contest the conviction in collateral proceedings). Defense counsel should ordinarily object to any such waivers in negotiations with the government, and request specific, individualized reasons for their inclusion. Any such waiver should include an exception for a subsequent showing of "manifest injustice" and actual innocence.

(b) Any such waiver and its possible consequences should be fully explained to and discussed with the client, before agreeing. Even if the client wishes to agree to such waivers after consultation, defense counsel should consider first challenging the legitimacy of any such waiver with the court.

[Alternative Proposal – Task Force did not unanimously agree:]

Defense counsel should, with the consent of the defendant, oppose the prosecution's requirement as a condition of a plea agreement that the defendant waive the right to appeal, to seek post-conviction relief, to assert ineffective assistance of defense counsel, or to seek preservation of the evidence as these avenues of relief are provided to ensure that miscarriages of justice may be remedied by the criminal justice system and that guilty plea convictions and sentences are subject to judicial scrutiny.

VII. TRIAL

Standard 4-7.1 Courtroom Professionalism

(a) As an officer of the court, defense counsel is entitled to the same respect as is afforded to judges, prosecutors, and other participants in the legal process. Similarly, defense counsel should support the authority and dignity of the court by adherence to codes of professionalism and by manifesting a courteous and professional attitude toward the judge, opposing counsel, witnesses, jurors, courtroom staff, and others involved in the legal process.

(b) Defense counsel should not 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 the judge. When *ex parte* communications or submissions are authorized, defense counsel should honestly inform the court of all material facts known to the lawyer that would enable the court to make an informed decision, even if such facts are adverse. Except when nondisclosure is legally authorized, counsel should notify opposing counsel that an *ex parte* contact has occurred, without disclosing its content unless ordered to do so.

(c) When court is in session, unless otherwise permitted by the court, defense counsel should address the court and should not address other counsel directly on any matter relating to the case.

(d) Defense counsel should comply promptly with all final orders and directives of a court. Nevertheless, defense counsel has a right and obligation to have the record reflect adverse rulings, grounds for objections, and judicial conduct which counsel considers prejudicial to the client's legitimate interests. If a judge prohibits making an adequate proffer or record, counsel should take other lawful steps to protect the client's rights. Defense counsel has a right to make respectful requests for reconsiderations of adverse rulings, as well as requests for judicial recusal on appropriate grounds.

(e) Defense counsel should cooperate with courts and the organized bar in developing codes of professionalism.

Standard 4-7.2 Selection of Jurors

(a) Defense counsel should be prepared prior to trial to discharge effectively his or her function in the selection of the jury, including the raising of any appropriate issues concerning the method by which the jury panel was selected and the exercise of challenges for cause and peremptory challenges.

(b) Defense counsel should not strike jurors based on constitutionally or statutorily impermissible criteria. [*The Task Force was split as to whether the next sentence should be in the black letter standard, or in Commentary: Such criteria may include factors such as race, gender, religion and national origin, and may include other factors such as sexual orientation.*] Defense counsel should be alert to, and challenge, a prosecutor's use of peremptory challenges that indicates a possible impermissible discriminatory intent.

(c) In those cases where it appears necessary to conduct a pretrial investigation of the background of potential jurors, the investigative methods of the defense should not harass, unduly embarrass, or invade the privacy of potential jurors. Absent special circumstances, such investigation should be restricted to an investigation of records and sources of information already in existence.

(d) The opportunity to question jurors personally should be used solely to obtain information for the well-informed exercise of challenges. Defense counsel should not intentionally use voir dire to present matters or evidence which defense counsel knows will not be admissible at trial, or to argue counsel's case to the jury, or to unduly ingratiate counsel with the jurors.

Standard 4-7.3 Relationship with Jury

(a) Defense counsel should ordinarily not communicate with persons counsel knows to be summoned for jury duty or impaneled as jurors, prior to or during the trial, other than in the lawful conduct of courtroom proceedings. Defense counsel should avoid the appearance of such extraneous communications and minimize any out-of-court proximity to or contacts with jurors. Where out-of-court contacts cannot be avoided, counsel should not communicate about or refer to the specific case.

(b) Defense counsel should treat jurors with courtesy and respect for the important role jurors play in the criminal justice system, while avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.

(c) After discharge of the jury from further consideration of a case, defense counsel should avoid any action, communication or contact that reasonably could harass or embarrass the juror or could tend to influence any future jury service, and should know and comply with applicable rules and law governing the subject.

(d) After a jury proceeding is concluded, defense counsel may, if no statute, rule or order prohibits such action, communicate with jurors to investigate whether a verdict may be subject to legal challenge, or to

evaluate counsel's performance for improvements in the future. Counsel should consider requesting the court to instruct the jury that (if it is not prohibited by law) it is not improper for jurors to discuss the case with the lawyers, although they are not required to do so. Any post-discharge communication with a juror should be crafted to support a perception of fairness and trust in the criminal justice system and the jury trial process, regardless of the trial result, and should not express criticism of the jury's actions or verdict.

Standard 4-7.4 Opening Statement at Trial [See PF 6.5]

(a) Defense counsel should be aware of the importance of an opening statement. Absent extraordinary reason, an opening statement should always be given at the beginning of the trial and not be deferred. Any decision to defer the opening statement should be fully discussed with the client, and a record of such decision should be made. The opportunity to give an opening statement should never be waived, even if deferred.

(b) Defense counsel's opening statement should be specific regarding the facts and context of the client's case, and should, among other things, alert the jury to known flaws in the government's case and present the jury with the defense theory of the case.

(c) Defense counsel's opening statement should be made without argument, and should be confined to a fair statement of the issues in the case, including legal issues, and discussion of evidence that defense counsel reasonably believes in good faith will be available, offered, and admitted.

(d) Defense counsel's opening statement should be made without inappropriate appeals to emotion, expressions of personal opinion, vouching for witnesses, or personal attacks on opposing counsel. When defense counsel has reason to believe that a portion of the opening statement may be objectionable, counsel should raise that point with opposing counsel and, if necessary, the court, in advance.

Standard 4-7.5 Presentation of Evidence [See PF 6.6]

(a) If defense counsel has reasonable uncertainty about the admissibility of evidence, counsel should seek and obtain resolution from the court prior to trial if possible, or reasonably in advance of the time for proffering the evidence before the jury. Counsel should challenge, and consider an interlocutory appeal if possible, evidentiary rulings that are materially adverse to the client.

(b) Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of material falsity in evidence offered by the defense, unless specific authority in the jurisdiction otherwise permits.

(c) Defense counsel should not knowingly and for the purpose of bringing inadmissible matter to the attention of the trier of fact offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the trier of fact.

(d) Defense counsel should not permit any physical evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration of the case by the trier of fact until such time as a good faith tender of such evidence is made.

(e) Defense counsel should not tender physical evidence in the presence of the trier of fact if it would tend to prejudice fair consideration of the case, unless there is a reasonable basis for its admission in evidence.

Standard 4-7.6 Examination of Witnesses in Court [See PF 6.7]

(a) The examination of any witness should be conducted fairly and with due regard for the legitimate dignity and privacy interests of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.

(b) Defense counsel's belief or knowledge that the witness is telling the truth does not preclude vigorous cross-examination, even though the examination may cast doubt on the testimony.

(c) Defense counsel should not call a witness in the presence of the jury who the lawyer knows will claim a valid privilege not to testify.

(d) Defense counsel should not ask a question which implies the existence of a factual predicate for which a good faith belief in its existence is lacking.

Standard 4-7.7 Closing Argument to the Jury [See PF 6.8]

(a) In closing argument to the jury, defense counsel may argue all reasonable inferences from the evidence that is in the record. Defense counsel should know or review the evidence in the record to the extent reasonably possible. Defense counsel should not knowingly misstate the evidence in the record, or argue inferences that have no good-faith support in the record.

(b) Defense counsel should not argue in terms of counsel's personal opinion. Counsel may, however, state that the evidence demonstrates that the defendant is not guilty or should be acquitted for some other lawful reason, and that the evidence suggests that defense witnesses testified accurately or that prosecution witnesses testified falsely.

(c) Defense counsel should not make arguments calculated to appeal to improper prejudices of the jury.

(d) Defense counsel should not argue to the jury that the jury should not follow its oath to consider the evidence and follow the law. Unless prohibited by law in the jurisdiction, however, defense counsel may argue that interests of fairness or justice with support in the record should lead the jury to acquittal.

(e) Defense counsel may respond fairly to arguments made in the prosecution's initial closing argument, and should object and request relief from the court regarding prosecution arguments it believes are improper, rather than responding with jury arguments that counsel knows are improper.

(f) Because the prosecution often has the last word in the form of a rebuttal argument, defense counsel should anticipate this and craft the defense closing argument to anticipate the government's rebuttal.

(g) If defense counsel believes the prosecution's rebuttal closing argument has been improper, defense counsel should object and consider requesting relief from the court, including the opportunity to reopen argument so that defense counsel may respond before the jury.

Standard 4-7.8 Facts Outside the Record [See Pf 6.9]

In any court hearing, defense counsel should not knowingly refer to or argue on the basis of facts outside the record, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court can take judicial notice, or are facts that counsel reasonably believes will be entered into the record at that proceeding.

Standard 4-7.9 Comments by Defense Counsel After Verdict or Ruling [New] [See PF 6.10]

(a) Defense counsel may express respectful disagreement with an adverse court ruling or jury verdict, and may indicate that the defendant maintains innocence and intends to appeal. Defense counsel should refrain from personalized criticism of any participant. In all cases,

defense counsel are governed by the general Standard on Public Statements, Standard 4-1.6.

(b) Defense counsel may publicly praise a favorable court verdict or ruling, compliment participants and supporters, and note the social value of a particular ruling or event. Defense counsel should not boast or gloat or seek personal aggrandizement regarding a verdict.

Standard 4-7.10 Motions for Acquittal During Trial [New]

Defense counsel should ordinarily move for acquittal after close of the government's evidence and at the close of all evidence. Counsel should be aware of applicable rules regarding waiver, and take appropriate steps during trial to fully preserve the client's post-trial and appellate rights.

VIII. POST-TRIAL MOTIONS AND SENTENCING

Standard 4-8.1 Post-Trial Motions [See PF 7.1]

(a) If the triers of fact render a judgment of guilty, defense counsel should know the relevant rules governing post-trial motions and timely present all motions necessary to protect the defendant's rights, including the defendant's right to appeal all aspects of the case. This should ordinarily include a motion for acquittal notwithstanding the verdict and for a new trial based on errors during the proceedings.

(b) Unless otherwise agreed or provided by law, defense counsel should ordinarily continue to represent the defendant through all post-trial proceedings. Nevertheless, if a guilty verdict has been returned, defense counsel should also dispassionately consider whether the client's best interests would be served by substitution of new counsel for post-trial motions.

(c) If a post-trial motion is based on ineffective assistance of counsel, defense counsel should notify the court of a need to withdraw, move to withdraw, and aid the client in obtaining substitute counsel.

Standard 4-8.2 Reassessment of Options After Trial [New]

After a guilty verdict and before sentencing, defense counsel should reassess prior decisions in light of changed circumstances, and pursue options that now seem appropriate, regardless of prior decisions. For example, counsel should reassess and pursue if appropriate the

possibility of obtaining a reduction of the client's bail or a release from custody on conditions. Defense counsel might also reassess whether cooperation with the government at this point could benefit the client, and after consultation with the client, pursue that option if appropriate.

Standard 4-8.3 Sentencing [See PF 7.2]

(a) Very early in the representation and well before negotiating a plea or beginning trial, and without assuming the client's guilt, defense counsel should focus on potential issues that may later affect sentencing. Defense counsel should become familiar with the client's background, applicable sentencing laws and rules, and what options may be available to the client if convicted. Before any sentencing briefing or hearing begins, defense counsel should be fully informed regarding all sentencing alternatives available to the court and with community and other resources which may be of assistance in formulating a plan for meeting the client's needs. Defense counsel should consider whether association of an expert specializing in sentencing options, or other experts relevant to specific sentencing issues, is appropriate.

(b) Defense counsel's preparation prior to sentencing should also include familiarization with the court's practices in exercising sentencing discretion, the practical consequences of different sentences, and the normal pattern of sentences for the offense involved, including any guidelines applicable at either the sentencing or parole stages. The consequences (including all reasonably foreseeable collateral consequences) of potential dispositions should be explained fully by defense counsel to the client.

(c) Defense counsel should present to the court any argument or evidence which will assist in reaching a disposition favorable to the accused. If a presentence report or summary is made available to defense counsel, counsel should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. In many cases, defense counsel should independently investigate the facts relevant to sentencing, rather than relying on the government's report, and seek discovery or relevant information from governmental agencies or other third parties if necessary. Counsel should submit independent documents, information and arguments to the presentence officials and court.

(d) Defense counsel should gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible; and in an appropriate case, with the consent of the accused, be prepared to suggest alternative programs of rehabilitation or other nonimprisonment options, based on defense

counsel's exploration of employment, educational, and other opportunities made available by community services.

(e) Defense counsel should also ensure that the accused understands the nature of the presentence investigation process, and in particular the significance of statements made by the accused to probation officers and related personnel. Unless prohibited, defense counsel should attend the probation officer's interview with the accused. In any case, defense counsel should ordinarily seek to meet with the probation officer and discuss the case in person.

(f) Defense counsel should alert the accused to the right of allocution, if any, and to the possible dangers of making a statement that might tend to prejudice the sentencing judge's disposition or the merits of an appeal.

(g) If a sentence of imprisonment is imposed, defense counsel should seek the court's assistance, including an on-the-record statement by the court if possible, recommending the appropriate place of confinement and types of treatment, programming and counseling that should be provided for the defendant in confinement.

(h) Once the sentence has been announced, defense counsel should make any objections necessary for the record, seek clarification of any unclear terms, and advise the client of the meaning and effects of the judgment, including any known collateral consequences.

(i) If the client is in custody and an appeal will be taken, defense counsel should determine whether bail pending appeal is appropriate and, if so, move for it.

IX. APPEAL

Standard 4-9.1 Preparing to Appeal

(a) After conviction, defense counsel should explain to the client the meaning and consequences of the court's judgment and defendant's right of appeal. Defense counsel should provide the client with counsel's professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. Defense counsel should also explain to the client the advantages and disadvantages of an appeal, including the possibility that the government might cross-appeal, and the possibility that if the client prevails on appeal, a remand could result in a less favorable disposition. The ultimate decision whether to appeal should be the client's.

(b) Defense counsel should take whatever steps are necessary to protect the client's rights of appeal, including filing a timely notice of

appeal in the trial court, even if counsel does not expect to continue as counsel on appeal.

(c) Defense counsel should explain to the client that the client has a right to counsel on appeal (appointed, if the client is indigent), and that lawyers who specialize in criminal appeals are usually available. Defense counsel should candidly explore with the client whether trial counsel is the best lawyer to represent the client on appeal, or whether a lawyer specializing in appellate work should be consulted, added or substituted.

Standard 4-9.2 Counsel on Appeal [See PF 8.1]

(a) Appellate defense counsel should seek the cooperation and active participation of the client's trial counsel in the evaluation of potential appellate issues and preparation of briefing. A client's trial court counsel should ordinarily provide such assistance as is possible, including promptly providing the file of the case to appellate counsel.

(b) Appellate counsel should not conclude that a defense appeal lacks merit until counsel has fully examined the trial court record and the relevant legal authorities. If appellate counsel does so conclude, counsel should fully discuss that conclusion with the client, and explain the "no merit" briefing process applicable in the jurisdiction if available. Whether to file a "no merit" brief is the ultimately the defendant's decision after consultation.

(c) After examining the record and the relevant law, appellate counsel should give the client counsel's best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence, including any that might require initial presentation in a trial court. Counsel should advise the client about the probable and possible outcomes of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal, and to eliminate appellate contentions lacking in substance.

(d) If the client chooses to proceed with an appeal against the advice of counsel, counsel should present the appeal, so long as such advocacy does not involve deception of the court. When counsel cannot continue without misleading the court, counsel may request permission to withdraw.

(e) Appellate counsel has the ultimate authority to decide which arguments to make on appeal. If the client desires to raise an argument that is colorable, counsel should work toward an acceptable resolution with the client. When appellate counsel decides not to brief all of the issues that his or her client desires to be argued, appellate counsel should

inform the client of his or her *pro se* briefing rights, and consider providing the appellate court with a list of additional issues the client would like to present.

(f) In a jurisdiction with an intermediate appellate court, counsel for a defendant-appellant or appellee should ordinarily continue to represent the client after the intermediate court renders a decision if the prosecution seeks review in the highest court, unless a retainer agreement provides otherwise, or new counsel is substituted, or a court permits counsel to withdraw. Similarly, unless a retainer agreement provides otherwise or new counsel is substituted or a court permits counsel to withdraw, appellate counsel should ordinarily continue to represent the client if review is sought in the United States Supreme Court.

(g) If trial defense counsel will not remain as appellate counsel, trial counsel should notify the client of any applicable time limits, act to preserve the client's appellate rights if possible, and cooperate and assist in securing qualified appellate counsel. If appellate counsel's representation ends but further discretionary review is possible, counsel should advise the client of further options and deadlines, such as for certiorari.

(h) When the government appeals some ruling favorable to the client, defense counsel should analyze the issues and possible implications for the defendant and act to zealously protect the client's interests.

(i) When the law permits the filing of interlocutory appeals or writs to challenge adverse trial court rulings, defense counsel should consider whether to file an interlocutory appeal and, after consultation with the client, vigorously pursue such an appeal if in the client's interest. If the government files an interlocutory appeal, defense counsel should follow (g) above.

Standard 4-9.3 Conduct of Appeal [See PF 8.1]

(a) Prior to filing an appellate brief, appellate defense counsel should consult with the client about the appeal, and seek to meet with the client unless impractical.

(b) Appellate counsel should be aware of all applicable rules relating to securing all necessary record documents, transcripts, and exhibits, and ensure that all such items necessary to effectively prosecute the appeal are properly and timely ordered. Prior to filing the brief, appellate counsel should ordinarily examine the docket sheet, all exhibits and record documents, not just those designated by another lawyer. Counsel should consider whether, and how to appropriately, seek to

augment the record with any other matters, documents or evidence relevant to effective prosecution of the client's appeal.

(c) Appellate counsel should be aware of opportunities to favorably affect or resolve a defendant's appeal by motions filed in the appellate court, prior to the filing of a merits brief.

(d) Appellate counsel should be diligent in perfecting appeals and expediting their prompt submission to appellate courts, and be familiar with and follow all applicable appellate rules, while also protecting the defendant's best interests on appeal.

(e) Counsel should understand that the arguments listed or omitted on direct appeal can limit issues available in later collateral proceedings, and not unnecessarily abandon arguments that should be preserved. Counsel should also explicitly label federal constitutional arguments as such, so as to preserve all federal litigation options.

(f) Appellate counsel should be accurate in referring to the record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument. Appellate counsel should not fail to present directly adverse authority in the controlling jurisdiction of which counsel is aware and that has not been presented by other counsel in the appeal.

(g) Appellate counsel should not intentionally refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or are other matters of which the court properly may take judicial notice. Appellate counsel should seek by appropriate motion, filed in either the trial or the appellate court, to make available any necessary, relevant extra-record matters.

(h) If the appeal is set for oral argument, appellate counsel should explain to the client the right for the client to be present, and that attending the argument may have certain strategic advantages or disadvantages. If after consultation the client desires to attend the argument, counsel should seek to ensure that the client can be present. If the client is in custody, counsel should file a motion for the client to be brought to the argument.

(i) Appellate counsel should be aware of local rules and practices that may apply to oral arguments, for example, rules that apply to the submission of subsequent authorities or the use of demonstrative aids during argument.

(j) If appellate counsel's study of the record reveals that an ineffective assistance of trial counsel claim should be made, appellate counsel should weigh the advantages and disadvantages of raising an ineffective assistance claim on the existing record, versus pursuing such a claim in the trial court either before, or after, the appeal is heard.

Standard 4-9.4 Newly Discovered or Innocence Evidence [New]

(a) If newly discovered evidence relevant to the lawfulness of the client's conviction or sentence, or evidence tending to show actual innocence of the client, comes to the attention of counsel at any time after trial, counsel should promptly (i) evaluate the evidence and determine what potential remedies are available, (ii) advise the client, and (iii) determine what action if any to take. Counsel should determine applicable deadlines if any for the most effective use of such evidence, including federal habeas corpus deadlines, and timely act to preserve the client's rights. Counsel should determine whether, and how, best to notify the prosecution and court of such evidence only after carefully considering all strategic options that may be available. If time permits, counsel should consider enlisting additional counsel with expertise regarding the use of such evidence.

(b) When counsel confronts such newly discovered evidence, counsel should, after the steps in (a) above, exercise due diligence to investigate the significance of the evidence, and ordinarily take effective steps to attack the client's conviction or sentence.

(c) The duty to act on evidence tending to show actual innocence, or unlawfulness of conviction or sentence, applies to defense counsel even after that counsel's representation is ended, to the extent that such evidence comes to that counsel's personal attention. Such former counsel may discharge the duty, however, by alerting current defense counsel (if any) to the evidence.

Standard 4-9.5 Post-Appellate Remedies

(a) Once a defendant's direct appellate avenues have been exhausted, appellate counsel is not obligated to represent the defendant in a post-appellate, collateral proceeding unless counsel has agreed to do so. Nevertheless, appellate counsel should consider, in preparing the appellate briefing, whether there might be any potential grounds for relief using other post-conviction remedies (such as habeas corpus). Counsel should explain to the client the advantages and disadvantages of taking such action, and any timing deadlines that apply to such actions. Counsel should assist the client to the extent practicable in locating competent counsel for any post-appellate proceedings.

(b) The responsibilities of a lawyer representing a defendant in a post-appellate, collateral proceeding should be guided generally by the standards governing the conduct of defense counsel in criminal cases.

(c) Post-appellate counsel should seek the cooperation and active participation of the client's prior lawyer(s) in the evaluation of potential post-conviction issues and preparation of briefing. A client's prior counsel should ordinarily provide such assistance as is practicable.

(d) In post-appellate, collateral proceedings, defense counsel should consider invoking these Standards as providing possible standards of care for evaluating the effective assistance of counsel.

Standard 4-9.6 Challenges to the Effectiveness of Counsel

(a) If post-appellate counsel is satisfied, after appropriate investigation and legal research, that another defense counsel who served in an earlier phase of the case did not provide effective assistance, new counsel should not hesitate to seek relief for the client on that ground. Counsel should recognize that an ineffective assistance claim requires a showing of conduct below a reasonable standard of care, and not merely a showing of error.

(b) If post-appellate counsel is satisfied after appropriate investigation and legal research that another defense counsel who served in an earlier phase of the case provided effective assistance, he or she should so advise the client and may decline to proceed further.

(c) If defense counsel concludes that he or she did not provide effective assistance in an earlier phase of the case, defense counsel should explain this conclusion to the defendant and seek to withdraw from further representation of the defendant with an explanation to the court of the reason, while still honoring the duty of confidentiality and loyalty to the client.

(d) Counsel who is challenging a former defense counsel's performance should be sensitive to the professional and personal conflicts that can be raised by such a challenge involving a fellow member of the Bar, and the potential to act less aggressively in the face of such conflicts. Counsel should also be sensitive to the potential conflicts that may arise if the same lawyer handles a criminal client's trial, appeal, and subsequent habeas corpus action. Counsel should exercise counsel's own best independent judgment in such a situation, act in the best interests of the client, and attempt to not be influenced by such personal or professional considerations. Counsel whose effectiveness is challenged should similarly recognize that defense counsel's obligation is to the client, and that counsel who aggressively pursues such a challenge is attempting to act in the client's best interests.

(e) Defense counsel whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the matters raised by his

former client to the extent reasonably necessary, even though this involves revealing matters which were given in confidence. However, former defense counsel continues to have a duty of loyalty to the former client, and should carefully consider whether some other course of conduct, short of revealing damaging client confidences or privileged information, is appropriate. A waiver of the duty of confidence or the attorney-client privilege should not be presumed simply from the filing of an ineffective assistance claim. Rather, a fully informed and voluntary contemporaneous waiver from the client should be sought and the court and counsel advised of potential privilege and confidentiality claims. Even if the privilege is found to be waived, former counsel should, to the extent permitted by law, restrict the disclosure of confidences only to the extent that disclosure is necessary for the relevant purposes of the proceeding.

(f) In a proceeding challenging counsel's performance, counsel should not rely on the prosecutor to act as counsel's lawyer in the proceeding, and should to the extent possible continue to consider the former client's best interests. Former defense counsel should, however, provide truthful and complete information as the court may request.

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