

ADOPTED**RESOLUTION**

- 1 RESOLVED, That the American Bar Association adopts the black letter of the *ABA*
- 2 *Standards for Criminal Justice: Prosecution Function and Defense Function*, chapters
- 3 three and four of the *ABA Standards for Criminal Justice*, dated February 2015, to
- 4 supplant the Third Edition (1993) of the *ABA Standards for Criminal Justice:*
- 5 *Prosecution Function and Defense Function*.

6 **AMERICAN BAR ASSOCIATION**

7 Fourth Edition of the
8 **CRIMINAL JUSTICE STANDARDS**
9 for the
10 **PROSECUTION and DEFENSE FUNCTIONS**
11 (encompassing proposed revisions to the
12 **Third Edition approved in 1993**)

13
14 Presented by the
15 **CRIMINAL JUSTICE SECTION**
16 for Adoption by the House of Delegates
17 Midyear Meeting, Houston, TX
18 **February 2015**

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21 **CRIMINAL JUSTICE STANDARDS**

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23 for the

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25 **PROSECUTION FUNCTION**

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28 Co-Chairs, Criminal Justice Section Council: Cynthia Orr and Jim Felman, Chairs.

29 Standards Committee Chair: John Cline.

30 Task Force Chair: The Hon. John R. Tunheim, U.S. District Judge (D. Minn.).

31 Reporter: Professor Rory K. Little, U.C. Hastings College of the Law, San Francisco
32 litler@uchastings.edu

33
34 Reporter's Notes

35 1. Each Standard begins on a separate page. There are 57 proposed Prosecution Function
36 Standards here, up from 42 Standards in the 1993 Edition. Where there is no 1993 equivalent
37 Standard (or a subsection of a 1993 Standards is now made into a separate Standard), the proposed
38 revision is designated a "New" Standard.

39
40 2. This draft reflects final revisions approved by the Council of the Criminal Justice Section
41 at its April 2014 meeting.
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Proposed Revisions to the
Criminal Justice Standards for the
Prosecution Function

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PART I.

GENERAL STANDARDS

142
143
144145 **Standard 3-1.1 The Scope and Function of These Standards**

146 (a) As used in these standards, “prosecutor” means any attorney, regardless of agency, title,
147 or full or part-time assignment, who acts as an attorney to investigate or prosecute criminal cases or
148 who provides legal advice regarding a criminal matter to government lawyers, agents, or offices
149 participating in the investigation or prosecution of criminal cases. These Standards are intended to
150 apply in any context in which a lawyer would reasonably understand that a criminal prosecution
151 could result.

152 (b) These Standards are intended to provide guidance for the professional conduct and
153 performance of prosecutors. They are written and intended to be entirely consistent with the ABA’s
154 Model Rules of Professional Conduct, and are not intended to modify a prosecutor’s obligations
155 under applicable rules, statutes, or the constitution. They are aspirational or describe “best
156 practices,” and are not intended to serve as the basis for the imposition of professional discipline, to
157 create substantive or procedural rights for accused or convicted persons, to create a standard of care
158 for civil liability, or to serve as a predicate for a motion to suppress evidence or dismiss a charge.
159 For purposes of consistency, these Standards sometimes include language taken from the Model
160 Rules of Professional Conduct; but the Standards often address conduct or provide details beyond
161 that governed by the Model Rules of Professional Conduct. No inconsistency is ever intended; and
162 in any case a lawyer should always read and comply with the rules of professional conduct and
163 other authorities that are binding in the specific jurisdiction or matter, including choice of law
164 principles that may regulate the lawyer’s ethical conduct.

165 (c) Because the Standards for Criminal Justice are aspirational, the words “should” or
166 “should not” are used in these Standards, rather than mandatory phrases such as “shall” or “shall
167 not,” to describe the conduct of lawyers that is expected or recommended under these Standards.
168 The Standards are not intended to suggest any lesser standard of conduct than may be required by
169 applicable mandatory rules, statutes, or other binding authorities.

170 (d) These Standards are intended to address the performance of prosecutors in all stages of
171 their professional work. Other ABA Criminal Justice Standards should also be consulted for more
172 detailed consideration of the performance of prosecutors in specific areas.

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173 **Standard 3-1.2 Functions and Duties of the Prosecutor**

174 (a) The prosecutor is an administrator of justice, a zealous advocate, and an officer of the
175 court. The prosecutor's office should exercise sound discretion and independent judgment in the
176 performance of the prosecution function.

177 (b) The primary duty of the prosecutor is to seek justice within the bounds of the law, not
178 merely to convict. The prosecutor serves the public interest and should act with integrity and
179 balanced judgment to increase public safety both by pursuing appropriate criminal charges of
180 appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate
181 circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider
182 the interests of victims and witnesses, and respect the constitutional and legal rights of all persons,
183 including suspects and defendants.

184 (c) The prosecutor should know and abide by the standards of professional conduct as
185 expressed in applicable law and ethical codes and opinions in the applicable jurisdiction. The
186 prosecutor should avoid an appearance of impropriety in performing the prosecution function. A
187 prosecutor should seek out, and the prosecutor's office should provide, supervisory advice and
188 ethical guidance when the proper course of prosecutorial conduct seems unclear. A prosecutor who
189 disagrees with a governing ethical rule should seek its change if appropriate, and directly challenge
190 it if necessary, but should comply with it unless relieved by court order.

191 (d) The prosecutor should make use of ethical guidance offered by existing organizations,
192 and should seek to establish and make use of an ethics advisory group akin to that described in
193 Defense Function Standard 4-1.11.

194 (e) The prosecutor should be knowledgeable about, consider, and where appropriate
195 develop or assist in developing alternatives to prosecution or conviction that may be applicable in
196 individual cases or classes of cases. The prosecutor's office should be available to assist
197 community efforts addressing problems that lead to, or result from, criminal activity or perceived
198 flaws in the criminal justice system.

199 (f) The prosecutor is not merely a case-processor but also a problem-solver responsible for
200 considering broad goals of the criminal justice system. The prosecutor should seek to reform and
201 improve the administration of criminal justice, and when inadequacies or injustices in the
202 substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate
203 and support efforts for remedial action. The prosecutor should provide service to the community,
204 including involvement in public service and Bar activities, public education, community service
205 activities, and Bar leadership positions. A prosecutorial office should support such activities, and
206 the office's budget should include funding and paid release time for such activities.

207

208 *[New]* **Standard 3-1.3** **The Client of the Prosecutor** *[New]*

209 The prosecutor generally serves the public and not any particular government agency, law
210 enforcement officer or unit, witness or victim. When investigating or prosecuting a criminal matter,
211 the prosecutor does not represent law enforcement personnel who have worked on the matter and
212 such law enforcement personnel are not the prosecutor's clients. The public's interests and views
213 are should be determined by the chief prosecutor and designated assistants in the jurisdiction.

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214 ***[New]* Standard 3-1.4 The Prosecutor’s Heightened Duty of Candor *[New]***

215 (a) In light of the prosecutor’s public responsibilities, broad authority and discretion, the
216 prosecutor has a heightened duty of candor to the courts and in fulfilling other professional
217 obligations. However, the prosecutor should be circumspect in publicly commenting on specific
218 cases or aspects of the business of the office.

219 (b) The prosecutor should not make a statement of fact or law, or offer evidence, that the
220 prosecutor does not reasonably believe to be true, to a court, lawyer, witness, or third party, except
221 for lawfully authorized investigative purposes. In addition, while seeking to accommodate
222 legitimate confidentiality, safety or security concerns, a prosecutor should correct a prosecutor’s
223 representation of material fact or law that the prosecutor reasonably believes is, or later learns was,
224 false, and should disclose a material fact or facts when necessary to avoid assisting a fraudulent or
225 criminal act or to avoid misleading a judge or factfinder.

226 (c) The prosecutor should disclose to a court legal authority in the controlling jurisdiction
227 known to the prosecutor to be directly adverse to the prosecution’s position and not disclosed by
228 others.

229 *[New]* **Standard 3-1.5 Preserving the Record** *[New]*

230 At every stage of representation, the prosecutor should take steps necessary to make a clear
231 and complete record for potential review. Such steps may include: filing motions including
232 motions for reconsideration, and exhibits; making objections and placing explanations on the
233 record; requesting evidentiary hearings; requesting or objecting to jury instructions; and making
234 offers of proof and proffers of excluded evidence.

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235 **[New] Standard 3-1.6 Improper Bias Prohibited [New]**

236 (a) The prosecutor should not manifest or exercise, by words or conduct, bias or prejudice
237 based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or
238 socioeconomic status. A prosecutor should not use other improper considerations, such as partisan
239 or political or personal considerations, in exercising prosecutorial discretion. A prosecutor should
240 strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly
241 informed that it exists within the scope of the prosecutor’s authority.

242
243 (b) A prosecutor’s office should be proactive in efforts to detect, investigate, and eliminate
244 improper biases, with particular attention to historically persistent biases like race, in all of its work.
245 A prosecutor’s office should regularly assess the potential for biased or unfairly disparate impacts
246 of its policies on communities within the prosecutor’s jurisdiction, and eliminate those impacts that
247 cannot be properly justified.

248
249

250 Standard 3-1.7 Conflicts of Interest

251 (a) The prosecutor should know and abide by the ethical rules regarding conflicts of interest
252 that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues. When a
253 conflict requiring recusal exists and is non-waivable, or informed consent has not been obtained, the
254 prosecutor should recuse from further participation in the matter. The office should not go forward
255 until a non-conflicted prosecutor, or an adequate waiver, is in place.

256 (b) The prosecutor should not represent a defendant in criminal proceedings in the
257 prosecutor's jurisdiction.

258 (c) The prosecutor should not participate in a matter in which the prosecutor previously
259 participated, personally and substantially, as a non-prosecutor, unless the appropriate government
260 office, and when necessary a former client, gives informed consent confirmed in writing.

261 (d) The prosecutor should not be involved in the prosecution of a former client. A
262 prosecutor who has formerly represented a client should not use information obtained from that
263 representation to the disadvantage of the former client.

264 (e) The prosecutor should not negotiate for private employment with an accused or the
265 target of an investigation, in a matter in which the prosecutor is participating personally and
266 substantially, or with an attorney or agent for such accused or target

267 (f) The prosecutor should not permit the prosecutor's professional judgment or obligations
268 to be affected by the prosecutor's personal, political, financial, professional, business, property, or
269 other interests or relationships. A prosecutor should not allow interests in personal advancement or
270 aggrandizement to affect judgments regarding what is in the best interests of justice in any case.

271 (g) The prosecutor should disclose to appropriate supervisory personnel any facts or
272 interests that could reasonably be viewed as raising a potential conflict of interest. If it is
273 determined that the prosecutor should nevertheless continue to act in the matter, the prosecutor and
274 supervisors should consider whether any disclosure to a court or defense counsel should be made,
275 and make such disclosure if appropriate. Close cases should be resolved in favor of disclosure to
276 the court and the defense.

277 (h) The prosecutor whose current relationship to another lawyer is parent, child, sibling,
278 spouse or sexual partner should not participate in the prosecution of a person who the prosecutor
279 knows is represented by the other lawyer. A prosecutor who has a significant personal, political,
280 financial, professional, business, property, or other relationship with another lawyer should not
281 participate in the prosecution of a person who is represented by the other lawyer, unless the
282 relationship is disclosed to the prosecutor's supervisor and supervisory approval is given, or unless
283 there is no other prosecutor who can be authorized to act in the prosecutor's stead. In the latter rare
284 case, full disclosure should be made to the defense and to the court.

285 (i) The prosecutor should not recommend the services of particular defense counsel to
286 accused persons or witnesses in cases being handled by the prosecutor's office. If requested to
287 make such a recommendation, the prosecutor should consider instead referring the person to the

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288 public defender, or to a panel of available criminal defense attorneys such as a bar association
289 lawyer-referral service, or to the court. In the rare case where a specific recommendation is made
290 by the prosecutor, the recommendation should be to an independent and competent attorney, and the
291 prosecutor should not make a referral that embodies, creates or is likely to create a conflict of
292 interest. A prosecutor should not comment negatively upon the reputation or abilities of a defense
293 counsel to an accused person or witness who is seeking counsel in a case being handled by the
294 prosecutor's office.

295 (j) The prosecutor should promptly report to a supervisor all but the most obviously
296 frivolous misconduct allegations made, publicly or privately, against the prosecutor. If a supervisor
297 or judge initially determines that an allegation is serious enough to warrant official investigation,
298 reasonable measures, including possible recusal, should be instituted to ensure that the prosecution
299 function is fairly and effectively carried out. A mere allegation of misconduct is not a sufficient
300 basis for prosecutorial recusal, and should not deter a prosecutor from attending to the prosecutor's
301 duties.

302

303 **[New] Standard 3-1.8 Appropriate Workload [from current 3-2.9(e)]**

304 (a) The prosecutor should not carry a workload that, by reason of its excessive size or
305 complexity, interferes with providing quality representation, endangers the interests of justice in
306 fairness, accuracy, or the timely disposition of charges, or has a significant potential to lead to the
307 breach of professional obligations. A prosecutor whose workload prevents competent
308 representation should not accept additional matters until the workload is reduced, and should work
309 to ensure competent representation in existing matters. A prosecutor within a supervisory structure
310 should notify supervisors when counsel's workload is approaching or exceeds professionally
311 appropriate levels.

312 (b) The prosecutor's office should regularly review the workload of individual prosecutors,
313 as well as the workload of the entire office, and adjust workloads (including intake) when necessary
314 to ensure the effective and ethical conduct of the prosecution function.

315 (c) The chief prosecutor for a jurisdiction should inform governmental officials of the
316 workload of the prosecutor's office, and request funding and personnel that are adequate to meet the
317 criminal caseload. The prosecutor should consider seeking such funding from all appropriate
318 sources. If workload exceeds the appropriate professional capacity of a prosecutor or prosecutor's
319 office, that office or counsel should also alert the court(s) in its jurisdiction and seek judicial relief.

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320 **Standard 3-1.9 Diligence, Promptness and Punctuality**

321
322 (a) The prosecutor should act with diligence and promptness to investigate, litigate, and
323 dispose of criminal charges, consistent with the interests of justice and with due regard for fairness,
324 accuracy, and rights of the defendant, victims, and witnesses. The prosecutor’s office should be
325 organized and supported with adequate staff and facilities to enable it to process and resolve
326 criminal charges with fairness and efficiency.

327
328 (b) When providing reasons for seeking delay, the prosecutor should not knowingly
329 misrepresent facts or otherwise mislead. The prosecutor should use procedures that will cause delay
330 only when there is a legitimate basis for such use, and not to secure an unfair tactical advantage.

331
332 (c) The prosecutor should not unreasonably oppose requests for continuances from defense
333 counsel.

334
335 (d) The prosecutor should know and comply with timing requirements applicable to a
336 criminal investigation and prosecution, so as to not prejudice a criminal matter.

337
338 (e) The prosecutor should be punctual in attendance in court, in the submission of motions,
339 briefs, and other papers, and in dealings with opposing counsel, witnesses and others. The
340 prosecutor should emphasize to assistants and prosecution witnesses the importance of punctuality
341 in court attendance.

342

343 **Standard 3-1.10 Relationship with the Media**

344 (a) For purposes of this Standard, a “public statement” is any extrajudicial statement that a
345 reasonable person would expect to be disseminated by means of public communication or media,
346 including social media. An extrajudicial statement is any oral, written, or visual presentation not
347 made either in a courtroom during criminal proceedings or in court filings or correspondence with
348 the court or counsel regarding criminal proceedings.

349 (b) The prosecutor’s public statements about the judiciary, jurors, other lawyers, or the
350 criminal justice system should be respectful even if expressing disagreement.

351 (c) The prosecutor should not make, cause to be made, or authorize or condone the making
352 of, a public statement that the prosecutor knows or reasonably should know will have a substantial
353 likelihood of materially prejudicing a criminal proceeding or heightening public condemnation of
354 the accused, but the prosecutor may make statements that inform the public of the nature and extent
355 of the prosecutor’s or law enforcement actions and serve a legitimate law enforcement purpose.
356 The prosecutor may make a public statement explaining why criminal charges have been declined
357 or dismissed, but must take care not to imply guilt or otherwise prejudice the interests of victims,
358 witnesses or subjects of an investigation. A prosecutor’s public statements should otherwise be
359 consistent with the ABA Standards on Fair Trial and Public Discourse.

360 (d) A prosecutor should not place statements or evidence into the court record to circumvent
361 this Standard.

362 (e) The prosecutor should exercise reasonable care to prevent investigators, law
363 enforcement personnel, employees, or other persons assisting or associated with the prosecutor from
364 making an extrajudicial statement or providing non-public information that the prosecutor would be
365 prohibited from making or providing under this Standard or other applicable rules or law.

366 (f) The prosecutor may respond to public statements from any source in order to protect the
367 prosecution’s legitimate official interests, unless there is a substantial likelihood of materially
368 prejudicing a criminal proceeding, in which case the prosecutor should approach defense counsel or
369 a court for relief. A statement made pursuant to this paragraph shall be limited to such information
370 as is necessary to mitigate the recent adverse publicity.

371 (g) The prosecutor has duties of confidentiality and loyalty, and should not secretly or
372 anonymously provide non-public information to the media, on or off the record, without appropriate
373 authorization.

374 (h) The prosecutor should not allow prosecutorial judgment to be influenced by a personal
375 interest in potential media contacts or attention.

376 (i) A prosecutor uninvolved in a matter who is commenting as a media source may offer
377 generalized commentary concerning a specific criminal matter that serves to educate the public
378 about the criminal justice system and does not risk prejudicing a specific criminal proceeding. A
379 prosecutor acting as such a media commentator should make reasonable efforts to be well-informed
380 about the facts of the matter and the governing law. The prosecutor should not offer commentary

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381 regarding the specific merits of an ongoing criminal prosecution or investigation, except in a rare
382 case to address a manifest injustice and the prosecutor is reasonably well-informed about the
383 relevant facts and law.

384 (j) During the pendency of a criminal matter, the prosecutor should not re-enact, or assist
385 law enforcement in re-enacting, law enforcement events for the media. Absent a legitimate law
386 enforcement purpose, the prosecutor should not display the accused for the media, nor should the
387 prosecutor invite media presence during investigative actions without careful consideration of the
388 interests of all involved, including suspects, defendants, and the public. However, a prosecutor may
389 reasonably accommodate media requests for access to public information and events.
390

391 **Standard 3-1.11 Literary or Media Rights Agreements Prohibited**

392 (a) Before the conclusion of all aspects of a matter in which a prosecutor participates, the
393 prosecutor should not enter into any agreement or informal understanding by which the prosecutor
394 acquires an interest in a literary or media portrayal or account based on or arising out of the
395 prosecutor's involvement in the matter.

396 (b) The prosecutor should not allow prosecutorial judgment to be influenced by the
397 possibility of future personal literary or other media rights.

398 (c) In creating or participating in any literary or other media account of a matter in which
399 the prosecutor was involved, the prosecutor's duty of confidentiality must be respected even after
400 government service is concluded. When protected confidences are involved, a prosecutor or former
401 prosecutor should not make disclosure without consent from the prosecutor's office. Such consent
402 should not be unreasonably withheld, and the public's interest in accurate historical accounts of
403 significant events after a lengthy passage of time should be considered.
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405 **Standard 3-1.12 Duty to Report and Respond to Prosecutorial Misconduct**

406 (a) The prosecutor's office should adopt policies to address allegations of professional
407 misconduct, including violations of law, by prosecutors. At a minimum such policies should
408 require internal reporting of reasonably suspected misconduct to supervisory staff within the office,
409 and authorize supervisory staff to quickly address the allegations. Investigations of allegations of
410 professional misconduct within the prosecutor's office should be handled in an independent and
411 conflict-free manner.

412 (b) When a prosecutor reasonably believes that another person associated with the
413 prosecutor's office intends or is about to engage in misconduct, the prosecutor should attempt to
414 dissuade the person. If such attempt fails or is not possible, and the prosecutor reasonably believes
415 that misconduct is ongoing, will occur, or has occurred, the prosecutor should promptly refer the
416 matter to higher authority in the prosecutor's office including, if warranted by the seriousness of the
417 matter, to the chief prosecutor.

418 (c) If, despite the prosecutor's efforts in accordance with sections (a) and (b) above, the
419 chief prosecutor permits, fails to address, or insists upon an action or omission that is clearly a
420 violation of law, the prosecutor should take further remedial action, including revealing information
421 necessary to address, remedy, or prevent the violation to appropriate judicial, regulatory, or other
422 government officials not in the prosecutor's office.

423

424 **Standard 3-1.13 Training Programs**

425 (a) The prosecutor's office should develop and maintain programs of training and continuing
426 education for both new and experienced prosecutors and staff. The prosecutor's office, as well as
427 the organized Bar or courts, should require that current and aspiring prosecutors attend a reasonable
428 number of hours of such training and education.

429 (b) In addition to knowledge of substantive legal doctrine and courtroom procedures, a
430 prosecutor's core training curriculum should address the overall mission of the criminal justice
431 system. A core training curriculum should also seek to address: investigation, negotiation, and
432 litigation skills; compliance with applicable discovery procedures; knowledge of the development,
433 use, and testing of forensic evidence; available conviction and sentencing alternatives, reentry,
434 effective conditions of probation, and collateral consequences; civility, and a commitment to
435 professionalism; relevant office, court, and defense policies and procedures and their proper
436 application; exercises in the use of prosecutorial discretion; civility and professionalism;
437 appreciation of diversity and elimination of improper bias; and available technology and the ability
438 to use it. Some training programs might usefully be open to, and taught by, persons outside the
439 prosecutor's office such as defense counsel, court staff, and members of the judiciary.

440 (c) A prosecution office's training program should include periodic review of the office's
441 policies and procedures, which should be amended when necessary. Specialized prosecutors should
442 receive training in their specialized areas. Individuals who will supervise attorneys or staff should
443 receive training in how effectively to supervise.

444 (d) The prosecutor's office should also make available opportunities for training and
445 continuing education programs outside the office, including training for non-attorney staff.

446 (e) Adequate funding for continuing training and education, within and outside the office,
447 should be requested and provided by funding sources.

448

PART II.

ORGANIZATION OF THE PROSECUTION FUNCTION

Standard 3-2.1 Prosecution Authority to be Vested in Full-time, Public-Official Attorneys

- (a) The prosecution function should be performed by a lawyer who is (i) a public official, (ii) authorized to practice law in the jurisdiction, and (iii) subject to rules of attorney professional conduct and discipline.

Prosecutors whose professional obligations are devoted full-time and exclusively to the prosecution function are preferable to part-time prosecutors who have other potentially conflicting professional responsibilities.

(b) A prosecutor’s office should have open, effective, and well-publicized methods for communicating with, and receiving communications from, the public in the jurisdiction that it serves.

(c) If a particular matter requires the appointment of a special prosecutor from outside the office, adequate funding for this purpose should be made available. Such special prosecutors should know and are governed by applicable conflict of interest standards for prosecutors. A private attorney who is paid by, or who has an attorney-client relationship with, an individual or entity that is a victim of the charged crime, or who has a personal or financial interest in the prosecution of particular charges, or who has demonstrated any impermissible bias relevant to the particular matter, should not be permitted to serve as prosecutor in that matter.

(d) Unless impractical or unlawful, the prosecutor’s office should implement a system for allowing qualified law students, cross-designated prosecutors from other offices, and private attorneys temporarily assigned to the prosecutor’s office, to learn about and assist with the prosecution function.

478 **Standard 3-2.2 Assuring Excellence and Diversity in the Hiring,**
479 **Retention, and Compensation of Prosecutors**

480 (a) Strong professional qualifications and performance should be the basis for selection and
481 retention for prosecutor positions. Effective measures to retain excellent prosecutors should be
482 encouraged, while recognizing the benefits of some turnover. Supervisory prosecutors should select
483 and promote personnel based on merit and expertise, without regard to partisan, personal or political
484 factors or influence.

485 (b) In selecting personnel, the prosecutor's office should also consider the diverse interests
486 and makeup of the community it serves, and seek to recruit, hire, promote and retain a diverse group
487 of prosecutors and staff that reflect that community.

488 (c) The function of public prosecution requires highly developed professional skills and a
489 variety of backgrounds, talents and experience. The prosecutor's office should promote continuing
490 professional development and continuity of service, while providing prosecutors the opportunity to
491 gain experience in all aspects of the prosecution function.

492 (d) Compensation and benefits for prosecutors and their staffs should be commensurate
493 with the high responsibilities of the office, sufficient to compete with the private sector, and
494 regularly adjusted to attract and retain well-qualified personnel. Compensation for prosecutors
495 should be adequate and also comparable to that of public defense counsel in the jurisdiction.

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497 **Standard 3-2.3** **Investigative Resources and Experts**

498
499 The prosecutor should be provided with funds for qualified experts as needed for particular
500 matters. When warranted by the responsibilities of the office, funds should be available to the
501 prosecutor’s office to employ professional investigators and other necessary support personnel, as
502 well as to secure access to forensic and other experts.
503

504 **Standard 3-2.4 Office Policies and Procedures**

505 (a) Each prosecutor's office should seek to develop general policies to guide the exercise of
506 prosecutorial discretion, and standard operating procedures for the office. The objectives of such
507 policies and procedures should be to achieve fair, efficient, and effective enforcement of the
508 criminal law within the prosecutor's jurisdiction.

509 (b) In the interest of continuity and clarity, the prosecution office's policies and procedures
510 should be memorialized and accessible to relevant staff. The office policies and procedures should
511 be regularly reviewed and revised. The office policies and procedures should be augmented by
512 instruction and training, and are not a substitute for regular training programs.

513 (c) Prosecution office policies and procedures whose disclosure would not adversely affect
514 the prosecution function should be made available to the public.

515 (d) The prosecutor's office should have a system in place to regularly review compliance
516 with office policies.

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517 **Standard 3-2.5 Removal or Suspension and Substitution of Chief Prosecutor**

518
519 (a) Fair and objective procedures should be established by appropriate legislation that
520 empowers the governor or other public official or body to suspend or remove, and supersede, a
521 chief prosecutor for a jurisdiction and designate a replacement, upon making a public finding after
522 reasonable notice and hearing that the prosecutor is incapable of fulfilling the duties of office due to
523 physical or mental incapacity or for gross deviation from professional norms.

524
525 (b) The governor or other public official or body should be similarly empowered by law to
526 substitute, in a particular matter or category of cases, special counsel in the place of the chief
527 prosecutor, by consent or upon making a finding after fair process that substitution is required due
528 to a serious conflict of interest or a gross deviation from professional norms.

529 (c) Removal, suspension or substitution of a prosecutor should not be permitted for
530 improper or irrelevant partisan or personal reasons.

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- 532
- PART III
- 533
- PROSECUTORIAL RELATIONSHIPS
- 534 **Standard 3-3.1 Structure of, and Relationships Among, Prosecution Offices**
- 535 (a) When possible, the geographic jurisdiction of a prosecution office should be determined
536 on the basis of population, caseload, and other relevant factors sufficient to warrant at least one full-
537 time prosecutor and necessary support staff.
- 538 (b) In all States, there should be coordination of the prosecution policies of local
539 prosecution offices to improve the administration and consistency of justice throughout the State.
540 To the extent needed, a central pool of supporting resources, forensic laboratories, and personnel
541 such as investigators, additional prosecutors, accountants and other experts, should be maintained
542 by the state government and should be available to assist local prosecutors. A coordinated forum
543 for prosecutors to discuss issues of professional responsibility should also be available. In some
544 jurisdictions, it may be appropriate to create a unified statewide system of prosecution, in which the
545 state attorney general is the chief prosecutor and district or county or other local prosecutors are the
546 attorney general’s deputies.
- 547 (c) Regardless of the statewide structure of prosecution offices, a state-wide association of
548 prosecutors should be established. When questions or issues arise that could create important state-
549 wide precedents, local prosecutors should advise and consult with the attorney general, the state-
550 wide association, and the prosecutors in other local prosecution offices.
- 551 (d) Federal, state, and local prosecution offices should develop practices and procedures
552 that encourage useful coordination with prosecutors within the jurisdiction and in other
553 jurisdictions. Prosecutors should work to identify potential issues of conflict, coordinate with other
554 prosecution offices in advance, and resolve inter-office disputes amicably and in the public interest.
- 555

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556 **Standard 3-3.2 Relationships With Law Enforcement**

557 (a) The prosecutor should maintain respectful yet independent judgment when interacting
558 with law enforcement personnel.

559 (b) The prosecutor may provide independent legal advice to law enforcement about actions
560 in specific criminal matters and about law enforcement practices in general.

561 (c) The prosecutor should become familiar with and respect the experience and specialized
562 expertise of law enforcement personnel. The prosecutor should promote compliance by law
563 enforcement personnel with applicable legal rules, including rules against improper bias. The
564 prosecutor's office should keep law enforcement personnel informed of relevant legal and legal
565 ethics issues and developments as they relate to prosecution matters, and advise law enforcement
566 personnel of relevant prosecution policies and procedures. Prosecutors may exercise supervision
567 over law enforcement personnel involved in particular prosecutions when in the best interests of
568 justice and the public.

569 (d) Representatives of the prosecutor's office should meet and confer regularly with law
570 enforcement agencies regarding prosecution as well as law enforcement policies. The prosecutor's
571 office should assist in developing and administering training programs for law enforcement
572 personnel regarding matters and cases being investigated, matters submitted for charging, and the
573 law related to law enforcement activities.

574

575 **Standard 3-3.3 Relationship With Courts, Defense Counsel and Others**

576 (a) In all contacts with judges, the prosecutor should maintain a professional and independent
577 relationship. A prosecutor should not engage in unauthorized *ex parte* discussions with, or
578 submission of material to, a judge relating to a particular matter which is, or is likely to be, before
579 the judge. With regard to generalized matters requiring judicial discussion (for example, case-
580 management or administrative matters), the prosecutor should invite a representative defense
581 counsel to join in the discussion to the extent practicable.

582 (b) When *ex parte* communications or submissions are authorized, the prosecutor should
583 inform the court of material facts known to the prosecutor, including facts that are adverse,
584 sufficient to enable the court to make a fair and informed decision. Except when non-disclosure is
585 authorized, counsel should notify opposing counsel that an *ex parte* contact has occurred, without
586 disclosing its content unless permitted.

587 (c) In written filings, the prosecutor should respectfully evaluate and respond as appropriate to
588 opposing counsel's arguments and representations, and avoid unnecessary personalized
589 disparagement.

590 (d) The prosecutor should develop and maintain courteous and civil working relationships with
591 judges and defense counsel, and should cooperate with them in developing solutions to address
592 ethical, scheduling, or other issues that may arise in particular cases or generally in the criminal
593 justice system. Prosecutors should cooperate with courts and organized bar associations in
594 developing codes of professionalism and civility, and should abide by such codes that apply in their
595 jurisdiction.

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Standard 3-3.4 Relationship With Victims and Witnesses

(a) “Witness” in this Standard means any person who has or might have information about a matter, including victims.

(b) The prosecutor should know and follow the law and rules of the jurisdiction regarding victims and witnesses. In communicating with witnesses, the prosecutor should know and abide by law and ethics rules regarding the use of deceit and engaging in communications with represented, unrepresented, and organizational persons.

(c) The prosecutor or the prosecutor’s agents should seek to interview all witnesses, and should not act to intimidate or unduly influence any witness.

(d) The prosecutor should not use means that have no substantial purpose other than to embarrass, delay, or burden, and not use methods of obtaining evidence that violate legal rights. The prosecutor and prosecution agents should not misrepresent their status, identity or interests when communicating with a witness.

(e) The prosecutor should be permitted to compensate a witness for reasonable expenses such as costs of attending court, depositions pursuant to statute or court rule, and pretrial interviews, including transportation and loss of income. No other benefits should be provided to witnesses unless authorized by law, regulation, or well-accepted practice. All benefits provided to witnesses should be documented and disclosed to the defense. A prosecutor should not pay or provide a benefit to a witness in order to, or in an amount that is likely to, affect the substance or truthfulness of the witness’s testimony.

(f) A prosecutor should avoid the prospect of having to testify personally about the content of a witness interview. The prosecutor’s interview of most routine or government witnesses (for example, custodians of records or law enforcement agents) should not require a third-party observer. But when the need for corroboration of an interview is reasonably anticipated, the prosecutor should be accompanied by another trusted and credible person during the interview. The prosecutor should avoid being alone with any witness who the prosecutor reasonably believes has potential or actual criminal liability, or foreseeably hostile witnesses.

(g) The prosecutor should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to independent counsel when the law so requires. Even if the law does not require it, a prosecutor should consider so advising a witness if the prosecutor reasonably believes the witness may provide self-incriminating information and the witness appears not to know his or her rights. However, a prosecutor should not so advise, or discuss or exaggerate the potential criminal liability of, a witness with a purpose, or in a manner likely, to intimidate the witness, to influence the truthfulness or completeness of the witness’s testimony, or to change the witness’s decision about whether to provide information.

(h) The prosecutor should not discourage or obstruct communication between witnesses and the defense counsel, other than the government’s employees or agents if consistent with applicable ethical rules. The prosecutor should not advise any person, or cause any person to be advised, to decline to provide defense counsel with information which such person has a right to give. The

644 prosecutor may, however, fairly and accurately advise witnesses as to the likely consequences of
645 their providing information, but only if done in a manner that does not discourage communication.
646

647 (i) Consistent with any specific laws or rules governing victims, the prosecutor should
648 provide victims of serious crimes, or their representatives, an opportunity to consult with and to
649 provide information to the prosecutor, prior to making significant decisions such as whether or not
650 to prosecute, to pursue a disposition by plea, or to dismiss charges. The prosecutor should seek to
651 ensure that victims of serious crimes, or their representatives, are given timely notice of:

652 (i) judicial proceedings relating to the victims' case;

653 (ii) proposed dispositions of the case;

654 (iii) sentencing proceedings; and

655 (iv) any decision or action in the case that could result in the defendant's provisional
656 or final release from custody, or change of sentence.

657
658 (j) The prosecutor should ensure that victims and witnesses who may need protections
659 against intimidation or retaliation are advised of and afforded protections where feasible.
660

661 (k) Subject to ethical rules and the confidentiality that criminal matters sometimes require,
662 and unless prohibited by law or court order, the prosecutor should information about the status of
663 matters in which they are involved to victims and witnesses who request it.
664

665 (l) The prosecutor should give witnesses reasonable notice of when their testimony at a
666 proceeding is expected, and should not require witnesses to attend judicial proceedings unless their
667 testimony is reasonably expected at that time, or their presence is required by law. When witnesses'
668 attendance is required, the prosecutor should seek to reduce to a minimum the time witnesses must
669 spend waiting at the proceedings. The prosecutor should ensure that witnesses are given notice as
670 soon as practicable of scheduling changes which will affect their required attendance at judicial
671 proceedings.
672

673 (m) The prosecutor should not engage in any inappropriate personal relationship with any
674 victim or other witness.
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676 **Standard 3-3.5 Relationship with Expert Witnesses**

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678 (a) An expert may be engaged for consultation only, or to prepare an evidentiary report or
679 testimony. The prosecutor should know relevant rules governing expert witnesses, including
680 possibly different disclosure rules governing experts who are engaged for consultation only.

681

682 (b) A prosecutor should evaluate all expert advice, opinions, or testimony independently, and
683 not simply accept the opinion of a government or other expert based on employer, affiliation or
684 prominence alone.

685

686 (c) Before engaging an expert, the prosecutor should investigate the expert's credentials,
687 relevant professional experience, and reputation in the field. The prosecutor should also examine a
688 testifying expert's background and credentials for potential impeachment issues. Before offering an
689 expert as a witness, the prosecutor should investigate the scientific acceptance of the particular
690 theory, method, or conclusions about which the expert would testify.

691

692 (d) A prosecutor who engages an expert to provide a testimonial opinion should respect the
693 independence of the expert and should not seek to dictate the substance of the expert's opinion on
694 the relevant subject.

695

696 (e) Before offering an expert as a witness, the prosecutor should seek to learn enough about the
697 substantive area of the expert's expertise, including ethical rules that may be applicable in the
698 expert's field, to enable effective preparation of the expert, as well as effective cross-examination of
699 any defense expert on the same topic. The prosecutor should explain to the expert that the expert's
700 role in the proceeding will be as an impartial witness called to aid the fact-finders, explain the
701 manner in which the examination of the expert is likely to be conducted, and suggest likely
702 impeachment questions the expert may be asked.

703

704 (f) The prosecutor should not pay or withhold any fee or provide or withhold a benefit for the
705 purpose of influencing the substance of an expert's testimony. The prosecutor should not fix the
706 amount of the fee contingent upon the expert's testimony or the result in the case. Nor should the
707 prosecutor promise or imply the prospect of future work for the expert based on the expert's
708 testimony.

709

710 (g) The prosecutor should provide the expert with all information reasonably necessary to
711 support a full and fair opinion. The prosecutor should be aware, and explain to the expert, that all
712 communications with, and documents shared with, a testifying expert may be subject to disclosure
713 to opposing counsel. The prosecutor should be aware of expert discovery rules and act to protect
714 confidentiality and the public interest, for example by not sharing with the expert confidences and
715 work product that the prosecutor does not want disclosed.

716

717 (h) The prosecutor should timely disclose to the defense all evidence or information learned
718 from an expert that tends to negate the guilt of the accused or mitigate the offense, even if the
719 prosecutor does not intend to call the expert as a witness.

720

721 **[New] Standard 3-3.6 When Physical Evidence With Incriminating**
722 **Implications is Disclosed by the Defense [New]**

723 When physical evidence is delivered to the prosecutor consistent with Defense Function
724 Standard 4-4.7, the prosecutor should not offer the fact of delivery as evidence before a fact-finder
725 for purposes of establishing the culpability of defense counsel's client. The prosecutor may,
726 however, offer evidence of the fact of such delivery in response to a foundational objection to the
727 evidence based on chain-of-custody concerns, or in a subsequent proceeding for the purpose of
728 proving a crime or fraud regarding the evidence.

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PART IV

INVESTIGATION; DECISIONS TO CHARGE, NOT CHARGE, OR DISMISS; AND GRAND JURY

Standard 3-4.1 Investigative Function of the Prosecutor

(a) When performing an investigative function, prosecutors should be familiar with and follow the ABA Standards on Prosecutorial Investigations.

(b) A prosecutor should not use illegal or unethical means to obtain evidence or information, or employ, instruct, or encourage others to do so. Prosecutors should research and know the law in this regard before acting, understanding that in some circumstances a prosecutor's ethical obligations may be different from those of other lawyers.

745 **Standard 3-4.2** **Decisions to Charge Are the Prosecutor's**

746
747 (a) While the decision to arrest is often the responsibility of law enforcement personnel, the
748 decision to institute formal criminal proceedings is the responsibility of the prosecutor. Where the
749 law permits a law enforcement officer or other person to initiate proceedings by complaining
750 directly to a judicial officer or the grand jury, the complainant should be required to present the
751 complaint for prior review by the prosecutor, and the prosecutor's recommendation regarding the
752 complaint should be communicated to the judicial officer or grand jury.

753
754 (b) The prosecutor's office should establish standards and procedures for evaluating
755 complaints to determine whether formal criminal proceedings should be instituted.

756
757 (c) In determining whether formal criminal charges should be filed, prosecutors should
758 consider whether further investigation should be undertaken. After charges are filed the prosecutor
759 should oversee law enforcement investigative activity related to the case.

760
761 (d) If the defendant is not in custody when charged, the prosecutor should consider whether
762 a voluntary appearance rather than a custodial arrest would suffice to protect the public and ensure
763 the defendant's presence at court proceedings.

780 **[New] Standard 3-4.4 Discretion in Filing, Declining, Maintaining, and Dismissing**
 781 **Criminal Charges [New]**

782
 783 (a) In order to fully implement the prosecutor's functions and duties, including the
 784 obligation to enforce the law while exercising sound discretion, the prosecutor is not obliged to file
 785 or maintain all criminal charges which the evidence might support. Among the factors which the
 786 prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal
 787 charge, even though it meets the requirements of Standard 3-4.3, are:

- 788 (i) the strength of the case;
- 789 (ii) the prosecutor's doubt that the accused is in fact guilty;
- 790 (iii) the extent or absence of harm caused by the offense;
- 791 (iv) the impact of prosecution or non-prosecution on the public welfare;
- 792 (v) the background and characteristics of the offender, including any voluntary
 793 restitution or efforts at rehabilitation;
- 794 (vi) whether the authorized or likely punishment or collateral consequences are
 795 disproportionate in relation to the particular offense or the offender;
- 796 (vii) the views and motives of the victim or complainant;
- 797 (viii) any improper conduct by law enforcement;
- 798 (ix) unwarranted disparate treatment of similarly situated persons;
- 799 (x) potential collateral impact on third parties, including witnesses or victims;
- 800 (xi) cooperation of the offender in the apprehension or conviction of others;
- 801 (xii) the possible influence of any cultural, ethnic, socioeconomic or other improper
 802 biases;
- 803 (xiii) changes in law or policy;
- 804 (xiv) the fair and efficient distribution of limited prosecutorial resources;
- 805 (xv) the likelihood of prosecution by another jurisdiction; and
- 806 (xvi) whether the public's interests in the matter might be appropriately vindicated
 807 by available civil, regulatory, administrative, or private remedies.

808 (b) In exercising discretion to file and maintain charges, the prosecutor should not consider:

- 809 (i) partisan or other improper political or personal considerations;
- 810 (ii) hostility or personal animus towards a potential subject, or any other improper
 811 motive of the prosecutor; or
- 812 (iii) the impermissible criteria described in Standard 1.6 above.

813 (c) A prosecutor may file and maintain charges even if juries in the jurisdiction have tended
 814 to acquit persons accused of the particular kind of criminal act in question.

815 (d) The prosecutor should not file or maintain charges greater in number or degree than can
 816 reasonably be supported with evidence at trial and are necessary to fairly reflect the gravity of the
 817 offense or deter similar conduct.

818 (e) A prosecutor may condition a dismissal of charges, *nolle prosequi*, or similar action on
 819 the accused's relinquishment of a right to seek civil redress only if the accused has given informed
 820 consent, and such consent is disclosed to the court. A prosecutor should not use a civil waiver to

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821 avoid a bona fide claim of improper law enforcement actions, and a decision not to file criminal
822 charges should be made on its merits and not for the purpose of obtaining a civil waiver.

823

824 (f) The prosecutor should consider the possibility of a noncriminal disposition, formal or
825 informal, or a deferred prosecution or other diversionary disposition, when deciding whether to
826 initiate or prosecute criminal charges. The prosecutor should be familiar with the services and
827 resources of other agencies, public or private, that might assist in the evaluation of cases for
828 diversion or deferral from the criminal process.

829

830 **Standard 3-4.5 Relationship with a Grand Jury**

831
832 (a) In presenting a matter to a criminal grand jury, and in light of its *ex parte* character, the
833 prosecutor should respect the independence of the grand jury and should not preempt a function of
834 the grand jury, mislead the grand jury, or abuse the processes of the grand jury.

835
836 (b) Where the prosecutor is authorized to act as a legal advisor to the grand jury, the
837 prosecutor should appropriately explain the law and may, if permitted by law, express an opinion on
838 the legal significance of the evidence, but should give due deference to the grand jury as an
839 independent legal body.

840
841 (c) The prosecutor should not make statements or arguments to a grand jury in an effort to
842 influence grand jury action in a manner that would be impermissible in a trial.

843
844 (d) The entirety of the proceedings occurring before a grand jury, including the prosecutor's
845 communications with and presentations and instructions to the grand jury, should be recorded in
846 some manner, and that record should be preserved. The prosecutor should avoid off-the-record
847 communications with the grand jury and with individual grand jurors.

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849 **Standard 3-4.6** **Quality and Scope of Evidence Before a Grand Jury**

850
851 (a) A prosecutor should not seek an indictment unless the prosecutor reasonably believes
852 the charges are supported by probable cause and that there will be admissible evidence sufficient to
853 support the charges beyond reasonable doubt at trial. A prosecutor should advise a grand jury of the
854 prosecutor’s opinion that it should not indict if the prosecutor believes the evidence presented does
855 not warrant an indictment.

856
857 (b) In addition to determining what criminal charges to file, a grand jury may properly be
858 used to investigate potential criminal conduct, and also to determine the sense of the community
859 regarding potential charges.

860
861 (c) A prosecutor should present to a grand jury only evidence which the prosecutor believes
862 is appropriate and authorized by law for presentation to a grand jury. The prosecutor should be
863 familiar with the law of the jurisdiction regarding grand juries, and may present witnesses to
864 summarize relevant evidence to the extent the law permits.

865
866 (d) When a new grand jury is empanelled, a prosecutor should ensure that the grand jurors
867 are appropriately instructed, consistent with the law of the jurisdiction, on the grand jury’s right and
868 ability to seek evidence, ask questions, and hear directly from any available witnesses, including
869 eyewitnesses.

870
871 (e) A prosecutor with personal knowledge of evidence that directly negates the guilt of a
872 subject of the investigation should present or otherwise disclose that evidence to the grand jury.
873 The prosecutor should relay to the grand jury any request by the subject or target of an investigation
874 to testify before the grand jury, or present other non-frivolous evidence claimed to be exculpatory.

875
876 (f) If the prosecutor concludes that a witness is a target of a criminal investigation, the
877 prosecutor should not seek to compel the witness’s testimony before the grand jury absent
878 immunity. The prosecutor should honor, however, a reasonable request from a target or subject
879 who wishes to testify before the grand jury.

880
881 (g) Unless there is a reasonable possibility that it will facilitate flight of the target, endanger
882 other persons, interfere with an ongoing investigation, or obstruct justice, the prosecutor should give
883 notice to a target of a grand jury investigation, and offer the target an opportunity to testify before
884 the grand jury. Prior to taking a target’s testimony, the prosecutor should advise the target of the
885 privilege against self-incrimination and obtain a voluntary waiver of that right.

886
887 (h) The prosecutor should not seek to compel the appearance of a witness whose activities
888 are the subject of the grand jury’s inquiry, if the witness states in advance that if called the witness
889 will claim the constitutional privilege not to testify, and provides a reasonable basis for such claim.

890 If warranted, the prosecutor may judicially challenge such a claim of privilege or seek a grant of
891 immunity according to the law.
892
893 (i) The prosecutor should not issue a grand jury subpoena to a criminal defense attorney or
894 defense team member, or other witness whose testimony reasonably might be protected by a

895 recognized privilege, without considering the applicable law and rules of professional responsibility
896 in the jurisdiction.

897
898 (j) Except where permitted by law, a prosecutor should not use the grand jury in order to
899 obtain evidence to assist the prosecution’s preparation for trial of a defendant who has already been
900 charged. A prosecutor may, however, use the grand jury to investigate additional or new charges
901 against a defendant who has already been charged.

902
903 (k) Except where permitted by law, a prosecutor should not use a criminal grand jury solely
904 or primarily for the purpose of aiding or assisting in an administrative or civil inquiry.
905

PART V

PRETRIAL ACTIVITIES and NEGOTIATED DISPOSITIONS

Standard 3-5.1 Role in First Appearance and Preliminary Hearing

(a) A prosecutor should be present at any first appearance of the accused before a judicial officer, and at any preliminary hearing.

(b) At or before the first appearance, the prosecutor should consider:

(i) whether the accused has counsel, and if not, whether and when counsel will be made available or waived;

(ii) whether the accused appears to be mentally competent, and if not, whether to seek an evaluation;

(iii) whether the accused should be released or detained pending further proceedings. And, if released, whether supervisory conditions should be imposed; and

(iv) what further proceedings should be scheduled to move the matter toward timely resolution.

(c) The prosecutor handling the first appearance should ensure that the charges are consistent with the conduct described in the available law enforcement reports and any other information the prosecutor possesses.

(d) If the accused does not yet have counsel and has not waived counsel, the prosecutor should ask the court not to engage in substantive proceedings, other than a decision to release the accused. The prosecutor should not obtain a waiver of other important pretrial rights, such as the right to a preliminary hearing, from an unrepresented accused unless that person has been judicially authorized to proceed *pro se*.

(e) The prosecutor should not approach or communicate with an accused unless a voluntary waiver of counsel has been entered or the accused’s counsel consents. If the accused does not have counsel, the prosecutor should make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel, and is given reasonable opportunity to obtain counsel.

(f) If the prosecutor believes pretrial release is appropriate, or it is ordered, the prosecutor should cooperate in arrangements for release under the prevailing pretrial release system.

(g) If the prosecutor has reasonable concerns about the accused’s mental competence, the prosecutor should bring those concerns to the attention of defense counsel and, if necessary, the judicial officer.

(h) The prosecutor should not seek to delay a prompt judicial determination of probable cause for criminal charges without good cause, particularly if the accused is in custody.

951 ***[New] Standard 3-5.2 The Decision to Recommend Release or Seek Detention [New]***

952 (a) The prosecutor should favor pretrial release of a criminally accused, unless detention is
953 necessary to protect individuals or the community or to ensure the return of the defendant for future
954 proceedings.

955 (b) The prosecutor's decision to recommend pretrial release or seek detention should be based
956 on the facts and circumstances of the defendant and the offense, rather than made categorically.
957 The prosecutor should consider information relevant to these decisions from all sources, including
958 the defendant.

959 (c) The prosecutor should cooperate with pretrial services or other personnel who review or
960 assemble information to be provided to the court regarding pretrial release determinations.

961 (d) The prosecutor should be open to reconsideration of pretrial detention or release decisions
962 based on changed circumstances, including an unexpectedly lengthy period of detention.

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964 **[New] Standard 3-5.3 Preparation for Court Proceedings, and Recording and**
965 **Transmitting Information [New]**
966

967 (a) The prosecutor should prepare in advance for court proceedings unless that is
968 impossible. Adequate preparation depends on the nature of the proceeding and the time available,
969 and will often include: reviewing available documents; considering what issues are likely to arise
970 and the prosecution’s position regarding those issues; how best to present the issues and what
971 solutions might be offered; relevant legal research and factual investigation; and contacting other
972 persons who might be of assistance in addressing the anticipated issues. If the prosecutor has not
973 had adequate time to prepare and is unsure of the relevant facts or law, the prosecutor should
974 communicate to the court the limits of the prosecutor’s knowledge or preparation.
975

976 (b) The prosecutor should make effort to appear at all hearings in cases assigned to the
977 prosecutor. A prosecutor who substitutes at a court proceeding for another prosecutor assigned to
978 the case should make reasonable efforts to be adequately informed about the case and issues likely
979 to come up at the proceeding, and to adequately prepare.
980

981 (c) The prosecutor handling any court appearance should document what happens at the
982 proceeding, to aid the prosecutor’s later memory and so that necessary information will be available
983 to other prosecutors who may handle the case in the future.
984

985 (d) The prosecutor should take steps to ensure that any court order issued to the prosecution
986 is transmitted to the appropriate persons necessary to effectuate the order.
987

988 (e) The prosecutor’s office should be provided sufficient resources and be organized to
989 permit adequate preparation for court proceedings.
990

991 **Standard 3-5.4 Identification and Disclosure of Information and Evidence**

992

993 (a) After charges are filed if not before, the prosecutor should diligently seek to identify all
994 information in the possession of the prosecution or its agents that tends to negate the guilt of the
995 accused, mitigate the offense charged, impeach the government's witnesses or evidence, or reduce
996 the likely punishment of the accused if convicted.

997

998 (b) The prosecutor should diligently advise other governmental agencies involved in the
999 case of their continuing duty to identify, preserve, and disclose to the prosecutor information
1000 described in (a) above.

1001

1002 (c) Before trial of a criminal case, a prosecutor should make timely disclosure to the defense
1003 of information described in (a) above that is known to the prosecutor, regardless of whether the
1004 prosecutor believes it is likely to change the result of the proceeding, unless relieved of this
1005 responsibility by a court's protective order. (Regarding discovery prior to a guilty plea, see
1006 Standard 3-5.6(f) below.) A prosecutor should not intentionally attempt to obscure information
1007 disclosed pursuant to this standard by including it without identification within a larger volume of
1008 materials.

1009

1010 (d) The obligations to identify and disclose such information continue throughout the
1011 prosecution of a criminal case.

1012

1013 (e) A prosecutor should timely respond to legally proper discovery requests, and make a
1014 diligent effort to comply with legally proper disclosure obligations, unless otherwise authorized by
1015 a court. When the defense makes requests for specific information, the prosecutor should provide
1016 specific responses rather than merely a general acknowledgement of discovery obligations.
1017 Requests and responses should be tailored to the case and "boilerplate" requests and responses
1018 should be disfavored.

1019

1020 (f) The prosecutor should make prompt efforts to identify and disclose to the defense any
1021 physical evidence that has been gathered in the investigation, and provide the defense a reasonable
1022 opportunity to examine it.

1023

1024 (g) A prosecutor should not avoid pursuit of information or evidence because the prosecutor
1025 believes it will damage the prosecution's case or aid the accused.

1026

1027 (h) A prosecutor should determine whether additional statutes, rules or caselaw may govern
1028 or restrict the disclosure of information, and comply with these authorities absent court order.

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[New] Standard 3-5.5 Preservation of Information and Evidence [New]

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(a) The prosecutor should make reasonable efforts to preserve, and direct the prosecutor’s agents to preserve, relevant materials during and after a criminal case, including

- (i) evidence relevant to investigations as well as prosecutions, whether or not admitted at trial;
- (ii) information identified pursuant to Standard 3-5.4(a); and
- (iii) other materials necessary to support significant decisions made and conclusions reached by the prosecution in the course of an investigation and prosecution.

(b) The prosecutor’s office should develop policies regarding the method and duration of preservation of such materials. Such policies should be consistent with applicable rules and laws (such as public records laws) in the jurisdiction. These policies, and individual preservation decisions, should consider the character and seriousness of each case, the character of the particular evidence or information, the likelihood of further challenges to judgments following conviction, and the resources available for preservation. Physical evidence should be preserved so as to reasonably preserve its forensic characteristics and utility.

(c) Materials should be preserved at least until a criminal case is finally resolved or is final on appeal and the time for further appeal has expired. In felony cases, materials should be preserved until post-conviction litigation is concluded or time-limits have expired. In death penalty cases, information should be preserved until the penalty is carried out or is precluded.

(d) The prosecutor should comply with additional statutes, rules or caselaw that may govern the preservation of evidence.

1056 **Standard 3-5.6 Conduct of Negotiated Disposition Discussions**

1057 (a) The prosecutor should be open, at every stage of a criminal matter, to discussions with
1058 defense counsel concerning disposition of charges by guilty plea or other negotiated disposition.

1059 (b) A prosecutor should not engage in disposition discussions directly with a represented
1060 defendant, except with defense counsel's approval. Where a defendant has properly waived
1061 counsel, the prosecutor may engage in disposition discussions with the defendant, and should make
1062 and preserve a record of such discussions.

1063 (c) The prosecutor should not enter into a disposition agreement before having information
1064 sufficient to assess the defendant's actual culpability. The prosecutor should consider collateral
1065 consequences of a conviction before entering into a disposition agreement. The prosecutor should
1066 consider factors listed in Standard 3-4.4(a), and not be influenced in disposition discussions by
1067 inappropriate factors such as those listed in Standards 3-1.6 and 3-4.4(b).

1068 (d) The prosecutor should not set unreasonably short deadlines, or demand conditions for a
1069 disposition, that are so coercive that the voluntariness of a plea or the effectiveness of defense
1070 counsel is put into question. A prosecutor may, however, set a reasonable deadline before trial or
1071 hearing for acceptance of a disposition offer.

1072 (e) A prosecutor should not knowingly make false statements of fact or law in the course of
1073 disposition discussions.

1074 (f) Before entering into a disposition agreement, the prosecutor should disclose to the
1075 defense a factual basis sufficient to support the charges in the proposed agreement, and information
1076 currently known to the prosecutor that tends to negate guilt, mitigates the offense or is likely to
1077 reduce punishment.

1078 (g) A prosecutor should not agree to a guilty plea if the prosecutor reasonably believes that
1079 sufficient admissible evidence to support conviction beyond reasonable doubt would be lacking if
1080 the matter went to trial.

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1081 **Standard 3-5.7** **Establishing and Fulfilling Conditions of Negotiated Dispositions**

1082 (a) A prosecutor should not demand terms in a negotiated disposition agreement that are
1083 unlawful or in violation of public policy.

1084 (b) The prosecutor may properly promise the defense that the prosecutor will or will not
1085 take a particular position concerning sentence and conditions. The prosecutor should not, however,
1086 imply a greater power to influence the disposition of a case than is actually possessed.

1087 (c) The prosecutor should memorialize all promises and conditions that are part of the
1088 agreement, and ensure that any written disposition agreement accurately and completely reflects the
1089 precise terms of the agreement including the prosecutor's promises and the defendant's obligations.
1090 At any court hearing to finalize a negotiated disposition, the prosecutor should ensure that all
1091 relevant details of the agreement have been placed on the record. The presumption is that the
1092 hearing and record will be public, but in some cases the hearing or record (or a portion) may be
1093 sealed for good cause.

1094 (d) Once a disposition agreement is final and accepted by the court, the prosecutor should
1095 comply with, and make good faith efforts to have carried out, the government's obligations. The
1096 prosecutor should construe agreement conditions, and evaluate the defendant's performance
1097 including any cooperation, in a good-faith and reasonable manner.

1098 (e) If the prosecutor believes that a defendant has breached an agreement that has been
1099 accepted by the court, the prosecutor should notify the defense regarding the prosecutor's belief and
1100 any intended adverse action. If the defense presents a good-faith disagreement and the parties
1101 cannot quickly resolve it, the prosecutor should not act before judicial resolution.

1102 (f) If the prosecutor reasonably believes that a court is acting inconsistently with any term
1103 of a negotiated disposition, the prosecutor should raise the matter with the court.

1104

1105 *[New]* **Standard 3-5.8 Waiver of Rights as Condition of Disposition Agreements** *[New]*

1106 (a) A prosecutor should not condition a disposition agreement on a waiver of the right to
1107 appeal the terms of a sentence which exceeds an agreed-upon or reasonably anticipated sentence.
1108 Any waiver of appeal of sentence should be comparably binding on the defendant and the
1109 prosecution.

1110
1111 (b) A prosecutor should not suggest or require, as a condition of a disposition agreement,
1112 any waiver of post-conviction claims addressing ineffective assistance of counsel, prosecutorial
1113 misconduct, or destruction of evidence, unless such claims are based on past instances of such
1114 conduct that are specifically identified in the agreement or in the transcript of proceedings that
1115 address the agreement. If a proposed disposition agreement contains such a waiver regarding
1116 ineffective assistance of counsel, the prosecutor should ensure that the defendant has been provided
1117 the opportunity to consult with independent counsel regarding the waiver before agreeing to the
1118 disposition.

1119
1120 (c) A prosecutor may propose or require other sorts of waivers on an individualized basis if
1121 the defendant's agreement is knowing and voluntary. No waivers of any kind should be accepted
1122 without an exception for manifest injustice based on newly-discovered evidence, or actual
1123 innocence.

1124
1125 (d) Although certain claims may have been waived, a prosecutor should not condition a
1126 disposition agreement on a complete waiver of the right to file a habeas corpus or other comparable
1127 post-conviction petition.

1128
1129 (e) A prosecutor should not request or rely on waivers to hide an injustice or material flaw
1130 in the case which is undisclosed to the defense.

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1132 **Standard 3-5.9 Record of Reasons for Dismissal of Charges**

1133 When criminal charges are dismissed on the prosecution's motion, including by plea of *nolle*
1134 *prosequi* or its equivalent, the prosecutor should make and retain an appropriate record of the
1135 reasons for the dismissal, and indicate on the record whether the dismissal was with or without
1136 prejudice.
1137

1138

PART VI

1139

COURT HEARINGS AND TRIAL

1140

Standard 3-6.1

Scheduling Court Hearings

1141

Final control over the scheduling of court appearances, hearings and trials in criminal matters should rest with the court rather than the parties. When the prosecutor is aware of facts that would affect scheduling, the prosecutor should advise the court and, if the facts are case-specific, defense counsel.

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1146 **Standard 3-6.2 Civility With Courts, Opposing Counsel, and Others**

1147 (a) As an officer of the court, the prosecutor should support the authority of the court and
1148 the dignity of the courtroom by adherence to codes of professionalism and civility, and by
1149 manifesting a professional and courteous attitude toward the judge, opposing counsel, witnesses,
1150 defendants, jurors, court staff and others. In court as elsewhere, the prosecutor should not display
1151 or act out of any improper or unlawful bias.

1152
1153 (b) When court is in session, unless otherwise permitted by the court, the prosecutor should
1154 address the court and not address other counsel or the defendant directly on any matter related to the
1155 case.

1156
1157 (c) The prosecutor should comply promptly and civilly with a court's orders or seek
1158 appropriate relief from such order. If the prosecutor considers an order to be significantly erroneous
1159 or prejudicial, the prosecutor should ensure that the record adequately reflects the events. The
1160 prosecutor has a right to make respectful objections and reasonable requests for reconsideration, and
1161 to seek other relief as the law permits. If a judge prohibits making an adequate objection, proffer, or
1162 record, the prosecutor may take other lawful steps to protect the public interest.

1163

1164 **Standard 3-6.3 Selection of Jurors**

1165 (a) The prosecutor's office should be aware of legal standards that govern the selection of
1166 jurors, and train prosecutors to comply. The prosecutor should prepare to effectively discharge the
1167 prosecution function in the selection of the jury, including exercising challenges for cause and
1168 peremptory challenges. The prosecutor's office should also be aware of the process used to select
1169 and summon the jury pool and bring legal deficiencies to the attention of the court.

1170
1171 (b) The prosecutor should not strike jurors based on any criteria rendered impermissible by
1172 the constitution, statutes, applicable rules of the jurisdiction, or these standards, including race, sex,
1173 religion, national origin, disability, sexual orientation or gender identity. The prosecutor should
1174 consider contesting a defense counsel's peremptory challenges that appear to be based upon such
1175 criteria.

1176
1177 (c) In cases in which the prosecutor conducts a pretrial investigation of the background of
1178 potential jurors, the investigative methods used should not harass, intimidate, or unduly embarrass
1179 or invade the privacy of potential jurors. Absent special circumstances, such investigation should
1180 be restricted to review of records and sources of information already in existence and to which
1181 access is lawfully allowed. If the prosecutor uses record searches that are unavailable to the
1182 defense, such as criminal record databases, the prosecutor should share the results with defense
1183 counsel or seek a judicial protective order.

1184
1185 (d) The opportunity to question jurors personally should be used solely to obtain
1186 information relevant to the well-informed exercise of challenges. The prosecutor should not seek to
1187 commit jurors on factual issues likely to arise in the case, and should not intentionally present
1188 arguments, facts or evidence which the prosecutor reasonably should know will not be admissible at
1189 trial. Voir dire should not be used to argue the prosecutor's case to the jury, or to unduly ingratiate
1190 counsel with the jurors.

1191
1192 (e) During voir dire, the prosecutor should seek to minimize any undue embarrassment or
1193 invasion of privacy of potential jurors, for example by seeking to inquire into sensitive matters
1194 outside the presence of other potential jurors, while still enabling fair and efficient juror selection.

1195
1196 (f) If the court does not permit voir dire by counsel, the prosecutor should provide the court
1197 with suggested questions in advance, and request specific follow-up questions during the selection
1198 process when necessary to ensure fair juror selection.

1199
1200 (g) If the prosecutor has reliable information that conflicts with a potential juror's
1201 responses, or that reasonably would support a "for cause" challenge by any party, the prosecutor
1202 should inform the court and, unless the court orders otherwise, defense counsel.

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Standard 3-6.4 Relationship With Jurors

(a) The prosecutor should not communicate with persons the prosecutor knows to be summoned for jury duty or impaneled as jurors, before or during trial, other than in the lawful conduct of courtroom proceedings. The prosecutor should avoid even the appearance of improper communications with jurors, and minimize any out-of-court proximity to or contact with jurors. Where out-of-court contact cannot be avoided, the prosecutor should not communicate about or refer to the specific case.

(b) The prosecutor should treat jurors with courtesy and respect, while avoiding a show of undue solicitude for their comfort or convenience.

(c) After discharge of a juror, a prosecutor should avoid contacts that may harass or embarrass the juror, that criticize the jury’s actions or verdict, or that express views that could otherwise adversely influence the juror’s future jury service. The prosecutor should know and comply with applicable rules and law governing the subject.

(d) After a jury is discharged, the prosecutor 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 the prosecution’s performance for improvement in the future. The prosecutor 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 not disparage the criminal justice system and the jury trial process, and should not express criticism of the jury’s actions or verdict.

(e) A prosecutor who learns reasonably reliable information that there was a problem with jury deliberations or conduct that could support an attack on a judgment of conviction and that is recognized as potentially valid in the jurisdiction, should promptly report that information to the appropriate judicial officer and, unless the court orders otherwise, defense counsel.

1233 **Standard 3-6.5 Opening Statement at Trial**

- 1234
- 1235 (a) The prosecutor should give an opening statement before the presentation of evidence
- 1236 begins.
- 1237
- 1238 (b) The prosecutor's opening statement at trial should be confined to a fair statement of the
- 1239 case from the prosecutor's perspective, and discussion of evidence that the prosecutor reasonably
- 1240 believes will be available, offered and admitted to support the prosecution case. The prosecutor's
- 1241 opening should avoid speculating about what defenses might be raised by the defense unless the
- 1242 prosecutor knows they will be raised.
- 1243
- 1244 (c) The prosecutor's opening statement should be made without expressions of personal
- 1245 opinion, vouching for witnesses, inappropriate appeals to emotion or personal attacks on opposing
- 1246 counsel. The prosecutor should scrupulously avoid any comment on a defendant's right to remain
- 1247 silent.
- 1248
- 1249 (d) When the prosecutor has reason to believe that a portion of the opening statement may
- 1250 be objectionable, the prosecutor should raise that point with defense counsel and, if necessary, the
- 1251 court, in advance. Similarly, visual aids or exhibits that the prosecutor intends to use during
- 1252 opening statement should be shown to defense counsel in advance.

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1253 **Standard 3-6.6 Presentation of Evidence**

1254 (a) The prosecutor should not offer evidence that the prosecutor does not reasonably believe
1255 to be true, whether by documents, tangible evidence, or the testimony of witnesses. When a
1256 prosecutor has reason to doubt the truth or accuracy of particular evidence, the prosecutor should
1257 take reasonable steps to determine that the evidence is reliable, or not present it.

1258
1259 (b) If the prosecutor reasonably believes there has been misconduct by opposing counsel, a
1260 witness, the court or other persons that affects the fair presentation of the evidence, the prosecutor
1261 should challenge the perceived misconduct by appealing or objecting to the court or through other
1262 appropriate avenues, and not by engaging in retaliatory conduct that the prosecutor knows to be
1263 improper.

1264
1265 (c) During the trial, if the prosecutor discovers that false evidence or testimony has been
1266 introduced by the prosecution, the prosecutor should take reasonable remedial steps. If the witness
1267 is still on the stand, the prosecutor should attempt to correct the error through further examination.
1268 If the falsity remains uncorrected or is not discovered until the witness is off the stand, the
1269 prosecutor should notify the court and opposing counsel for determination of an appropriate
1270 remedy.

1271
1272 (d) The prosecutor should not bring to the attention of the trier of fact matters that the
1273 prosecutor knows to be inadmissible, whether by offering or displaying inadmissible evidence,
1274 asking legally objectionable questions, or making impermissible comments or arguments. If the
1275 prosecutor is uncertain about the admissibility of evidence, the prosecutor should seek and obtain
1276 resolution from the court before the hearing or trial if possible, and reasonably in advance of the
1277 time for proffering the evidence before a jury.

1278
1279 (e) The prosecutor should exercise strategic judgment regarding whether to object or take
1280 exception to evidentiary rulings that are materially adverse to the prosecution, and not make every
1281 possible objection. The prosecutor should not make objections without a reasonable basis, or for
1282 improper reasons such as to harass or to break the flow of opposing counsel's presentation. The
1283 prosecutor should make an adequate record for appeal, and consider the possibility of an
1284 interlocutory appeal regarding significant adverse rulings if available.

1285
1286 (f) The prosecutor should not display tangible evidence (and should object to such display
1287 by the defense) until it is admitted into evidence, except insofar as its display is necessarily
1288 incidental to its tender, although the prosecutor may seek permission to display admissible evidence
1289 during opening statement. The prosecutor should avoid displaying even admitted evidence in a
1290 manner that is unduly prejudicial.

1291

1292 **Standard 3-6.7 Examination of Witnesses in Court**

1293
1294 (a) The prosecutor should conduct the examination of witnesses fairly and with due regard
1295 for dignity and legitimate privacy concerns, and without seeking to intimidate or humiliate a witness
1296 unnecessarily.

1297
1298 (b) The prosecutor should not use cross-examination to discredit or undermine a witness's
1299 testimony, if the prosecutor knows the testimony to be truthful and accurate.

1300
1301 (c) The prosecutor should not call a witness to testify in the presence of the jury, or require
1302 the defense to do so, when the prosecutor knows the witness will claim a valid privilege not to
1303 testify. If the prosecutor is unsure whether a particular witness will claim a privilege to not testify,
1304 the prosecutor should alert the court and defense counsel in advance and outside the presence of the
1305 jury.

1306
1307 (d) The prosecutor should not ask a question that implies the existence of a factual predicate
1308 for which a good faith belief is lacking.

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Standard 3-6.8 Closing Arguments to the Trier of Fact

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1312 (a) In closing argument to a jury (or to a judge sitting as trier of fact), the prosecutor should
1313 present arguments and a fair summary of the evidence that proves the defendant guilty beyond
1314 reasonable doubt. The prosecutor may argue all reasonable inferences from the evidence in the
1315 record, unless the prosecutor knows an inference to be false. The prosecutor should, to the extent
1316 time permits, review the evidence in the record before presenting closing argument. The prosecutor
1317 should not knowingly misstate the evidence in the record, or argue inferences that the prosecutor
1318 knows have no good-faith support in the record. The prosecutor should scrupulously avoid any
1319 reference to a defendant's decision not to testify.
1320
- 1321 (b) The prosecutor should not argue in terms of counsel's personal opinion, and should not
1322 imply special or secret knowledge of the truth or of witness credibility.
1323
- 1324 (c) The prosecutor should not make arguments calculated to appeal to improper prejudices
1325 of the trier of fact. The prosecutor should make only those arguments that are consistent with the
1326 trier's duty to decide the case on the evidence, and should not seek to divert the trier from that duty.
1327
- 1328 (d) If the prosecutor presents rebuttal argument, the prosecutor may respond fairly to
1329 arguments made in the defense closing argument, but should not present or raise new issues. If the
1330 prosecutor believes the defense closing argument is or was improper, the prosecutor should timely
1331 object and request relief from the court, rather than respond with arguments that the prosecutor
1332 knows are improper.
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1334 **Standard 3-6.9 Facts Outside the Record**

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When before a jury, the prosecutor 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 are matters of which a court clearly may take judicial notice, or are facts the prosecutor reasonably believes will be entered into the record at that proceeding. In a nonjury context the prosecutor may refer to extra-record facts relevant to issues about which the court specifically inquires, but should note that they are outside the record.

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1343 **Standard 3-6.10 Comments by Prosecutor After Verdict or Ruling**

1344 (a) The prosecutor should respectfully accept acquittals. Regarding other adverse rulings
1345 (including the rare acquittal by a judge that is appealable), while the prosecutor may publicly
1346 express respectful disagreement and an intention to pursue lawful options for review, the prosecutor
1347 should refrain from public criticism of any participant. Public comments after a verdict or ruling
1348 should be respectful of the legal system and process.

1349
1350 (b) The prosecutor may publicly praise a jury verdict or court ruling, compliment
1351 government agents or others who aided in the matter, and note the social value of the ruling or
1352 event. The prosecutor should not publicly gloat or seek personal aggrandizement regarding a
1353 verdict or ruling.

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PART VII
POST-TRIAL MOTIONS AND SENTENCING

[New]* Standard 3-7.1 Post-trial Motions *[New]

The prosecutor should conduct a fair evaluation of post-trial motions, determine their merit, and respond accordingly and respectfully. The prosecutor should not oppose motions at any stage without a reasonable basis for doing so.

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Standard 3-7.2 Sentencing

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(a) The severity of sentences imposed should not be used as a measure of a prosecutor’s effectiveness.

(b) The prosecutor should be familiar with relevant sentencing laws, rules, consequences and options, including alternative non-imprisonment sentences. Before or soon after charges are filed, and throughout the pendency of the case, the prosecutor should evaluate potential consequences of the prosecution and available sentencing options, such as forfeiture, restitution, and immigration effects, and be prepared to actively advise the court in sentencing.

(c) The prosecutor should seek to assure that a fair and informed sentencing judgment is made, and to avoid unfair sentences and disparities.

(d) In the interests of uniformity, the prosecutor’s office should develop consistent policies for evaluating and making sentencing recommendations, and not leave complete discretion for sentencing policy to individual prosecutors.

(e) The prosecutor should know the relevant laws and rules regarding victims’ rights, and facilitate victim participation in the sentencing process as the law requires or permits.

Standard 3-7.3 Information Relevant to Sentencing

- 1383
1384
1385 (a) The prosecutor should assist the court in obtaining complete and accurate information for
1386 use in sentencing, and should cooperate fully with the court's and staff's presentence investigations.
1387 The prosecutor should provide any information that the prosecution believes is relevant to the
1388 sentencing to the court and to defense counsel. A record of such information provided to the court and
1389 counsel should be made, so that it may be reviewed later if necessary. If material incompleteness or
1390 inaccuracy in a presentence report comes to the prosecutor's attention, the prosecutor should take steps
1391 to present the complete and correct information to the court and defense counsel.
1392
- 1393 (b) The prosecutor should disclose to the defense and to the court, at or before the sentencing
1394 proceeding, all information that tends to mitigate the sentence and is known to the prosecutor, unless the
1395 prosecutor is relieved of this responsibility by a court order.
1396
- 1397 (c) Prior to sentencing, the prosecutor should disclose to the defense any evidence or
1398 information it provides, whether by document or orally, to the court or presentence investigator in aid of
1399 sentencing, unless contrary to law or rule in the jurisdiction or a protective order has been sought.
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PART VIII

1402

APPEALS AND OTHER CONVICTION CHALLENGES *[NEW]*

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[New] **Standard 3-8.1** **Duty To Defend Conviction Not Absolute** *[New]*

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The prosecutor has a duty to defend convictions obtained after fair process. This duty is not

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absolute, however, and the prosecutor should temper the duty to defend with independent

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professional judgment and discretion. The prosecutor should not defend a conviction if the

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prosecutor believes the defendant is innocent or was wrongfully convicted, or that a miscarriage of

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justice associated with the conviction has occurred.

1409 *[New]* **Standard 3-8.2** **Appeals -- General Principles** *[New]*

1410 (a) All prosecutors should be sufficiently knowledgeable about appellate practice to be able
1411 to make a record sufficient to preserve issues and arguments for appeal, and should make such a
1412 record at the trial court level.

1413 (b) When the prosecutor receives an adverse ruling, the prosecutor should consider whether
1414 it may be appealed. If the ruling may be appealed, the prosecutor should consider whether an
1415 appeal should be filed, and refer it to an appellate prosecutor if appropriate for decision.

1416 (c) When considering whether an adverse ruling should be appealed, the prosecutor should
1417 evaluate not only the legal merits, but also whether it is in the interests of justice to pursue such an
1418 appeal, taking into account the benefits to the prosecution, the judicial system, and the public, as
1419 well as the costs of the appellate process and of delay to the prosecution, defendant, victims and
1420 witnesses.

1421 (d) A prosecutor handling a criminal appeal should know the specific rules, practices and
1422 procedures that govern appeals in the jurisdiction.

1423 (e) The prosecutor's office should designate one or more prosecutors in the office to
1424 develop expertise regarding appellate law and procedure, and should develop contacts with other
1425 offices' prosecutors who have such expertise. The prosecutor's office should develop consistent
1426 policies and positions regarding issues that are common or recurring in the appellate process or
1427 court. The prosecutor's office should regularly notify its prosecutors and law enforcement agents
1428 about new developments in the law or judicial decisions, and should provide regular training to such
1429 personnel on such topics.

1430 (f) A prosecutor handling a criminal appeal who was not counsel in the trial court should
1431 consult with the trial prosecutor, but should exercise independent judgment in reviewing the record
1432 and the defense arguments. The appellate prosecutor should not make or oppose arguments in an
1433 appeal without a reasonable legal basis.

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1434 *[New]* **Standard 3-8.3** **Responses to New or Newly-Discovered Evidence or Law** *[New]*

1435
1436 If a prosecutor learns of credible and material information creating a reasonable likelihood
1437 that a defendant was wrongfully convicted or sentenced or is actually innocent, the prosecutor
1438 should comply with ABA Model Rules of Professional Conduct 3.8(g) and (h). The prosecutor's
1439 office should develop policies and procedures to address such information, and take actions that are
1440 consistent with applicable law, rules, and the duty to pursue justice.

1441 *[New]* **Standard 3-8.4** **Challenges to the Effectiveness of Defense Counsel** *[New]*

1442

1443 (a) In any post-conviction challenge to the effectiveness of defense counsel, the prosecutor
1444 should be cognizant of the defendant's potential attorney-client privilege with former defense
1445 counsel as well as former defense counsel's other ethical or legal obligations, and not seek to
1446 abrogate such privileges or obligations without an unambiguous legal basis, or court order.

1447

1448 (b) If a prosecutor observes, at any stage of a criminal proceeding, defense counsel conduct
1449 or omission that might reasonably constitute ineffective assistance of counsel, the prosecutor should
1450 take reasonable steps to preserve the defendant's right to effective assistance as well as the public's
1451 interest in obtaining a valid conviction, while not intruding on a defendant's constitutional right to
1452 counsel. During an ongoing defense representation, the prosecutor should not express concerns
1453 regarding possible ineffective assistance on the public record without an unambiguous legal basis or
1454 court order, and should not communicate any such concerns directly to the defendant.

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1455 *[New]* **Standard 3-8.5** **Collateral Attacks on Conviction** *[New]*

1456

1457 If required to respond to a collateral attack on a conviction, the prosecutor should consider
1458 all lawful responses, including applicable procedural or other defenses. The prosecutor need not,
1459 however, invoke every possible defense to a collateral attack, and should consider potential
1460 negotiated dispositions or other remedies, if the prosecutor and the prosecutor's office reasonably
1461 conclude that the interests of justice are thereby served.

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1464 **-- END of Proposed Revisions to the PROSECUTION FUNCTION Standards --**

1465

1466 **AMERICAN BAR ASSOCIATION**

1467 Proposed Fourth Edition of the
1468 **CRIMINAL JUSTICE STANDARDS**
1469 **for the**
1470 **PROSECUTION and DEFENSE FUNCTIONS**
1471 **(encompassing proposed revisions to the**
1472 **Third Edition approved in 1993)**

1473
1474
1475 Presented by the
1476 CRIMINAL JUSTICE SECTION
1477 for Adoption by the House of Delegates
1478 Midyear Meeting, Houston, TX

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1480 February 2015
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1483 **CRIMINAL JUSTICE STANDARDS**
1484 **for the**
1485 **DEFENSE FUNCTION**

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1487
1488 Chair, Criminal Justice Section Council: Mathias H. Heck, Jr., Montgomery County Prosecuting
1489 Attorney, Dayton, Ohio..

1490 Standards Committee Chair: The Hon. Mark R. Dwyer, New York Court of Claims.

1491 Task Force Chair: The Hon. John R. Tunheim, U.S. District Judge (D. Minn.).

1492 Reporter: Professor Rory K. Little, U.C. Hastings College of the Law, San Francisco
1493 little@uchastings.edu
1494

1495 Reporter's Notes

1496 1. Each Standard begins on a separate page. There are 65 proposed Defense Function
1497 Standards here, up from 43 Standards in the 1993 Edition. Where there is no 1993 equivalent
1498 Standard (or a subsection of a 1993 Standards is now made into a separate Standard), the proposed
1499 revision is designated a "New" Standard.

1500
1501 2. This draft reflects final revisions approved by the Council of the Criminal Justice Section
1502 at its April 2014 meeting.

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PART I

GENERAL STANDARDS

Standard 4-1.1 The Scope and Function of these Standards

(a) As used in these Standards, “defense counsel” means any attorney – including privately retained, assigned by the court, acting *pro bono* or serving indigent defendants in a legal aid or public defender’s office – who acts as an attorney on behalf of a client being investigated or prosecuted for alleged criminal conduct, or a client seeking legal advice regarding a potential, ongoing or past criminal matter or subpoena, including as a witness. These Standards are intended to apply in any context in which a lawyer would reasonably understand that a criminal prosecution could result. The Standards are intended to serve the best interests of clients, and should not be relied upon to justify any decision that is counter to the client’s best interests. The burden to justify any exception should rest with the lawyer seeking it.

(b) These Standards are intended to provide guidance for the professional conduct and performance of defense counsel. They are not intended to modify a defense attorney’s obligations under applicable rules, statutes or the constitution. They are aspirational or describe “best practices,” and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for clients, or to create a standard of care for civil liability. They may be relevant in judicial evaluation of constitutional claims regarding the right to counsel. For purposes of consistency, these Standards sometimes include language taken from the Model Rules of Professional Conduct; but the Standards often address conduct or provide details beyond that governed by the Model Rules of Professional Conduct. No inconsistency is ever intended; and in any case a lawyer should always read and comply with the rules of professional conduct and other authorities that are binding in the specific jurisdiction or matter, including choice of law principles that may regulate the lawyer’s ethical conduct.

(c) Because the Standards for Criminal Justice are aspirational, the words “should” or “should not” are used in these Standards, rather than mandatory phrases such as “shall” or “shall not,” to describe the conduct of lawyers that is expected or recommended under these Standards. The Standards are not intended to suggest any lesser standard of conduct than may be required by applicable mandatory rules, statutes, or other binding authorities.

(d) These Standards are intended to address the performance of criminal defense counsel in all stages of their professional work. Other ABA Criminal Justice Standards should also be consulted for more detailed consideration of the performance of criminal defense counsel in specific areas.

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Standard 4-1.2 Functions and Duties of Defense Counsel

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(a) Defense counsel is essential to the administration of criminal justice. A court properly constituted to hear a criminal case should be viewed as an entity consisting of the court (including judge, jury, and other court personnel), counsel for the prosecution, and counsel for the defense.

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(b) Defense counsel have the difficult task of serving both as officers of the court and as loyal and zealous advocates for their clients. The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients' counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.

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(c) Defense counsel should know and abide by the standards of professional conduct as expressed in applicable law and ethical codes and opinions in the applicable jurisdiction. Defense counsel should seek out supervisory advice when available, and defense counsel organizations as well as others should provide ethical guidance when the proper course of conduct seems unclear. Defense counsel who disagrees with a governing ethical rule should seek its change if appropriate, and directly challenge it if necessary, but should comply with it unless relieved by court order.

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(d) Defense counsel is the client's professional representative, not the client's alter-ego. Defense counsel should act zealously within the bounds of the law and standards on behalf of their clients, but have no duty to, and may not, execute any directive of the client which violates the law or such standards. In representing a client, defense counsel may engage in a good faith challenge to the validity of such laws or standards if done openly.

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(e) Defense counsel should seek 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. Defense counsel should provide services 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.

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(f) Defense counsel should be knowledgeable about, and consider, alternatives to prosecution or conviction that may be applicable in individual cases, and communicate them to the client. Defense counsel should be available to assist other groups in the community in addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.

1692

1693

(g) Because the death penalty differs from other criminal penalties, defense counsel in a capital case should make extraordinary efforts on behalf of the accused and,

1694 more specifically, review and comply with the ABA Guidelines for the Appointment and
1695 Performance of Defense Counsel in Death Penalty Cases.

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1696 *[New]* **Standard 4-1.3** **Continuing Duties of Defense Counsel** *[New]*

1697

1698 Some duties of defense counsel run throughout the period of representation, and
1699 even beyond. Defense counsel should consider the impact of these duties at all stages of
1700 a criminal representation and on all decisions and actions that arise in the course of
1701 performing the defense function. These duties include:

1702

1703 (a) a duty of confidentiality regarding information relevant to the client’s
1704 representation which duty continues after the representation ends;

1705

1706 (b) a duty of loyalty toward the client;

1707

1708 (c) a duty of candor toward the court and others, tempered by the duties of
1709 confidentiality and loyalty;

1710

1711 (d) a duty to communicate and keep the client informed and advised of
1712 significant developments and potential options and outcomes;

1713

1714 (e) a duty to be well-informed regarding the legal options and developments that
1715 can affect a client’s interests during a criminal representation;

1716

1717 (f) a duty to continually evaluate the impact that each decision or action may
1718 have at later stages, including trial, sentencing, and post-conviction review;

1719

1720 (g) a duty to be open to possible negotiated dispositions of the matter, including
1721 the possible benefits and disadvantages of cooperating with the prosecution;

1722

1723 (h) a duty to consider the collateral consequences of decisions and actions,
1724 including but not limited to the collateral consequences of conviction.

1725

1726 *[New]* **Standard 4-1.4** **Defense Counsel’s Tempered Duty of Candor** *[New]*
1727

1728 (a) In light of criminal defense counsel’s constitutionally recognized role in the
1729 criminal process, defense counsel’s duty of candor may be tempered by competing
1730 ethical and constitutional obligations. Defense counsel must act zealously within the
1731 bounds of the law and applicable rules to protect the client’s confidences and the unique
1732 liberty interests that are at stake in criminal prosecution.

1733
1734 (b) Defense counsel should not knowingly make a false statement of fact or law
1735 or offer false evidence, to a court, lawyer, witnesses, or third party. It is not a false
1736 statement for defense counsel to suggest inferences that may reasonably be drawn from
1737 the evidence. In addition, while acting to accommodate legitimate confidentiality,
1738 privilege, or other defense concerns, defense counsel should correct a defense
1739 representation of material fact or law that defense counsel knows is, or later learns was,
1740 false.

1741
1742 (c) Defense counsel should disclose to a court legal authority in the controlling
1743 jurisdiction known to defense counsel to be directly adverse to the position of the client
1744 and not disclosed by others.

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1745 *[New]* **Standard 4-1.5** **Preserving the Record** *[New]*

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At every stage of representation, defense counsel should take steps necessary to make a clear and complete record for potential review. Such steps may include: filing motions, including motions for reconsideration, and exhibits; making objections and placing explanations on the record; requesting evidentiary hearings; requesting or objecting to jury instructions; and making offers of proof and proffers of excluded evidence.

1754 *[New]* **Standard 4-1.6** **Improper Bias Prohibited** *[New]*

1755 (a) Defense counsel should not manifest or exercise, by words or conduct, bias or
1756 prejudice based upon race, sex, religion, national origin, disability, age, sexual
1757 orientation, gender identity, or socioeconomic status. Defense counsel should strive to
1758 eliminate implicit biases, and act to mitigate any improper bias or prejudice when
1759 credibly informed that it exists within the scope of defense counsel’s authority.

1760
1761 (b) Defense counsel should be proactive in efforts to detect, investigate, and
1762 eliminate improper biases, with particular attention to historically persistent biases like
1763 race, in all of counsel’s work. A public defense office should regularly assess the
1764 potential for biased or unfairly disparate impacts of its policies on communities within
1765 the defense office’s jurisdiction, and eliminate those impacts that cannot be properly
1766 justified.

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Standard 4-1.7 Conflicts of Interest

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(a) 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. When a conflict requiring withdrawal exists and is non-waivable, or informed consent has not been obtained, defense counsel should decline to proceed further, or take only minimal actions necessary to protect the client’s interests, until an adequate waiver or new counsel is in place, or a court orders continued representation.

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

(c) Defense counsel should disclose to the client at the earliest feasible opportunity any information, including any interest in or connection to the matter or to other persons involved in the matter, that would reasonably be relevant to the client’s selection of unconflicted counsel or decision to continue counsel’s representation. The disclosure of conflicts of interest that would otherwise be prohibited by applicable rules or law should be in writing, and should be disclosed on the record to any court that the matter comes before. Disclosures to the client should include communication of information sufficient to permit the client to appreciate the material risks involved and available alternatives. Defense counsel should obtain informed consent from a client before proceeding with any representation where an actual or realistically potential conflict is present.

(d) 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) should not undertake to represent more than one client in the same criminal case. When there is not yet a criminal case, such multiple representation should be engaged in only when, after careful investigation and consideration, it is clear either that no conflict is likely to develop at any stage of the matter, or that multiple representation will be advantageous to each of the clients represented and that foreseeable conflicts can be waived.

(e) In instances of permissible multiple representation:
(i) the clients should be fully advised that the lawyer may be unable to continue if a conflict develops, and that confidentiality may not exist between the clients;
(ii) informed written consent should be obtained from each of the clients, and
(iii) if the matter is before a tribunal, such consent should be made on the record with appropriate inquiries by counsel and the court.

(f) Defense counsel who has formerly represented a 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

1814 confidentiality and loyalty otherwise do not apply, and should not take legal positions
1815 that are substantially adverse to a former client.

1816

1817 (g) In accepting payment of fees by one person for the representation of another,
1818 defense counsel should explain to the payor that counsel's loyalty and confidentiality
1819 obligations are owed entirely to the person being represented and not to the payor, and
1820 that counsel may not release client information to the payor unless applicable ethics rules
1821 allow. Defense counsel should not permit a person who recommends, employs, or pays
1822 defense counsel to render legal services for another to direct or regulate counsel's
1823 professional judgment in rendering such legal services. In addition, defense counsel
1824 should not accept such third-party compensation unless:

1825 (i) the client gives informed consent after full disclosure and explanation;

1826 (ii) defense counsel is confident there will be no interference with defense
1827 counsel's independence or professional judgment or with the client-lawyer relationship;
1828 and

1829 (iii) defense counsel is reasonably confident that information relating to the
1830 representation of the client will be protected from disclosure as required by counsel's
1831 ethical duty of confidentiality.

1832

1833 (h) Defense counsel should not represent a client in a criminal matter in which
1834 counsel, or counsel's partner or other lawyer in counsel's law office or firm, is the
1835 prosecutor in the same or a substantially related matter, or is a prosecutor in the same
1836 jurisdiction.

1837

1838 (i) If defense counsel's partner or other lawyer in counsel's law office was
1839 formerly a prosecutor in the same or substantially related matter or was a prosecutor in
1840 the same jurisdiction, defense counsel should not take on representation in that matter
1841 unless appropriate screening and consent measures under applicable ethics rules are
1842 undertaken, and no confidential information of the client or of the government has
1843 actually been exchanged between defense counsel and the former prosecutor.

1844

1845 (j) If defense counsel is a candidate for a position, or seeking employment, as a
1846 prosecutor or judge, this should be promptly disclosed to the client, and informed consent
1847 to continue be obtained.

1848

1849 (k) Defense counsel who formerly participated personally and substantially in the
1850 prosecution or criminal investigation of a defendant should not thereafter represent any
1851 person in the same or a substantially related matter, unless waiver is obtained from both
1852 the client and the government. Defense counsel who acquired confidential information
1853 about a person when counsel was formerly a prosecutor should not use such information
1854 in the representation of a client whose interests are adverse to that other person, unless
1855 the information has become generally known or the ethical obligations of confidentiality
1856 and loyalty otherwise do not apply.

1857

1858 (l) Defense counsel whose current relationship to a prosecutor is parent, child,
1859 sibling, spouse, or sexual partner should not represent a client in a criminal matter in

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1860 which defense counsel knows the government is represented by that prosecutor. Nor
1861 should defense counsel who has a significant personal or financial relationship with a
1862 prosecutor represent a client in a criminal matter in which defense counsel knows the
1863 government is represented in the matter by such prosecutor, except upon informed
1864 consent by the client regarding the relationship.

1865
1866 (m) Defense counsel should not act as surety on a bond either for a client whom
1867 counsel represents or for any other client in the same or a related case, unless it is
1868 required by law or it is clear that there is no risk that counsel's judgment could be
1869 materially limited by counsel's interest in recovering the amount ensured.

1870
1871 (n) Except as law may otherwise permit, defense counsel should not negotiate to
1872 employ any person who is significantly involved as an attorney, employee, or agent of the
1873 prosecution in a matter in which defense counsel is participating personally and
1874 substantially.

1875

1876 **Standard 4-1.8** **Appropriate Workload**

1877

1878 (a) Defense counsel should not carry a workload that, by reason of its excessive
1879 size or complexity, interferes with providing quality representation, endangers a client's
1880 interest in independent, thorough, or speedy representation, or has a significant potential
1881 to lead to the breach of professional obligations. A defense counsel whose workload
1882 prevents competent representation should not accept additional matters until the workload
1883 is reduced, and should work to ensure competent representation in counsel's existing
1884 matters. Defense counsel within a supervisory structure should notify supervisors when
1885 counsel's workload is approaching or exceeds professionally appropriate levels.

1886

1887 (b) Defense organizations and offices should regularly review the workload of
1888 individual attorneys, as well as the workload of the entire office, and adjust workloads
1889 (including intake) when necessary and as permitted by law to ensure the effective and
1890 ethical conduct of the defense function.

1891

1892 (c) Publicly-funded defense entities should inform governmental officials of the
1893 workload of their offices, and request funding and personnel that are adequate to meet the
1894 defense caseload. Defense counsel should consider seeking such funding from all
1895 appropriate sources. If workload exceeds the appropriate professional capacity of a
1896 publicly-funded defense office or other defense counsel, that office or counsel should
1897 also alert the court(s) in its jurisdiction and seek judicial relief.

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1898 **Standard 4-1.9** **Diligence, Promptness and Punctuality**

1899

1900 (a) Defense counsel should act with diligence and promptness in representing a
1901 client, and should avoid unnecessary delay in the disposition of cases. But defense
1902 counsel should not act with such haste that quality representation is compromised.
1903 Defense counsel and publically-funded defense entities should be organized and
1904 supported with adequate staff and facilities to enable them to represent clients effectively
1905 and efficiently.

1906

1907 (b) When providing reasons for seeking delay, defense counsel should not
1908 knowingly misrepresent facts or otherwise mislead. Defense counsel should use
1909 procedural devices that will cause delay only when there is a legitimate basis for their
1910 use. Defense counsel should not accept a representation for the purpose of delaying a
1911 trial or hearing.

1912

1913 (c) Defense counsel should not unreasonably oppose requests for continuances
1914 from the prosecutor.

1915

1916 (d) Defense counsel should know and comply with timing requirements
1917 applicable to a criminal representation so as to not prejudice the client's rights.

1918

1919 (e) Defense counsel should be punctual in attendance at court, in the submission
1920 of motions, briefs, and other papers, and in dealings with opposing counsel, witnesses
1921 and others. Defense counsel should emphasize to the client, assistants, and defense
1922 witnesses the importance of punctuality in court attendance.

1923

1924 **Standard 4-1.10 Relationship With Media**

1925

1926 (a) For purposes of this Standard, a “public statement” is any extrajudicial
1927 statement that a reasonable person would expect to be disseminated by means of public
1928 communication or media, including social media. An extrajudicial statement is any oral,
1929 written, or visual presentation not made either in a courtroom during the criminal
1930 proceedings or in court filings or correspondence with the court or counsel regarding the
1931 criminal proceedings.

1932

1933 (b) Defense counsel’s public statements about the judiciary, jurors, other lawyers,
1934 or the criminal justice system should be respectful even if expressing disagreement.

1935

1936 (c) Defense counsel should not make, cause to be made, or authorize or condone
1937 the making of, a public statement that counsel knows or reasonably should know will
1938 have a substantial likelihood of materially prejudicing a criminal proceeding. Defense
1939 counsel’s public statements should otherwise be consistent with the ABA Standards on
1940 Fair Trial and Public Discourse.

1941

1942 (d) Defense counsel should not place statements or evidence into the court record
1943 to circumvent this Standard.

1944

1945 (e) Defense counsel should exercise reasonable care to prevent investigators,
1946 employees, or other persons assisting or associated with the defense from making an
1947 extrajudicial statement or providing non-public information that defense counsel would
1948 be prohibited from making or providing under this Standard or other applicable rules or
1949 law.

1950

1951 (f) Defense counsel may respond to public statements from any source in order to
1952 protect a client’s legitimate interests, unless there is a substantial likelihood of materially
1953 prejudicing a criminal proceeding, in which case defense counsel should approach the
1954 prosecutor or the Court for relief. A statement made pursuant to this paragraph shall be
1955 limited to such information as is necessary to mitigate the recent adverse publicity.

1956

1957 (g) In making any public statement regarding a representation, defense counsel
1958 should comply with ethical rules governing client confidentiality and loyalty, and should
1959 not provide confidential information to the media, on or off the record, without
1960 authorization from the client.

1961

1962 (h) Defense counsel should not allow the client’s representation to be adversely
1963 affected by counsel’s personal interest in potential media contacts or attention.

1964

1965 (i) A defense attorney uninvolved in a matter who is commenting as a media
1966 source may offer generalized media commentary concerning a specific criminal matter
1967 that serves to educate the public about the criminal justice system and does not risk
1968 prejudicing a specific criminal proceeding. Counsel acting as such a media commentator
1969 should make reasonable efforts to be well-informed about the facts of the matter and the

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1970 governing law. Counsel should not offer commentary regarding the specific merits of an
1971 ongoing prosecution or investigation, except in a rare case to address a manifest injustice
1972 and counsel is reasonably well-informed about the relevant facts and law.

1973 **Standard 4-1.11 Advisory Groups and Communications for Guidance**
1974 **on Issues of Professional Conduct**

1975

1976 (a) In every jurisdiction, a group of lawyers with recognized experience,
1977 integrity, and standing in the criminal defense bar should be established to consider issues
1978 of professional conduct for defense attorneys in criminal matters. Members of this group
1979 should provide prompt and confidential guidance and advice to defense counsel seeking
1980 assistance in the application of standards of professional conduct in criminal
1981 representations.

1982

1983 (b) Defense counsel should initially take steps to ensure that the member from
1984 whom advice is sought does not have any conflicting interests, and the advisory group
1985 should establish procedures to avoid such conflicts.

1986

1987 (c) Communications between a defense lawyer and an advisory group member,
1988 and the seeking of advice itself, should be treated as confidential, and such
1989 communications should be afforded the same attorney-client privilege and other
1990 protections of the client's confidences as exists between any other lawyer and client. A
1991 group member should be bound by statute or rule of court in the same manner as a lawyer
1992 is otherwise bound in that jurisdiction not to reveal confidences of the client of the
1993 consulting lawyer.

1994

1995 (d) In seeking advice from a group member, defense counsel should take steps to
1996 protect the client's confidences (for example, by the use of anonymous hypotheticals),
1997 and reveal only such confidential information as may be necessary.

1998

1999 (e) Defense counsel should employ the foregoing confidentiality measures even
2000 when informally seeking advice from any other lawyer, and such informal consultations
2001 should be afforded confidentiality to the extent the law permits. Defense counsel should
2002 be cautious and protect confidences when seeking advice outside the advisory group
2003 context.

2004

2005 (f) Confidences regarding a consultation may later be revealed to the extent
2006 necessary if:

2007

2008 (i) defense counsel's client challenges the effectiveness of counsel's
2009 conduct of the matter and counsel has relied on the guidance received
2010 from an advisory group member, and the information is subpoenaed or
2011 otherwise judicially supervised; or

2011

2012 (ii) the defense counsel's conduct is called into question in a disciplinary
2013 inquiry or other proceeding against which counsel must defend.

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2014 *[New]* **Standard 4-1.12** **Training Programs** *[New]*

2015 (a) The community of criminal defense attorneys, including public defense
2016 offices and State and local Bar Associations, should develop and maintain programs of
2017 training and continuing education for both new and experienced defense counsel.
2018 Defense offices, as well as the organized Bar or courts, should require that current and
2019 aspiring criminal defense counsel attend a reasonable number of hours of such training
2020 and education.

2021 (b) In addition to knowledge of substantive legal doctrine and courtroom
2022 procedures, a core training curriculum for criminal defense counsel should seek to
2023 address: investigation, negotiation and litigation skills; knowledge of the development,
2024 use, and testing of forensic evidence; available sentencing structures including non-
2025 conviction and non-imprisonment alternatives and collateral consequences; professional
2026 responsibility, civility, and a commitment to professionalism; relevant office, court, and
2027 prosecution policies and procedures and their proper application; appreciation of diversity
2028 and elimination of improper bias; and available technology and the ability to use it.
2029 Some training programs might usefully be open to, and taught by, persons outside the
2030 criminal defense community, such as prosecutors, law enforcement agencies, court staff,
2031 and members of the judiciary.

2032 (c) A public defense office's training program should include periodic review of
2033 the office's policies and procedures, which should be amended when necessary. Counsel
2034 defending in specialized subject areas should receive training in those specialized areas.
2035 Individuals who will supervise attorneys or staff should receive training in how
2036 effectively to supervise.
2037

2038 (d) A public criminal defense organization should also make available
2039 opportunities for training and continuing education programs outside the office, including
2040 training for non-attorney staff.

2041 (e) Adequate funding for continuing training and education programs, within and
2042 outside of public defense offices, should be requested and provided by funding sources.

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PART II

ACCESS TO DEFENSE COUNSEL

Standard 4-2.1 Duty to Make Qualified Criminal Defense Representation Available

(a) The government has an obligation to provide, and fully fund, services of qualified defense counsel for indigent criminal defendants. In addition, the organized Bar of all lawyers in a jurisdiction 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 efforts by their interested attorneys to become qualified and then take on criminal representations.

(c) 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 lawyer's ability to provide quality representation.

(e) Lawyers who are not qualified to serve as criminal defense counsel should

- (i) be encouraged to seek qualification;
- (ii) make their legal skills and expertise available to assist qualified counsel in providing indigent criminal defense; and
- (iii) provide or assist in obtaining financial assistance and political support for indigent criminal defense budgets and resources.

2102 **Standard 4-2.2 Confidential Defense Communication with Detained Persons**
2103 **[(c) and (d) are New]**
2104

2105 (a) Every jurisdiction should guarantee by statute or rule the right of a criminally-
2106 detained or confined person to prompt, confidential, affordable and effective
2107 communication with a defense lawyer throughout a criminal investigation, prosecution,
2108 appeal, or other quasi-criminal proceedings such as habeas corpus.
2109

2110 (b) All detention or imprisonment institutions should provide reasonable,
2111 affordable access to confidential and unmonitored telephonic and other communication
2112 facilities to allow effective confidential communication between defense counsel and
2113 their detained clients. This should include providing or allowing access to language
2114 translation or other communication services when necessary.
2115

2116 (c) All detention or imprisonment institutions should provide adequate facilities
2117 for private, unmonitored meetings between defense counsel and an accused. Private
2118 facilities should also be provided for the review of evidence and discovery materials by
2119 counsel together with their detained clients.
2120

2121 (d) Absent a credible threat of immediate danger or violence, or advance judicial
2122 authorization, persons working in detention or imprisonment institutions should be
2123 prohibited from examining, monitoring, recording, or interfering with confidential
2124 communications between defense counsel and their detained clients.
2125

2133 **Standard 4-2.4 Referral Service for Criminal Cases**

2134

2135 (a) To assist persons who wish to retain defense counsel, every jurisdiction
2136 should have a referral service for qualified criminal defense counsel. The referral service
2137 should maintain a list of qualified counsel willing to undertake the defense of a criminal
2138 case, for a fee as well as pro bono, and should be organized so that it can provide prompt
2139 service at all times.

2140

2141 (b) A defense referral service should employ an objective set of standards for
2142 defense attorneys to qualify for placement on the referral list, and should employ fair and
2143 neutral criteria for admitting qualified attorneys to the list, making referrals, and striking
2144 counsel from the list. Such standards, criteria, and procedures concerning referral lists
2145 should be published and readily available.

2146

2147 (c) The availability of the referral service should be publicized, and information
2148 regarding fees should be included. Notices containing the essential information about the
2149 referral service and how to contact it should be posted in police stations, jails, and
2150 wherever else it is likely to give effective notice to criminally-accused persons, including
2151 the internet.

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2153 **Standard 4-2.5 Referrals for Representation**

2154

2155 (a) Defense counsel should not give anything of more than nominal value to a
2156 person for recommending the lawyer's services, except that

2157 (i) counsel may pay reasonable costs of advertisements, or the usual charges

2158 for a legal

2159 services plan or qualified lawyer referral service, as described in ABA

2160 Model Rule

2161 7.2; and

2162 (ii) counsel may maintain nonexclusive reciprocal referral arrangements with
2163 other

2164 lawyers, if the client is fully informed of the arrangement and the

2165 arrangement does

2166 not constrain defense counsel's independent professional judgment

2167 regarding the

2168 client's best interests.

2169

2170 (b) Defense counsel should not have an ongoing or regular referral relationship

2171 with any source (such as prosecutors, public defender programs, law enforcement

2172 personnel, bondsmen, or court personnel) when such an ongoing relationship is likely to

2173 create conflicting loyalties for the lawyers involved or an appearance of impropriety.

2174 Defense counsel's relationship with a referral source should be disclosed to the client.

2175

2176 (c) Referrals by one defense counsel to another should be based on merit,

2177 experience, competence for the particular matter, and other appropriate considerations.

2178

PART III

LAWYER-CLIENT RELATIONSHIP

Standard 4-3.1 Establishing and Maintaining An Effective Client Relationship

(a) Immediately upon appointment or retention, defense counsel should work to establish a relationship of trust and confidence with each client. Defense counsel should explain, at an appropriate time, 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 protects the confidentiality of communications with counsel except in exceptional and well-defined circumstances, and explain what the client can do to help preserve confidentiality.

(b) At an early stage, counsel should discuss with the client the objectives of the representation and through what stages of a criminal matter the defense counsel will continue to represent the accused. An engagement letter as described in Standard 4-3.5 should also be provided.

(c) Counsel should consider whether the client appears to have a mental impairment or other disability that could adversely affect the representation. Even if a client appears to have such a condition, this does not diminish defense counsel's obligations to the client, including maintaining a normal attorney-client relationship in so far as possible. In such an instance, defense counsel should also consider whether a mental examination or other protective measures are in the client's best interest.

(d) In communicating with a client, defense counsel should use language and means that the client is able to understand, which may require special attention when the client is a minor, elderly, or suffering from a mental impairment or other disability.

(e) Defense counsel should ensure that space is available and adequate for confidential client consultations.

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

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2216 **Standard 4-3.2 Seeking a Detained Client’s Release from Custody, or**
2217 **Reduction in Custodial Conditions [New]**

2218

2219 (a) In every case where the client is detained, defense counsel should discuss
2220 with the client, as promptly as possible, the client’s custodial or release status and
2221 determine whether release, a change in release conditions, or less restrictive custodial
2222 conditions, should be sought. Counsel should be aware of applicable statutes and rules,
2223 and all alternatives less restrictive than full institutional detention. Counsel should
2224 investigate community and family resources that might be available to assist in
2225 implementing such alternatives.

2226

2227 (b) Counsel should investigate the factual predicate that has been advanced to
2228 support detention and custodial conditions, and not assume its accuracy.

2229

2230 (c) Once counsel has sufficient command of the facts, counsel should approach
2231 the prosecutor to see if agreement to release or a change in release or custodial conditions
2232 can be negotiated and submitted for approval by the court.

2233

2234 (d) If the prosecutor does not agree, counsel should submit to the court a
2235 statement of facts, legal argument, and proposed conditions if necessary, to support the
2236 client’s release or a reduction in release or custodial conditions.

2237

2238 (e) If a court orders release, counsel should fully explain all conditions of release
2239 to the client, as well as the consequences of their violation. Counsel should assist the
2240 client and others acting for the client in properly implementing the release conditions.

2241

2242 (f) If counsel is unable to secure the client’s release, counsel should, after
2243 discussion with the client and with due regard to any relevant confidentiality concerns,
2244 alert the court and institutional personnel to any special medical, psychiatric, religious,
2245 dietary, or security needs of the client while in government custody, and request that the
2246 court order the appropriate officials to take steps to meet such special needs.

2247

2248 (g) Counsel should reevaluate the client’s eligibility for release, or for reduced
2249 release or custodial conditions, at all significant stages of a criminal matter and when
2250 there is any relevant change in facts or circumstances. Counsel should request
2251 reconsideration of detention or modification of conditions whenever it is in the client’s
2252 best interests.

2253

2254 **Standard 4-3.3 Interviewing the Client**

2255

2256 (a) In the initial meeting with a client, defense counsel should begin the process of
2257 establishing an effective attorney-client relationship. This includes assuring the client of
2258 confidentiality, establishing trust, explaining the posture of the matter, discussing fees if
2259 applicable, and inquiring about the client's objectives for the representation. Counsel
2260 may also discuss available evidentiary materials with the client, seek information from
2261 the client as to the facts and other potential sources of information, and ask what the
2262 client's immediate objectives and needs are and how to fulfill them.

2263

2264 (b) Counsel should interview the client as many times as necessary for effective
2265 representation, which in all but the most simple and routine cases will mean more than
2266 once. Defense counsel should make every reasonable effort to meet in person with the
2267 client. Consultation with the client regarding available options, immediately necessary
2268 decisions, and next steps, should be a part of every meeting.

2269

2270 (c) As early as practicable in the representation, defense counsel should also discuss:

2271

2272 (i) and share with the client evidentiary materials relevant to the matter
(consistent with the terms of any applicable protective order), and determine in depth the
2273 client's view of the facts and other relevant facts known to the client;

2274

2275 (ii) the likely length and course of the pending proceedings;
2276 (iii) potential sources of helpful information, evidence, and investigation;
2277 (iv) the client's wishes regarding, and the likelihood of and steps necessary to
gain, release or reduction of supervisory conditions;

2278

2279 (v) likely legal options such as motions, trial, and potential negotiated
dispositions;
2280 (vi) the range of potential outcomes and alternatives, and if convicted, possible
2281 punishments;

2282

2283 (vii) if appropriate, the possibility and potential costs and benefits of a negotiated
disposition, including one that might include cooperation with the government; and

2284

2285 (viii) relevant collateral consequences resulting from the current situation as well
as from possible resolutions of the matter.

2286

2287 (d) When asking the client for information and discussing possible options and
2288 strategies with the client, defense counsel should not seek to induce the client to make
2289 factual responses that are not true. Defense counsel should encourage candid disclosure
2290 by the client to counsel and not seek to maintain a calculated ignorance.

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2292 **Standard 4-3.4 Fees**

2293

2294 (a) Counsel should be familiar with statutes and rules regarding fees and costs
2295 that govern in the jurisdiction(s) in which counsel practices. Before or within a
2296 reasonably short time after commencing a representation, defense counsel should discuss
2297 with the client:

2298 (i) the likely cost of the representation including the attorney's fees, billing
2299 structure, and likely expenses;

2300 (ii) how fees and costs will be paid, and any available options regarding the fee
2301 structure;

2302 (iii) what services and expenses the fees will cover;

2303 (iv) what stages of the matter the fee covers, such as pre-charge investigation,
2304 preliminary hearing, negotiated disposition or trial, sentencing or appeal; and

2305 (v) whether the fee extends to addressing any related matters.
2306

2307

2308 (b) In determining the amount of the fee in a criminal case, it is proper to
2309 consider the time and effort required, the responsibility assumed by counsel, the novelty
2310 and difficulty of the issues involved, the skill requisite to proper representation, the need
2311 for any special technology, experts, investigators, or other unusual expenses, the
2312 likelihood that other employment will be precluded, the fee customarily charged in the
2313 locality for similar services, the gravity of the charge, the experience, reputation, and
2314 expertise of defense counsel, and the ability of the client to pay the fee.

2315

2316 (c) Once agreed upon, the amount, rate, and terms of the fee should be promptly
2317 communicated to the client, in clear terms and in writing, as part of the Engagement
2318 Letter.

2319

2320 (d) Defense counsel should not enter into an agreement for, charge, or collect an
2321 illegal or unreasonable fee. Defense counsel should be aware that accepting a fee
2322 comprised of assets that are contraband or proceeds of crime may be a crime and may
2323 also subject those fee assets to seizure and forfeiture.

2324

2325 (e) Defense counsel should not permit a dispute or unhappiness regarding
2326 compensation to interfere with providing competent and zealous representation. A
2327 competent defense does not require all possible expenditures, and counsel is not required
2328 to spend out of counsel's own pocket. If funding becomes an issue, counsel should
2329 discuss other possible sources of funds with the client and pursue those that are
2330 appropriate. If funding is inadequate, counsel may seek withdrawal in accordance with
2331 applicable laws, including court and ethics rules.

2332

2333 (f) A publically-paid defense counsel should not request or accept additional
2334 money or other compensation from non-public sources to represent a client in an
appointed criminal case, unless permitted by rules of the jurisdiction.

2335 (g) Retained defense counsel may accept compensation from third parties for the
2336 representation of a client, subject to counsel’s duties of loyalty and confidentiality to the
2337 client and the criteria in Standard 4-1.5(f) above.
2338

2339 (h) Defense counsel should not state or imply that their compensation is for any
2340 unethical or secret influence.
2341

2342 (i) Defense counsel should not divide a fee with a nonlawyer, except as permitted
2343 by applicable ethics rules.
2344

2345 (j) Defense counsel not in the same firm should not divide fees in a criminal
2346 matter among lawyers unless consistent with the rules of the jurisdiction and the division
2347 is in reasonable proportion to the experience, ability, and services performed by each
2348 counsel and is disclosed to the client; or by written agreement with the client each
2349 counsel assumes joint responsibility for the representation, the client is advised of and
2350 does not object to the participation of all counsel involved, and the total fee is reasonable.
2351

2352 (k) Defense counsel should not enter into an arrangement for, charge, or collect a
2353 contingent fee for representing a defendant in a criminal case or in a criminal forfeiture
2354 action.
2355

2356 (l) Defense counsel may charge a non-refundable “flat rate” fee if such is
2357 permitted by the law of the jurisdiction and the arrangement is fully explained in
2358 advance, but defense counsel should refund any part of such a fee that constitutes an
2359 undeserved windfall if exceptional and unanticipated developments arise such that a
2360 significant amount of anticipated work is not done by counsel.
2361

2362 (m) When a representation ends, counsel should offer to return any unearned fee.

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2363 [New] Standard 4-3.5 Engagement Letter [New]

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(a) Upon agreeing or being appointed to take on a criminal representation, defense counsel should promptly provide a new client with an engagement letter, email, or other written communication, as described below, written in plain language that the particular client can understand. If material conditions of the representation change during the representation, counsel should, after consultation with the client, promptly and specifically communicate the changes in writing to the client. Counsel should also provide an engagement letter to clients who have been previously-represented by the same counsel but have now engaged counsel on a new matter, explaining the scope of and any material changes in the terms of the new representation.

(b) While the content and level of detail may vary depending on the context, an engagement letter should include a description of:

- (i) the identity of the client and the scope of, and limitations on, the representation;
- (ii) the fee arrangement (including costs and expenses);
- (iii) the fact that counsel's duties of confidentiality and loyalty are owed to the client;
- (iv) materials that counsel may retain although related to the representation (*e.g.*, legal research for use in future cases);
- (v) any other information that is particularly relevant to the specific representation.

2387 **Standard 4-3.6 Literary or Media Rights Agreements Prohibited**

2388

2389 (a) Before the conclusion of all aspects of a criminal representation in which
2390 defense counsel participates, defense counsel should not enter into any agreement or
2391 informal understanding by which the defense counsel acquires an interest in a literary or
2392 media portrayal or account based on or arising out of defense counsel's involvement in
2393 the matter.

2394

2395 (b) Defense counsel should not allow the client's representation to be adversely
2396 affected by the possibility of future personal literary or other media rights.

2397

2398 (c) In creating or participating in any literary or other media account of a matter
2399 in which defense counsel was involved, counsel's duty of confidentiality must be
2400 respected even after a matter is concluded or the client is deceased. When protected
2401 confidences are involved, defense counsel should not make disclosure without consent
2402 from the client or the client's authorized representative.

2403

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2404 **Standard 4-3.7 Prompt and Thorough Actions to Protect the Client**

2405

2406 (a) Many important rights of a criminal client can be protected and preserved
2407 only by prompt legal action. Defense counsel should inform the client of his or her rights
2408 in the criminal process at the earliest opportunity, and timely plan and take necessary
2409 actions to vindicate such rights within the scope of the representation.

2410

2411 (b) Defense counsel should promptly seek to obtain and review all information
2412 relevant to the criminal matter, including but not limited to requesting materials from the
2413 prosecution. Defense counsel should, when relevant, take prompt steps to ensure that the
2414 government's physical evidence is preserved at least until the defense can examine or
2415 evaluate it.

2416

2417 (c) Defense counsel should work diligently to develop, in consultation with the
2418 client, an investigative and legal defense strategy, including a theory of the case. As the
2419 matter progresses, counsel should refine or alter the theory of the case as necessary, and
2420 similarly adjust the investigative or defense strategy.

2421

2422 (d) Not all defense actions need to be taken immediately. If counsel has evidence
2423 of innocence, mitigation, or other favorable information, defense counsel should discuss
2424 with the client and decide whether, going to the prosecution with such evidence is in the
2425 client's best interest, and if so, when and how..

2426

2427 (e) Defense counsel should consider whether an opportunity to benefit from
2428 cooperation with the prosecution will be lost if not pursued quickly, and if so, promptly
2429 discuss with the client and decide whether such cooperation is in the client's interest.
2430 Counsel should timely act in accordance with such decisions.

2431

2432 (f) For each matter, defense counsel should consider what procedural and
2433 investigative steps to take and motions to file, and not simply follow rote procedures
2434 learned from prior matters. Defense counsel should not be deterred from sensible action
2435 merely because counsel has not previously seen a tactic used, or because such action
2436 might incur criticism or disfavor. Before acting, defense counsel should discuss novel or
2437 unfamiliar matters or issues with colleagues or other experienced counsel, employing
2438 safeguards to protect confidentiality and avoid conflicts of interest.

2439

2440 (g) Whenever defense counsel is confronted with specialized factual or legal
2441 issues with which counsel is unfamiliar, counsel should, in addition to researching and
2442 learning about the issue personally, consider engaging or consulting with an expert in the
2443 specialized area.

2444

2445 (h) Defense counsel should always consider interlocutory appeals or other
2446 collateral proceedings as one option in response to any materially adverse ruling.

2447

2448 **Standard 4-3.8 Anticipated Unlawful Conduct**

2449

2450 (a) If defense counsel anticipates that a client may engage in unlawful conduct,
2451 defense counsel should advise the client concerning the meaning, scope and validity of
2452 the law and the possible consequences of violating the law, and should advise the client
2453 to comply with the law.

2454

2455 (b) Defense counsel should not knowingly propose, advise, or assist in a course of
2456 conduct which defense counsel knows to be criminal or fraudulent, but defense counsel
2457 may discuss the legal consequences of a proposed course of conduct with a client, and
2458 may counsel or assist a client in a good faith effort to determine the validity, scope,
2459 meaning, or application of the law.

2460

2461 (c) Defense counsel should not enter into an arrangement with persons or
2462 organizations counsel knows to be engaged in ongoing criminal conduct, to provide
2463 representation on a regular basis to the participants, if the legal services will knowingly
2464 assist the ongoing criminal conduct. Counsel may agree in advance to represent clients
2465 as part of a good faith effort to determine the validity, scope, meaning, or application of
2466 the law, or incident to a general retainer for providing legal services to a person or
2467 enterprise engaged in primarily legitimate activities, or if counsel's services are intended
2468 to bring conduct into conformance with the law.

2469

2470 (d) When unlawful conduct by a client is anticipated or has taken place, defense
2471 counsel should be aware of and follow applicable ethical rules, including provisions that
2472 require confidentiality and provisions that mandate or permit disclosures.

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2473 **Standard 4-3.9 Duty to Keep Client Informed and Advised About the**
2474 **Representation**

2475
2476 (a) Defense counsel should keep the client reasonably and currently informed about
2477 developments in and the progress of the lawyer's services, including developments in
2478 pretrial investigation, discovery, disposition negotiations, and preparing a defense.
2479 Information should be sufficiently detailed so that the client can meaningfully participate
2480 in the representation.

2481
2482 (b) Defense counsel should promptly comply with the client's reasonable requests
2483 for information about the matter and for copies of or access to relevant documents, unless
2484 the client's access to such information is restricted by law or court order. Counsel should
2485 challenge such restrictions on the client's access to information unless, after consultation
2486 with the client, there is good reason not to do so.
2487

2488 **[New] Standard 4-3.10 Maintaining Continuity of Representation;**
2489 **Relationship with Successor Counsel [New]**

2490

2491 (a) Defense counsel who withdraws from a representation at any stage of a
2492 criminal matter before its resolution should make reasonable efforts to assist the client in
2493 securing competent defense counsel as successor counsel, and to not leave the client
2494 unrepresented, unless the client otherwise directs.

2495

2496 (b) Defense counsel should make reasonable efforts to establish and maintain a
2497 cooperative relationship with any prior, or successor, defense counsel in the
2498 representation.

2499

2500 (c) When successor counsel enters a representation, prior counsel should still act
2501 to protect the client's privileges, confidences and secrets, and obtain consent (express or
2502 implied) from the client before providing such information to the new counsel.

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2503 *[New]* **Standard 4-3.11** **The Client’s File** *[New]*

2504

2505 (a) When a representation ends, if the client requests the client’s file, defense
2506 counsel should provide it to the client or, with the client’s consent, to successor counsel
2507 or other authorized representative. Defense counsel should provide the client with notice
2508 of the file’s disposition. Unless rules or statutes in the jurisdiction require otherwise,
2509 defense offices may retain clients’ files unless a client requests the file. If the client’s file
2510 remains with defense counsel, counsel should retain copies of essential portions until the
2511 client provides further instructions or for at least the length of time consistent with
2512 statutes and rules of the jurisdiction.

2513

2514 (b) During a representation, defense counsel should provide the client with the
2515 client’s file upon request, even if fees or costs are disputed or unpaid in whole or in part.

2516

2517 (c) Not everything in defense counsel’s files on a matter is the client’s, and the
2518 definition of the contents of “the client’s file” may vary among jurisdictions. Original
2519 documents and property delivered to the attorney by the client are part of the client’s file,
2520 as are correspondence and court filings in the client’s matter.

2521

2522 (d) When a representation ends, defense counsel may seek a release from the client
2523 regarding the representation, but may not unreasonably withhold the client’s file pending
2524 such release.

2525

PART IV

Standard 4-4.1 Duty to Investigate and Engage Investigators

(a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.

(b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.

(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 matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

(d) Defense counsel should determine whether the client's interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation.

(e) If the client lacks sufficient resources to pay for necessary investigation, counsel should seek resources from the court, the government, or donors. Application to the court should be made *ex parte* if appropriate to protect the client's confidentiality. Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a regular basis. If adequate investigative funding is not provided, counsel may advise the court that the lack of resources for investigation may render legal representation ineffective.

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2566 **Standard 4-4.2 Illegal and Unethical Investigation Prohibited**

2567

2568 Defense counsel should not use illegal or unethical means to obtain evidence or
2569 information, or employ, instruct, or encourage others to do so.

2570

2571 **Standard 4-4.3 Relationship With Witnesses**

2572

2573 (a) “Witness” in this Standard means any person who has or might have
2574 information about a matter, including victims and the client.

2575

2576 (b) Defense counsel should know and follow the law and rules of the jurisdiction
2577 regarding victims and witnesses. In communicating with witnesses, counsel should know
2578 and abide by law and ethics rules regarding the use of deceit and engaging in
2579 communications with represented, unrepresented, and organizational persons.

2580

2581 (c) Defense counsel or counsel’s agents should seek to interview all witnesses,
2582 including seeking to interview the victim or victims, and should not act to intimidate or
2583 unduly influence any witness.

2584

2585 (d) Defense counsel should not use means that have no substantial purpose other
2586 than to embarrass, delay, or burden, and not use methods of obtaining evidence that
2587 violate legal rights. Defense counsel and their agents should not misrepresent their
2588 status, identity or interests when communicating with a witness.

2589

2590 (e) Defense counsel should be permitted to compensate a witness for reasonable
2591 expenses such as costs of attending court, depositions pursuant to statute or court rule,
2592 and pretrial interviews, including transportation and loss of income. No other benefits
2593 should be provided to witnesses, other than expert witnesses, unless authorized by law,
2594 regulation, or well-accepted practice. All benefits provided to witnesses should be
2595 documented so that they may be disclosed if required by law or court order. Defense
2596 counsel should not pay or provide a benefit to a witness in order to, or in an amount that
2597 is likely to, affect the substance or truthfulness of the witness’s testimony.

2598

2599 (f) Defense counsel should avoid the prospect of having to testify personally
2600 about the content of a witness interview. An interview of routine witnesses (for example,
2601 custodians of records) should not require a third-party observer. But when the need for
2602 corroboration of an interview is reasonably anticipated, counsel should be accompanied
2603 by another trusted and credible person during the interview. Defense counsel should
2604 avoid being alone with foreseeably hostile witnesses.

2605

2606 (g) It is not necessary for defense counsel or defense counsel’s agents, when
2607 interviewing a witness, to caution the witness concerning possible self-incrimination or a
2608 right to independent counsel. Defense counsel should, however, follow applicable ethical
2609 rules that address dealing with unrepresented persons. Defense counsel should not
2610 discuss or exaggerate the potential criminal liability of a witness with a purpose, or in a
2611 manner likely, to intimidate the witness, to intimidate the witness, or to influence the
2612 truthfulness or completeness of the witness’s testimony, or to change the witness’s
2613 decision about whether to provide information.

2614

2615 (h) Defense counsel should not discourage or obstruct communication between
2616 witnesses and the prosecution, other than a client’s employees, agents or relatives if

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2617 consistent with applicable ethical rules. Defense counsel should not advise any person,
2618 or cause any person to be advised, to decline to provide the prosecution with information
2619 which such person has a right to give. Defense counsel may, however, fairly and
2620 accurately advise witnesses as to the likely consequences of their providing information,
2621 but only if done in a manner that does not discourage communication.
2622

2623 (i) Defense counsel should give their witnesses reasonable notice of when their
2624 testimony at a proceeding is expected, and should not require witnesses to attend judicial
2625 proceedings unless their testimony is reasonably expected at that time, or their presence is
2626 required by law. When witnesses' attendance is required, defense counsel should seek to
2627 reduce to a minimum the time witnesses must spend waiting at the proceedings. Defense
2628 counsel should ensure that defense witnesses are given notice as soon as practicable of
2629 scheduling changes which will affect their required attendance at judicial proceedings.
2630

2631 (j) Defense counsel should not engage in any inappropriate personal relationship
2632 with any victim or other witness.
2633

2634 Standard 4-4.4 Relationship With Expert Witnesses

2635

2636 (a) An expert may be engaged to prepare an evidentiary report or testimony, or for
2637 consultation only. Defense counsel should know relevant rules governing expert
2638 witnesses, including possibly different disclosure rules governing experts who are
2639 engaged for consultation only.

2640

2641 (b) Defense counsel should evaluate all expert advice, opinions, or testimony
2642 independently, and not simply accept the opinion of an expert based on employer,
2643 affiliation or prominence alone.

2644

2645 (c) Before engaging an expert, defense counsel should investigate the expert's
2646 credentials, relevant professional experience, and reputation in the field. Defense counsel
2647 should also examine a testifying expert's background and credentials for potential
2648 impeachment issues. Before offering an expert as a witness, defense counsel should
2649 investigate the scientific acceptance of the particular theory, method, or conclusions
2650 about which the expert would testify.

2651

2652 (d) Defense counsel who engages an expert to provide a testimonial opinion should
2653 respect the independence of the expert and should not seek to dictate the substance of the
2654 expert's opinion on the relevant subject.

2655

2656 (e) Before offering an expert as a witness, defense counsel should seek to learn
2657 enough about the substantive area of the expert's expertise, including ethical rules that
2658 may be applicable in the expert's field, to enable effective preparation of the expert, as
2659 well as to cross-examine any prosecution expert on the same topic. Defense counsel
2660 should explain to the expert that the expert's role in the proceeding will be as an impartial
2661 witness called to aid the fact-finders, explain the manner in which the examination of the
2662 expert is likely to be conducted, and suggest likely impeachment questions the expert
2663 may be asked.

2664

2665 (f) Defense counsel should not pay or withhold a fee, or provide or withhold a
2666 benefit, for the purpose of influencing an expert's testimony. Defense counsel should not
2667 fix the amount of the fee contingent upon the substance of an expert's testimony or the
2668 result in the case. Nor should defense counsel promise or imply the prospect of future
2669 work for the expert based on the expert's testimony.

2670

2671 (g) Subject to client confidentiality interests, defense counsel should provide the
2672 expert with all information reasonably necessary to support a full and fair opinion.
2673 Defense counsel should be aware, and explain to the expert, that all communications
2674 with, and documents shared with, a testifying expert may be subject to disclosure to
2675 opposing counsel. Defense counsel should be aware of expert discovery rules and act to
2676 protect confidentiality, for example by not sharing with the expert client confidences and
2677 work product that counsel does not want disclosed.

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2679 **Standard 4-4.5 Compliance With Discovery Procedures**

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Defense counsel should timely respond to legally proper discovery requests, and make a diligent effort to comply with legally proper disclosure obligations, unless otherwise authorized by a court. When the prosecution makes requests for specific information, defense counsel should provide specific responses rather than merely a general acknowledgement of discovery obligations. Requests and responses should be tailored to the case, and “boilerplate” requests and responses should be disfavored.

2687 **[New] Standard 4-4.6 Preparation for Court Proceedings, and Recording and**
2688 **Transmitting Information [New]**

2689

2690 (a) Defense counsel should prepare in advance for court proceedings. Adequate
2691 preparation depends on the nature of the proceeding and the time available, and will often
2692 include: reviewing available documents; considering what issues are likely to arise and
2693 the client's position regarding those issues; how best to present the issues and what
2694 solutions might be offered; relevant legal research and factual investigation; and
2695 contacting other persons who might be of assistance in addressing the anticipated issues.
2696 If defense counsel has not had adequate time to prepare and is unsure of the relevant facts
2697 or law, counsel should communicate to the court the limits of the defense counsel's
2698 knowledge or preparation.

2699

2700 (b) Defense counsel should appear at all hearings in cases assigned to them,
2701 unless with good cause a substitute counsel is arranged. A defense attorney who
2702 substitutes at a court proceeding for another attorney should be adequately informed
2703 about the case and issues likely to come up at the proceeding and should adequately
2704 prepare.

2705

2706 (c) Defense counsel handling any court appearance should document what
2707 happens at the proceeding, to aid counsel's own memory and the client's future reference,
2708 and so that necessary information will be available to counsel who may handle the case in
2709 the future.

2710

2711 (d) Defense counsel should take steps to ensure that any court order issued to the
2712 defense is transmitted to the appropriate persons necessary to effectuate the order.

2713

2714 (e) A public criminal defense office should be provided sufficient resources and
2715 be organized to permit adequate preparation for court proceedings.

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2717 **Standard 4-4.7 Handling Physical Evidence With Incriminating Implications**

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(a) *Counseling the client:* If defense counsel knows that the client possesses physical evidence that the client may not legally possess (such as contraband or stolen property) or evidence that might be used to incriminate the client, counsel should examine and comply with the law and rules of the jurisdiction on topics such as obstruction of justice, tampering with evidence, and protection for the client's confidentiality and against self-incrimination. Counsel should then competently advise the client about lawful options and obligations.

(b) *Permissible actions of the client:* If requested or legally required, defense counsel may assist the client in lawfully disclosing such physical evidence to law enforcement authorities. Counsel may advise destruction of a physical item if its destruction would not obstruct justice or otherwise violate the law or ethical obligations. Counsel may not assist the client in conduct that counsel knows is unlawful, and should not knowingly and unlawfully impede efforts of law enforcement authorities to obtain evidence.

(c) *Confidentiality:* Defense counsel should act in accordance with applicable confidentiality laws and rules. In some circumstances, applicable law or rules may permit or require defense counsel to disclose the existence of, or the client's possession or disposition of, such physical evidence.

(d) *Receipt of physical evidence:* Defense counsel should not take possession of such physical evidence, personally or through third parties, and should advise the client not to give such evidence to defense counsel, except in circumstances in which defense counsel may lawfully take possession of the evidence. Such circumstances may include:

- (i) when counsel reasonably believes the client intends to unlawfully destroy or conceal such evidence;
- (ii) when counsel reasonably believes that taking possession is necessary to prevent physical harm to someone;
- (iii) when counsel takes possession in order to produce such evidence, with the client's informed consent, to its lawful owner or to law enforcement authorities;
- (iv) when such evidence is contraband and counsel may lawfully take possession of it in order to destroy it; and
- (v) when defense counsel reasonably believes that examining or testing such evidence is necessary for effective representation of the client.

(e) *Compliance with legal obligations to produce physical evidence:* If defense counsel receives physical evidence that might implicate a client in criminal conduct, counsel should determine whether there is a legal obligation to return the evidence to its source or owner, or to deliver it to law enforcement or a court, and comply with any such legal obligations. A lawyer who is legally obligated to turn over such physical evidence should do so in a lawful manner that will minimize prejudice to the client.

2761 (f) *Retention of producible item for examination.* Unless defense counsel has a
2762 legal obligation to disclose, produce, or dispose of such physical evidence, defense
2763 counsel may retain such physical evidence for a reasonable time for a legitimate
2764 purpose. Legitimate purposes for temporarily obtaining or retaining physical evidence
2765 may include: preventing its destruction; arranging for its production to relevant
2766 authorities; arranging for its return to the source or owner; preventing its use to harm
2767 others; and examining or testing the evidence in order to effectively represent the client.
2768

2769 (g) *Testing physical evidence.* If defense counsel determines that effective
2770 representation of the client requires that such physical evidence be submitted for forensic
2771 examination and testing, counsel should observe the following practices:
2772

2773 (i) The item should be properly handled, packaged, labeled and stored, in a
2774 manner designed to document its identity and ensure its integrity.
2775

2776 (ii) Any testing or examination should avoid, when possible, consumption
2777 of the item, and a portion of the item should be preserved and retained to permit further
2778 testing or examination.
2779

2780 (iii) Any person conducting such testing or examination should not,
2781 without prior approval of defense counsel, conduct testing or examination in any manner
2782 that will consume the item or otherwise destroy the ability for independent re-testing or
2783 examination by the prosecution.
2784

2785 (iv) Before approving a test or examination that will entirely consume the
2786 item or destroy the prosecution's opportunity and ability to re-test the item, defense
2787 counsel should provide the prosecution with notice and an opportunity to object and seek
2788 an appropriate court order.
2789

2790 (v) If a motion objecting to consumptive testing or examination is filed,
2791 the court should consider ordering procedures that will permit independent evaluation of
2792 the defense's analysis, including but not limited to:
2793

2794 (A) permitting a prosecution expert to be present during
2795 preparation and testing of the evidence;
2796 (B) video recording the preparation and testing of the evidence;
2797 (C) still photography of the preparation and testing of evidence;
2798 and
2799 (D) access to all raw data, notes and other documentation relating
2800 to the defense preparation and testing of the evidence.
2801

2802 (h) *Client consent to accept a physical item.* Before voluntarily taking possession
2803 from the client of physical evidence that defense counsel may have a legal obligation to
2804 disclose, defense counsel should advise the client of potential legal implications of the
2805 proposed conduct and possible lawful alternatives, and obtain the client's informed
2806 consent.

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2807 (i) *Retention or return of item when law permits.* If defense counsel reasonably
2808 determines that there is no legal obligation to disclose physical evidence in counsel's
2809 possession to law enforcement authorities or others, the lawyer should deal with the
2810 physical evidence consistently with ethical and other rules and law. If defense counsel
2811 retains the evidence for use in the client's representation, the lawyer should comply with
2812 applicable law and rules, including rules on safekeeping property, which may require
2813 notification to third parties with an interest in the property. Counsel should maintain the
2814 evidence separately from privileged materials of other clients, and preserve it in a manner
2815 that will not impair its evidentiary value. Alternatively, counsel may deliver the evidence
2816 to a third-party lawyer who is also representing the client and will be obligated to
2817 maintain the confidences of the client as well as defense counsel.
2818

2819 (j) *Adoption of judicial and legislated procedures for handling physical*
2820 *evidence.* Courts and legislatures, as appropriate, should adopt procedures regarding
2821 defense handling of such physical evidence, as follows:

2822 (i) When defense counsel notifies the prosecution of the possession of
2823 such evidence or produces such evidence to the prosecution, the prosecution should be
2824 prohibited from presenting testimony or argument identifying or implying the defense as
2825 the source of the evidence, except as provided in Standard 3-3.6;

2826 (ii) When defense counsel reasonably believes that contraband does not
2827 relate to a pending criminal investigation or prosecution, counsel may take possession of
2828 the contraband and destroy it.

PART V.

CONTROL AND DIRECTION OF LITIGATION

Standard 4-5.1 Advising the Client

(a) Defense counsel should exercise independent professional judgment when advising a client.

(b) Defense counsel should keep the client reasonably and regularly informed about the status of the case. Before significant decision-points, and at other times if requested, defense counsel should advise the client with candor concerning all aspects of the case, including an assessment of possible strategies and likely as well as possible outcomes. Such advisement should take place after counsel is as fully informed as is reasonably possible in the time available about the relevant facts and law. Counsel should act diligently and, unless time does not permit, advise the client of what more needs to be done or considered before final decisions are made.

(c) Defense counsel should promptly communicate to the client every plea offer and all significant developments, motions, and court actions or rulings, and provide advice as outlined in this Standard.

(d) In rendering advice to the client, counsel should consider the client's desires and views, and may refer not only to law but also to other considerations such as moral, economic, social or political factors that may be relevant to the client's situation. Counsel should attempt to distinguish for the client between legal advice and advice based on such other considerations.

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

(f) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case or exert undue influence on the client's decisions regarding a plea.

(g) Defense counsel should advise the client to avoid communication about the case with anyone, including victims or other possible witnesses, persons in custody, family, friends, and any government personnel, except with defense counsel's approval, although where the client is a minor consultation with parents or guardians may be useful. Counsel should advise the client to avoid any contact with jurors or persons called for jury duty; and to avoid either the reality or the appearance of any other improper activity.

(h) Defense counsel should consider and advise the client of potential benefits as well as negative aspects of cooperating with law enforcement or the prosecution.

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2875 (i) After advising the client, defense counsel should aid the client in deciding on
2876 the best course of action and how best to pursue and implement that course of action.

Standard 4-5.2 Control and Direction of the Case

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(a) Certain decisions relating to the conduct of the case are for the accused; others are 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 ultimately to be made by a competent client, after full consultation with defense counsel, include:

- (i) whether to proceed without counsel;
- (ii) what pleas to enter;
- (iii) whether to accept a plea offer;
- (iv) whether to cooperate with 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 speak at sentencing;
- (viii) whether to appeal; and
- (ix) any other decision that has been determined in the jurisdiction to belong to the client.

(c) If defense counsel has a good faith doubt regarding the client's competence to make important decisions, counsel should consider seeking an expert evaluation from a mental health professional, within the protection of confidentiality and privilege rules if applicable.

(d) 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, what stipulations if any to agree to, and what and how evidence should be introduced.

(e) If a disagreement on a significant matter arises between defense counsel and the client, and counsel resolves it differently than the client prefers, defense counsel should consider memorializing the disagreement and its resolution, showing that record to the client, and preserving it in the file.

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2916 **Standard 4-5.3** **Obligations of Stand-By Counsel**

2917

2918 (a) An attorney whose assigned duty is to actively assist a *pro se* criminally
2919 accused person should permit the accused to make the final decisions on all matters,
2920 including strategic and tactical matters relating to the conduct of the case, while still
2921 providing the attorney's best advice.

2922

2923 (b) An attorney whose assigned duty is to assist a *pro se* criminally accused
2924 person only when the accused requests assistance may bring to the attention of the
2925 accused steps that could be potentially beneficial or dangerous to the accused, but should
2926 not actively participate in the conduct of the defense unless requested by the accused or
2927 as directed by the court.

2928

2929 (c) In either case, the assigned attorney should respect the accused's right to
2930 develop and present the accused's own case, while still advising the accused of potential
2931 benefits and dangers the attorney perceives in the course of the litigation. Such an
2932 attorney should be fully prepared about the matter, in order to offer such advice and in
2933 case the court and the accused determine that the full representation role should be
2934 transferred to defense counsel at some point during the criminal proceedings.

2935

2936 **[New] Standard 4-5.4** **Consideration of Collateral Consequences [New]**

2937

2938 (a) Defense counsel should identify, and advise the client of, collateral
2939 consequences that may arise from charge, plea or conviction. Counsel should investigate
2940 consequences under applicable federal, state, and local laws, and seek assistance from
2941 others with greater knowledge in specialized areas in order to be adequately informed as
2942 to the existence and details of relevant collateral consequences. Such advice should be
2943 provided sufficiently in advance that it may be fairly considered in a decision to pursue
2944 trial, plea, or other dispositions.

2945

2946 (b) When defense counsel knows that a consequence is particularly important to
2947 the client, counsel should advise the client as to whether there are procedures for
2948 avoiding, mitigating or later removing the consequence, and if so, how to best pursue or
2949 prepare for them.

2950

2951 (c) Defense counsel should include consideration of potential collateral
2952 consequences in negotiations with the prosecutor regarding possible dispositions, and in
2953 communications with the judge or court personnel regarding the appropriate sentence or
2954 conditions, if any, to be imposed.

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2955 **[New] Standard 4-5.5 Special Attention to Immigration Status and**
2956 **Consequences [New]**

2957

2958 (a) Defense counsel should determine a client's citizenship and immigration
2959 status, assuring the client that such information is important for effective legal
2960 representation and that it should be protected by the attorney-client privilege. Counsel
2961 should avoid any actions that might alert the government to information that could
2962 adversely affect the client.

2963

2964 (b) If defense counsel determines that a client may not be a United States citizen,
2965 counsel should investigate and identify particular immigration consequences that might
2966 follow possible criminal dispositions. Consultation or association with an immigration
2967 law expert or knowledgeable advocate is advisable in these circumstances. Public and
2968 appointed defenders should develop, or seek funding for, such immigration expertise
2969 within their offices.

2970

2971 (c) After determining the client's immigration status and potential adverse
2972 consequences from the criminal proceedings, including removal, exclusion, bars to relief
2973 from removal, immigration detention, denial of citizenship, and adverse consequences to
2974 the client's immediate family, counsel should advise the client of all such potential
2975 consequences and determine with the client the best course of action for the client's
2976 interests and how to pursue it.

2977

2978 (d) If a client is convicted of a removable offense, defense counsel should advise
2979 the client of the serious consequences if the client illegally returns to the United States.

2980

PART VI

DISPOSITION WITHOUT TRIAL

Standard 4-6.1 Duty to Explore Disposition Without Trial

(a) Defense counsel should be open, at every stage of a criminal matter and after consultation with the client, to discussions with the prosecutor concerning disposition of charges by guilty plea or other negotiated disposition. Counsel should be knowledgeable about possible dispositions that are alternatives to trial or imprisonment, including diversion from the criminal process.

(b) In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest.

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3002 **Standard 4-6.2 Negotiated Disposition Discussions**

3003

3004 (a) As early as practicable, and preferably before engaging in disposition
3005 discussions with the prosecutor, defense counsel should discuss with and advise the client
3006 about possible disposition options.

3007

3008 (b) Once discussions with the prosecutor begin, defense counsel should keep the
3009 accused advised of relevant developments. Defense counsel should promptly
3010 communicate and explain to the client any disposition proposals made by the prosecutor,
3011 while explaining that presenting the prosecution's offer does not indicate counsel's
3012 unwillingness to go to trial.

3013

3014 (c) Defense counsel should ensure that the client understands any proposed
3015 disposition agreement, including its direct and possible collateral consequences.

3016

3017 (d) Defense counsel should not recommend to a defendant acceptance of a
3018 disposition without appropriate investigation. Before accepting or advising a disposition,
3019 defense counsel should request that the prosecution disclose any information that tends to
3020 negate guilt, mitigates the offense or is likely to reduce punishment.

3021

3022 (e) Defense counsel may make a recommendation to the client regarding
3023 disposition proposals, but should not unduly pressure the client to make any particular
3024 decision.

3025

3026 (f) Defense counsel should not knowingly make false statements of fact or law in
3027 the course of disposition discussions.

3028

3029 (g) Defense counsel should be aware of possible benefits from early cooperation
3030 with the government, but should also consider possible disadvantages. Counsel should
3031 fully advise the client about the client's overall interests before recommending any
3032 cooperation-dependent disposition.

3033

3034 (h) Defense counsel should not negotiate an aggregate disposition for multiple
3035 clients, even if joint representation was initially appropriate under applicable conflict
3036 provisions.

3037

3038 (i) Defense counsel should not recommend concessions favorable to one client by
3039 any agreement which is detrimental to the legitimate interests of a client in another case,
3040 unless both clients give their fully-informed consent.

3041

3042 **[New] Standard 4-6.3 Plea Agreements and Other Negotiated Dispositions**3043 **[New]**

3044

3045 (a) Defense counsel should ensure that any written disposition agreement
3046 accurately and completely reflects the precise terms of the agreement, including the
3047 prosecution's promises and the client's obligations and whether any dismissal of charges
3048 will be with or without prejudice to later reinstatement.

3049

3050 (b) During any court hearing regarding a negotiated disposition, defense counsel
3051 should ensure that all relevant details of the negotiated agreement are placed on the
3052 record, and that the record fully reflects any factors necessary to protect the client's best
3053 interests. Although the presumption is that the record will be public, in some cases the
3054 record (or a portion) may be sealed for good cause or as required by applicable rule or
3055 statute.

3056

3057 (c) Defense counsel should fully prepare the client for any hearing before a court
3058 related to entering or accepting a negotiated disposition, and for any pre-disposition or
3059 post-disposition interview conducted by the prosecution or by court agents such as
3060 presentence investigators or probation officers. Counsel should ordinarily be present at
3061 any such interview to protect the client's interests there.

3062

3063 (d) In appropriate cases counsel should consider, and with the consent of the
3064 client seek, entry of a disposition and immediate sentencing without a presentence
3065 investigation.

3066

3067 (e) Defense counsel should investigate and be knowledgeable about sentencing
3068 procedures, law, and alternatives, collateral consequences and likely outcomes, and the
3069 practices of the sentencing judge, and advise the client on these topics before permitting
3070 the client to enter a negotiated disposition. Counsel should also consider and explain to
3071 the client how specific terms of an agreement are likely to be implemented.

3072

3073 (f) If defense counsel believes that prosecutorial conduct or conditions (such as
3074 unreasonably speedy deadlines or refusal to provide discovery) have unfairly influenced
3075 the client's disposition decision, defense counsel should bring the circumstances to the
3076 attention of the court on the record, unless after consultation with the client, it is agreed
3077 that the risk of losing the negotiated disposition outweighs other considerations.

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3079 **[New] Standard 4-6.4 Opposing Waivers of Rights in Disposition Agreements**

3080 **[New]**

3081

3082 (a) Defense counsel should not accept disposition agreement waivers of post-
3083 conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct,
3084 or destruction of evidence, unless such claims are based on past instances of such conduct
3085 that are specifically identified in the agreement or in the transcript of proceedings that
3086 address the agreement. If a proposed disposition agreement contains such a waiver
3087 regarding ineffective assistance of counsel, defense counsel should ensure that the
3088 defendant has consulted with independent counsel regarding the waiver before agreeing
3089 to the disposition.

3090

3091 (b) In addition to claims addressed in (a), defense counsel should not agree to
3092 waivers of any other important defense rights such as the right to appeal (including
3093 sentencing appeals), to receive *Brady* discovery, or to contest the conviction or sentence
3094 in collateral proceedings, unless after consultation with the client it is agreed that the risk
3095 of losing the negotiated disposition outweighs other considerations. In negotiations,
3096 counsel should request the prosecution to provide specific, individualized reasons for the
3097 inclusion of such waivers. Counsel should also consult with the client about whether to
3098 object to such waivers in court.

3099

3100 (c) Counsel should not recommend acceptance of any disposition agreement
3101 waivers without fully assessing and discussing with the client the impact of any waiver
3102 on the defendant's individualized circumstances. Defense counsel should demand that
3103 any such waiver include at the very least an exception for a subsequent showing of
3104 manifest injustice based on newly discovered evidence, or actual innocence.

3105

3106 (d) Even if the client wishes to agree to such waivers after fully informed
3107 consultation, defense counsel should consider challenging the legitimacy of any such
3108 waiver if the challenge can be made without harming the client's interests.

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PART VII
COURT HEARINGS AND TRIAL

3113 *[New]* **Standard 4-7.1** **Scheduling Court Hearings** *[New]*

3114 Final control over the scheduling of court appearances, hearings and trials in criminal
3115 matters should rest with the court rather than the parties. When defense counsel is aware
3116 of facts that would affect scheduling, defense counsel should advise the court and, if the
3117 facts are case-specific, the prosecutor.

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3118 Standard 4-7.2 Civility with Courts, Prosecutors, and Others

3119

3120 (a) As an officer of the court, defense counsel should support the authority and
3121 dignity of the court by adherence to codes of professionalism and by manifesting a
3122 courteous and professional attitude toward the judge, opposing counsel, witnesses, jurors,
3123 courtroom staff and others. In court as elsewhere, the defense counsel should not display
3124 or act out of any improper or unlawful bias.

3125

3126 (b) In all contacts with judges, defense counsel should maintain a professional
3127 and independent relationship. Defense counsel should not engage in unauthorized *ex*
3128 *parte* discussions with, or submission of material to, a judge relating to a particular matter
3129 which is, or is likely to be, before the judge. With regard to generalized matters requiring
3130 judicial discussion (for example, case-management or administrative matters), defense
3131 counsel should invite a representative prosecutor to join in the discussion to the extent
3132 practicable.

3133

3134 (c) When *ex parte* communications or submissions are authorized, defense
3135 counsel should inform the court of material facts known to counsel (other than those
3136 protected by a valid privilege), including facts that are adverse, sufficient to enable the
3137 court to make an informed decision. Except when non-disclosure is authorized, counsel
3138 should notify opposing counsel that an *ex parte* contact has occurred, without disclosing
3139 its content unless permitted.

3140

3141 (d) When court is in session, unless otherwise permitted by the court, defense
3142 counsel should address the court and should not address other counsel directly on any
3143 matter relating to the case.

3144 (e) In written filings, defense counsel should respectfully evaluate and respond as
3145 appropriate to opposing counsel's arguments and representations, and avoid unnecessary
3146 personalized disparagement.

3147 (f) Defense counsel should comply promptly and civilly with a court's orders or
3148 seek appropriate relief from such order. If defense counsel considers an order to be
3149 significantly erroneous or prejudicial, counsel should ensure that the record adequately
3150 reflects the events. Defense counsel has a right to make respectful objections and
3151 reasonable requests for reconsideration, and to seek other relief as the law permits. If a
3152 judge prohibits making an adequate objection, proffer, or record, counsel may take other
3153 lawful steps to protect the client's rights.

3154 (g) Defense counsel should develop and maintain courteous and civil working
3155 relationships with judges and prosecutors, and should cooperate with them in developing
3156 solutions to address ethical, scheduling, or other issues that may arise in particular cases
3157 or generally in the criminal justice system. Defense counsel should cooperate with courts
3158 and organized bar associations in developing codes of professionalism and civility, and
3159 should abide by such codes that apply in their jurisdiction.

3160

3161 **Standard 4-7.3 Selection of Jurors**

3162

3163 (a) Defense counsel should be aware of legal standards that govern the selection
3164 of jurors, and be prepared to discharge effectively the defense function in the selection of
3165 the jury, including raising appropriate issues concerning the method by which the jury
3166 panel was selected and exercising challenges for cause and peremptory challenges.

3167

3168 (b) Defense counsel should not strike jurors based on any criteria rendered
3169 impermissible by the constitution, statutes, or applicable rules of the jurisdiction or these
3170 standards, including race, sex, religion, national origin, disability, sexual orientation or
3171 gender identity. Defense counsel should consider challenging a prosecutor's peremptory
3172 challenges that appear to be based on such criteria.

3173

3174 (c) In cases in which defense counsel conducts a pretrial investigation of the
3175 background of potential jurors, the investigative methods used should not harass,
3176 intimidate, unduly embarrass, or invade the privacy of potential jurors. Absent special
3177 circumstances, such investigation should be restricted to review of records and sources of
3178 information already in existence and to which access is lawfully allowed.

3179

3180 (d) The opportunity to question jurors personally should be used solely to obtain
3181 information relevant to the well-informed exercise of challenges. Defense counsel should
3182 not seek to commit jurors on factual issues likely to arise in the case, or to suggest facts
3183 or arguments that the defense counsel reasonably should know are likely to be barred at
3184 trial. Voir dire should not be used to argue counsel's case to the jury, or to unduly
3185 ingratiate counsel with the jurors.

3186

3187 (e) During voir dire, defense counsel should seek to minimize any undue
3188 embarrassment or invasion of privacy of potential jurors, for example by seeking to
3189 inquire into sensitive matters outside the presence of other potential jurors, while still
3190 enabling fair and efficient juror selection.

3191

3192 (f) If the court does not permit voir dire by counsel, defense counsel should
3193 provide the court with suggested questions in advance if possible, and request specific
3194 follow-up questions during the selection process when necessary to ensure fair juror
3195 selection.

3196

3197 (g) If defense counsel has reliable information that conflicts with a potential
3198 juror's responses, or that reasonably would support a "for cause" challenge by any party,
3199 defense counsel should inform the court and, unless the court orders otherwise, the
3200 prosecutor.

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3202 **Standard 4-7.4 Relationship With Jurors**

3203

3204 (a) Defense counsel should not communicate with persons counsel knows to be
3205 summoned for jury duty or impaneled as jurors, prior to or during trial, other than in the
3206 lawful conduct of courtroom proceedings. Defense counsel should avoid even the
3207 appearance of improper communications with jurors, and minimize any out-of-court
3208 proximity to or contact with jurors. Where out-of-court contact cannot be avoided,
3209 counsel should not communicate about or refer to the specific case.

3210

3211 (b) Defense counsel should treat jurors with courtesy and respect, while avoiding
3212 a show of undue solicitude for their comfort or convenience.

3213

3214 (c) After discharge of a juror, defense counsel should avoid contacts that may
3215 harass or embarrass the juror, that criticize the jury's actions or verdict, or that express
3216 views that could otherwise adversely influence a juror's future jury service. Defense
3217 counsel should know and comply with applicable rules and law governing the subject.

3218

3219 (d) After a jury is discharged, defense counsel may, if no statute, rule or order
3220 prohibits such action, communicate with jurors to investigate whether a verdict may be
3221 subject to legal challenge, or to evaluate counsel's performance for improvements in the
3222 future. Counsel should consider requesting the court to instruct the jury that, if it is not
3223 prohibited by law, it is not improper for jurors to discuss the case with the lawyers,
3224 although they are not required to do so. Any post-discharge communication with a juror
3225 should not disparage the criminal justice system and the jury trial process, and should not
3226 express criticism of the jury's actions or verdict.

3227

3228 (e) Defense counsel who learns reasonably reliable information that there was a
3229 problem with jury deliberations or conduct that could support an attack on the client's
3230 judgment of conviction and that is recognized as potentially valid in the jurisdiction,
3231 should promptly report that information to the appropriate judicial officer and, unless the
3232 court orders otherwise, to the prosecution.

3233

3234 **Standard 4-7.5 Opening Statement at Trial**

3235

3236 (a) Defense counsel should be aware of the importance of an opening statement
3237 and, except in unusual cases, give an opening statement immediately after the
3238 prosecution's, before the presentation of evidence begins. Any decision to defer the
3239 opening statement should be fully discussed with the client, and a record of the reasons
3240 for such decision should be made for the file.

3241

3242 (b) Defense counsel's opening statement at trial should be confined to a fair
3243 statement of the case from defense counsel's perspective, and discussion of evidence that
3244 defense counsel reasonably believes in good faith will be available, offered, and
3245 admitted. A deferred opening should focus on the defense evidence and theory of the
3246 case and not be a closing argument.

3247

3248 (c) Defense counsel's opening statement should be made without expressions of
3249 personal opinion, vouching for witnesses, inappropriate appeals to emotion, or personal
3250 attacks on opposing counsel.

3251

3252 (d) When defense counsel has reason to believe that a portion of the opening
3253 statement may be objectionable, counsel should raise that point with opposing counsel
3254 and, if necessary, the court, in advance. Similarly, visual aids or exhibits that defense
3255 counsel intends to use during opening statement should be shown to the prosecutor in
3256 advance.

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3258 **Standard 4-7.6** **Presentation of Evidence**

3259

3260 (a) Defense counsel has no obligation to present evidence, and should always
3261 consider, in consultation with the client, whether a decision not to present evidence may
3262 be in the client’s best interest. In making this decision, defense counsel should consider
3263 the impact of any evidence the defense would present and the potential damage that
3264 prosecution cross-examination or a rebuttal case could do, as well as the quality of the
3265 prosecution’s evidence.

3266

3267 (b) Defense counsel should not knowingly offer false evidence for its truth,
3268 whether by documents, tangible evidence, or the testimony of witnesses, or fail to take
3269 reasonable remedial measures upon discovery of material falsity in evidence offered by
3270 the defense, unless the court or specific authority in the jurisdiction otherwise permits.

3271

3272 (c) If defense counsel reasonably believes that there has been misconduct by
3273 opposing counsel, a witness, the court or other persons that affects the fair presentation of
3274 the evidence, defense counsel should challenge the perceived misconduct by appealing or
3275 objecting to the court or through other appropriate avenues, and not by engaging in
3276 retaliatory conduct that defense counsel knows is improper.

3277

3278 (d) Defense counsel should not bring to the attention of the trier of fact matters
3279 that defense counsel knows to be inadmissible, whether by offering or displaying
3280 inadmissible evidence, asking legally objectionable questions, or making impermissible
3281 comments or arguments. If defense counsel is uncertain about the admissibility of
3282 evidence, counsel should seek and obtain resolution from the court before the hearing or
3283 trial if possible, and reasonably in advance of the time for proffering the evidence before
3284 a jury.

3285

3286 (e) Defense counsel should exercise strategic judgment regarding whether to
3287 object or take exception to evidentiary rulings that are materially adverse to the client,
3288 and not make every possible objection. Defense counsel should not make objections
3289 without a reasonable basis, or for improper reasons such as to harass or to break the flow
3290 of opposing counsel’s presentation. Defense counsel should make an adequate record
3291 for appeal, and consider the possibility of an interlocutory appeal regarding significant
3292 adverse rulings if available.

3293

3294 (f) Defense counsel should not display tangible evidence (and should object to
3295 such display by the prosecutor), until it is admitted into evidence, except insofar as its
3296 display is necessarily incidental to its tender, although counsel may seek permission to
3297 display admissible evidence during opening statement. Defense counsel should avoid
3298 displaying even admitted evidence in a manner that is unduly prejudicial.

3299 **Standard 4-7.7 Examination of Witnesses in Court**

3300

3301 (a) Defense counsel should conduct the examination of witnesses fairly and with due
3302 regard for dignity and legitimate privacy concerns, and without seeking to intimidate or
3303 humiliate a witness unnecessarily.

3304

3305 (b) Defense counsel's belief or knowledge that a witness is telling the truth does not
3306 preclude vigorous cross-examination, even though defense counsel's cross-examination
3307 may cast doubt on the testimony.

3308

3309 (c) Defense counsel should not call a witness in the presence of the jury when
3310 counsel knows the witness will claim a valid privilege not to testify. If defense counsel is
3311 unsure whether a particular witness will claim a privilege to not testify, counsel should
3312 alert the court and the prosecutor in advance and outside the presence of the jury.

3313

3314 (d) Defense counsel should not ask a question which implies the existence of a
3315 factual predicate for which a good faith belief is lacking.

3316

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3317 **Standard 4-7.8 Closing Argument to the Trier of Fact**

3318

3319 (a) In closing argument to a jury (or to a judge sitting as trier of fact), defense
3320 counsel may argue all reasonable inferences from the evidence in the record. Defense
3321 counsel should, to the extent time permits, review the evidence in the record before
3322 presenting closing argument. Defense counsel should not knowingly misstate the
3323 evidence in the record, or argue inferences that counsel knows have no good-faith support
3324 in the record.

3325

3326 (b) Defense counsel should not argue in terms of counsel's personal opinion, and
3327 should not imply special or secret knowledge of the truth or of witness credibility.

3328

3329 (c) Defense counsel should not make arguments calculated to appeal to improper
3330 prejudices of the jury.

3331

3332 (d) Defense counsel should not argue to the jury that the jury should not follow
3333 its oath to consider the evidence and follow the law.

3334

3335 (e) Defense counsel may respond fairly to arguments made in the prosecution's
3336 initial closing argument. Defense counsel should object and request relief from the court
3337 regarding prosecution arguments it believes are improper, rather than responding with
3338 arguments that counsel knows are improper.

3339

3340 (f) If the prosecution is permitted a rebuttal argument, defense counsel should
3341 craft the defense closing argument to anticipate the government's rebuttal. If defense
3342 counsel believes the prosecution's rebuttal closing argument is or was improper, defense
3343 counsel should timely object and consider requesting relief from the court, including an
3344 instruction that the jury disregard the improper portion of the argument or an opportunity
3345 to reopen argument and respond before the factfinder.

3346

3347 Standard 4-7.9 Facts Outside the Record

3348

3349 When before a jury, defense counsel should not knowingly refer to, or argue on the
3350 basis of, facts outside the record, unless such facts are matters of common public
3351 knowledge based on ordinary human experience or are matters of which a court clearly
3352 may take judicial notice, or are facts that counsel reasonably believes will be entered into
3353 the record at that proceeding. In a nonjury context counsel may refer to extra-record facts
3354 relevant to issues about which the court specifically inquires, but should note that they
3355 are outside the record.

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3357 *[New]* **Standard 4-7.10** **Comments by Defense Counsel After Verdict or Ruling**

3358 *[New]*

3359

3360 (a) Defense counsel may publicly express respectful disagreement with an
3361 adverse court ruling or jury verdict, and may indicate that the defendant maintains
3362 innocence and intends to pursue lawful options for review. Defense counsel should
3363 refrain from public criticism of any participant. Public comments after a verdict or ruling
3364 should be respectful of the legal system and process.

3365 (b) Defense counsel may publicly praise a favorable court verdict or ruling,
3366 compliment participants, supporters, and others who aided in the matter, and note the
3367 social value of the ruling or event. Defense counsel should not publicly gloat or seek
3368 personal aggrandizement regarding a verdict or ruling.

3369

3370 *[New]* **Standard 4-7.11** **Motions For Acquittal During Trial** *[New]*

3371

3372 Defense counsel should move, outside the presence of the jury, for acquittal after
3373 the close of the prosecution’s evidence and at the close of all evidence, and be aware of
3374 applicable rules regarding waiver and preservation of issues when no or an inadequate
3375 motion is made.

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PART VIII

POST-TRIAL MOTIONS AND SENTENCING

Standard 4-8.1 Post-Trial Motions

(a) Defense counsel should know the relevant rules governing post-trial motions and, if the trier of fact renders a judgment of guilty, timely present all motions necessary to protect the client's rights, including the defendant's right to appeal all aspects of the case. A motion for acquittal notwithstanding a verdict should be filed absent rare and unusual circumstances, and counsel should consider the strategic value of a motion for a new trial. Defense counsel should file only those motions that have a non-frivolous legal basis.

(b) Unless contrary to the client's best interests or otherwise agreed or provided by law, defense counsel should ordinarily to represent the client in post-trial proceedings in the trial court. Defense counsel should consider, however, 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 seek to withdraw in accordance with the law regarding withdrawal and aid the client in obtaining substitute counsel.

3400 [New] Standard 4-8.2 Reassessment of Options After Trial [New]

3401

3402 After a guilty verdict and before sentencing, defense counsel should, in consultation
3403 with the client, reassess prior decisions made in the case, whether by counsel or others, in
3404 light of all changed circumstances, and pursue options that now seem appropriate,
3405 including possible motions to set or reduce bail or conditions, and possible cooperation
3406 with the prosecution if in the client's best interests.

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3407 **Standard 4-8.3 Sentencing**

3408

3409 (a) Early in the representation, and throughout the pendency of the case, defense
3410 counsel should consider potential issues that might affect sentencing. Defense counsel
3411 should become familiar with the client's background, applicable sentencing laws and
3412 rules, and what options might be available as well as what consequences might arise if
3413 the client is convicted. Defense counsel should be fully informed regarding available
3414 sentencing alternatives and with community and other resources which may be of
3415 assistance in formulating a plan for meeting the client's needs. Defense counsel should
3416 also consider whether consultation with an expert specializing in sentencing options or
3417 other sentencing issues is appropriate.

3418

3419 (b) Defense counsel's preparation before sentencing should include learning the
3420 court's practices in exercising sentencing discretion; the collateral consequences of
3421 different sentences; and the normal pattern of sentences for the offense involved,
3422 including any guidelines applicable for either sentencing and, where applicable, parole.
3423 The consequences (including reasonably foreseeable collateral consequences) of potential
3424 dispositions should be explained fully by defense counsel to the client.

3425

3426 (c) Defense counsel should present all arguments or evidence which will assist
3427 the court or its agents in reaching a sentencing disposition favorable to the accused.
3428 Defense counsel should ensure that the accused understands the nature of the presentence
3429 investigation process, and in particular the significance of statements made by the
3430 accused to probation officers and related personnel. Defense counsel should cooperate
3431 with court presentence officers unless, after consideration and consultation, it appears not
3432 to be in the best interests of the client. Unless prohibited, defense counsel should attend
3433 the probation officer's presentence interview with the accused and meet in person with
3434 the probation officer to discuss the case.

3435

3436 (d) Defense counsel should gather and submit to the presentence officers,
3437 prosecution, and court as much mitigating information relevant to sentencing as
3438 reasonably possible; and in an appropriate case, with the consent of the accused, counsel
3439 should suggest alternative programs of service or rehabilitation or other non-
3440 imprisonment options, based on defense counsel's exploration of employment,
3441 educational, and other opportunities made available by community services.

3442

3443 (e) If a presentence report is made available to defense counsel, counsel should
3444 seek to verify the information contained in it, and should supplement or challenge it if
3445 necessary. Defense counsel should either provide the client with a copy or (if copying is
3446 not allowed) discuss counsel's knowledge of its contents with the client. In many cases,
3447 defense counsel should independently investigate the facts relevant to sentencing, rather
3448 than relying on the court's presentence report, and should seek discovery or relevant
3449 information from governmental agencies or other third-parties if necessary.

3450

3451 (f) Defense counsel should alert the accused to the right of allocution. Counsel
3452 should consider with the client the potential benefits of the judge hearing a personal

3453 statement from the defendants as contrasted with the possible dangers of making a
3454 statement that could adversely impact the sentencing judge’s decision or the merits of an
3455 appeal.

3456
3457 (g) If a sentence of imprisonment is imposed, defense counsel should seek the
3458 court’s assistance, including an on-the-record statement by the court if possible,
3459 recommending the appropriate place of confinement and types of treatment,
3460 programming and counseling that should be provided for the defendant in confinement.

3461
3462 (h) Once the sentence has been announced, defense counsel should make any
3463 objections necessary for the record, seek clarification of any unclear terms, and advise the
3464 client of the meaning and effects of the judgment, including any known collateral
3465 consequences. Counsel should also note on the record the intention to appeal, if that
3466 decision has already been made with the client.

3467
3468 (i) If the client has received an imprisonment sentence and an appeal will be
3469 taken, defense counsel should determine whether bail pending appeal is appropriate and,
3470 if so, request it.

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PART IX

APPEALS AND POST-CONVICTION REMEDIES

Standard 4-9.1 Preparing to Appeal

(a) If a client is convicted, defense counsel should explain to the client the meaning and consequences of the court's judgment and the client's rights regarding appeal. Defense counsel should provide the client with counsel's professional judgment as to whether there are meritorious grounds for appeal and the possible, and likely, 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. Counsel should also be familiar with, and discuss with the client, possible interactions with other post-conviction procedures such as habeas corpus rules and actions.

(b) The ultimate decision whether to appeal should be the client's. Defense counsel should consider engaging or consulting with an expert in criminal appeals in order to determine issues related to making a decision to appeal.

(c) 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.

(d) 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 there are lawyers who specialize in criminal appeals. Defense counsel should candidly explore with the client whether trial counsel is the appropriate lawyer to represent the client on appeal, or whether a lawyer specializing in appellate work should be consulted, added or substituted.

3504 **Standard 4-9.2 Counsel on Appeal**

3505

3506 (a) Appellate defense counsel should seek the cooperation of the client’s trial
3507 counsel in the evaluation of potential appellate issues. A client’s trial counsel should
3508 provide such assistance as is possible, including promptly providing the file of the case to
3509 appellate counsel.

3510

3511 (b) When evaluating the case for appeal, appellate defense counsel should
3512 consider all issues that might affect the validity of the judgment of conviction and
3513 sentence, including any that might require initial presentation in a trial court. Counsel
3514 should consider raising on appeal even issues not objected to below or waived or
3515 forfeited, if in the best interests of the client.

3516

3517 (c) After examining the record and the relevant law, counsel should provide
3518 counsel’s best professional evaluation of the issues that might be presented on appeal.
3519 Counsel should advise the client about the probable and possible outcomes and
3520 consequences of a challenge to the conviction or sentence.

3521

3522 (d) Even if a client has agreed to a waiver of appeal, counsel should follow a
3523 client’s direction to file an appeal if there are non-frivolous grounds to argue that the
3524 waiver is not binding or that the appeal should otherwise be heard.

3525

3526 (e) Appellate defense counsel should not file a brief that counsel reasonably
3527 believes is devoid of merit. However, counsel should not conclude that a defense appeal
3528 lacks merit until counsel has fully examined the trial court record and the relevant legal
3529 authorities. If appellate counsel does so conclude, counsel should fully discuss that
3530 conclusion with the client, and explain the “no merit” briefing process applicable in the
3531 jurisdiction if available. Counsel should endeavor to persuade the client to abandon a
3532 frivolous appeal, and to eliminate appellate contentions lacking in substance. If the client
3533 ultimately demands that a no-merit brief not be filed, defense counsel should seek to
3534 withdraw.

3535

3536 (f) If the client chooses to proceed with a non-frivolous appeal against the advice
3537 of counsel, counsel should present the appeal. When counsel cannot continue without
3538 misleading the court, counsel may request permission to withdraw.

3539

3540 (g) Appellate counsel should discuss with the client the arguments to present in
3541 appellate briefing and at argument, and should diligently attempt to accommodate the
3542 client’s wishes. If the client desires to raise an argument that is colorable, counsel should
3543 work with the client to an acceptable resolution regarding the argument. If appellate
3544 counsel decides not to brief all of the issues that the client wishes to include, appellate
3545 counsel should inform the client of *pro se* briefing rights and consider providing the
3546 appellate court with a list of additional issues the client would like to present.

3547

3548 (h) In a jurisdiction that has an intermediate appellate court, appellate defense
3549 counsel should ordinarily continue to represent the client after the intermediate court

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3550 renders a decision if further appeals are likely, unless a retainer agreement provides
3551 otherwise, new counsel is substituted, or a court permits counsel to withdraw. Similarly,
3552 unless a retainer agreement provides otherwise, new counsel is substituted, or a court
3553 permits counsel to withdraw, appellate counsel should ordinarily continue to represent the
3554 client through all stages of a direct appeal, including review in the United States Supreme
3555 Court.

3556
3557 (i) If trial defense counsel will not remain as appellate counsel, trial counsel
3558 should notify the client of any applicable time limits, act to preserve the client's appellate
3559 rights if possible, and cooperate and assist in securing qualified appellate counsel. If
3560 appellate counsel's representation ends but further appellate review is possible, appellate
3561 counsel should advise the client of further options and deadlines, such as for a petition for
3562 *certiorari*.

3563
3564 (j) When the prosecution appeals a ruling that was favorable to the client, defense
3565 counsel should analyze the issues and possible implications for the client and act to
3566 zealously protect the client's interests. If the prosecution is appealing, defense counsel
3567 should consider adding or consulting with an appellate expert about the matter.

3568
3569 (k) When the law permits the filing of interlocutory appeals or writs to challenge
3570 adverse trial court rulings, defense counsel should consider whether to file an
3571 interlocutory appeal and, after consultation with the client, vigorously pursue such an
3572 appeal if in the client's interest. If the prosecution files an interlocutory appeal, defense
3573 counsel should act in accordance with the foregoing paragraphs.

3574

3575 **Standard 4-9.3 Conduct of Appeal**

3576

3577 (a) Before filing an appellate brief, appellate defense counsel should consult with
3578 the client about the appeal, and seek to meet with the client unless impractical.

3579

3580 (b) Appellate counsel should be aware of opportunities to favorably affect or
3581 resolve a defendant's appeal by motions filed in the appellate court, before filing a merits
3582 brief.

3583

3584 (c) Counsel should understand the complex rules that govern whether arguments
3585 listed or omitted on direct appeal can limit issues available in later collateral proceedings,
3586 and not unnecessarily or unknowingly abandon arguments that should be preserved.
3587 Counsel should explicitly label federal constitutional arguments as such, in order to
3588 preserve later federal litigation options.

3589

3590 (d) Appellate counsel should be aware of applicable rules relating to securing all
3591 necessary record documents, transcripts, and exhibits, and ensure that all such items
3592 necessary to effectively prosecute the appeal are properly and timely ordered. Before
3593 filing the brief, appellate counsel should ordinarily examine the docket sheet, all
3594 transcripts, trial exhibits and record documents, not just those designated by another
3595 lawyer or the client. Counsel should consider whether, and how appropriately, to
3596 augment the record with any other matters, documents or evidence relevant to effective
3597 prosecution of the client's appeal. Appellate counsel should seek by appropriate motion,
3598 filed in either the trial or the appellate court, to make available for the appeal any
3599 necessary, relevant extra-record matters.

3600

3601 (e) Appellate counsel should be diligent in perfecting appeals and expediting
3602 their prompt submission to appellate courts, and be familiar with and follow all
3603 applicable appellate rules, while also protecting the client's best interests on appeal.

3604

3605 (f) Appellate counsel should be accurate in referring to the record and the
3606 authorities upon which counsel relies in the presentation to the court of briefs and oral
3607 argument. Appellate counsel should present directly adverse authority in the controlling
3608 jurisdiction of which counsel is aware and that has not been presented by other counsel in
3609 the appeal.

3610

3611 (g) Appellate counsel should not intentionally refer to or argue on the basis of
3612 facts outside the record on appeal, unless such facts are matters of common public
3613 knowledge based on ordinary human experience or are other matters of which the court
3614 properly may take judicial notice.

3615

3616 (h) If the appeal is set for oral argument, appellate counsel should explain to an
3617 out-of-custody client that the client is permitted to attend, and that attending the argument
3618 may have certain strategic advantages and disadvantages. If after consultation the client
3619 desires to attend the argument, counsel should help the client to be present. If the client

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3620 is in custody, counsel should request a tape or transcript of the oral argument, and
3621 consider filing a motion for the government to transport client to the argument.

3622

3623 (i) Appellate counsel should be aware of local rules and practices that may apply
3624 to oral arguments, including, for example, rules that apply to the submission of
3625 subsequent authorities or the use of demonstrative aids or exhibits during argument.

3626

3627 (j) If appellate counsel's study of the record reveals that an ineffective assistance
3628 of trial counsel claim should be made, appellate counsel should weigh the advantages and
3629 disadvantages of raising an ineffective assistance claim on the existing record versus
3630 pursuing such a claim in the trial court either before, or after, the appeal is heard.

3631 Counsel should also learn the rules, if any, of the particular jurisdiction regarding this
3632 issue.

3633

3634 (k) Appellate counsel should consider, in preparing the appellate briefing,
3635 whether there might be any potential grounds for relief using other post-conviction
3636 remedies (such as habeas corpus), and consult with the client regarding timing and who
3637 might represent the client in such actions.

3638 **[New] Standard 4-9.4 New or Newly-Discovered Law or Evidence of**
3639 **Innocence or Wrongful Conviction or Sentence [New]**

3640

3641 (a) When defense counsel becomes aware of credible and material evidence or
3642 law creating a reasonable likelihood that a client or former client was wrongfully
3643 convicted or sentenced or was actually innocent, counsel has some duty to act. This duty
3644 applies even after counsel's representation is ended. Counsel must consider, and act in
3645 accordance with, duties of confidentiality. If such a former client currently has counsel,
3646 former counsel may discharge the duty by alerting the client's current counsel.

3647

3648 (b) If such newly discovered evidence or law (whether due to a change in the law
3649 or not) relevant to the validity of the client's conviction or sentence, or evidence or law
3650 tending to show actual innocence of the client, comes to the attention of the client's
3651 current defense counsel at any time after conviction, counsel should promptly:

3652

3653 (i) evaluate the information, investigate if necessary, and determine what
potential remedies are available;

3654

(ii) advise and consult with the client; and

3655

(iii) determine what action if any to take.

3656

3657 (c) Counsel should determine applicable deadlines for the effective use of such
3658 evidence or law, including federal habeas corpus deadlines, and timely act to preserve the
3659 client's rights. Counsel should determine whether -- and if so, how best -- to notify the
3660 prosecution and court of such evidence.

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3662 **Standard 4- 9.5** **Post-Appellate Remedies**

3663

3664 (a) Once a defendant’s direct appellate avenues have been exhausted, appellate
3665 counsel is not obligated to represent the defendant in a post-appellate collateral
3666 proceeding unless counsel has agreed, or has been appointed, to do so. But counsel
3667 should still reasonably advise and act to protect the client’s possible collateral options.
3668

3669 (b) If appellate counsel believes there is a reasonable prospect of a favorable
3670 result if collateral proceedings are pursued, counsel should explain to the client the
3671 advantages and disadvantages of pursuing collateral proceedings, and any timing
3672 deadlines that apply. Appellate defense counsel should assist the client to the extent
3673 practicable in locating competent counsel for any post-appellate collateral proceedings.
3674

3675 (c) Post-appellate counsel should seek the cooperation of the client’s prior
3676 counsel in the evaluation and briefing of potential post-conviction issues. Prior counsel
3677 should provide such assistance as is possible, including providing the file or copies of the
3678 file to post-appellate counsel.
3679

3680 **Standard 4- 9.6 Challenges to the Effectiveness of Counsel**

3681

3682 (a) If appellate or post-appellate counsel is satisfied after appropriate
3683 investigation and legal research that another defense counsel who served in an earlier
3684 phase of the case did not provide effective assistance, new counsel should not hesitate to
3685 seek relief for the client.

3686

3687 (b) If defense counsel concludes that he or she did not provide effective
3688 assistance in an earlier phase of the case, counsel should explain this conclusion to the
3689 client. Unless the client clearly wants counsel to continue, counsel in this situation
3690 should seek to withdraw from further representation of the client with an explanation to
3691 the court of the reason, consistent with the duty of confidentiality to the client. Counsel
3692 should recommend that the client consult with independent counsel if the client desires
3693 counsel to continue with the representation. Counsel should continue with the
3694 representation only if the client so desires after informed consent and such further
3695 representation is consistent with applicable conflict of interest rules.

3696

3697 (c) Defense counsel whose conduct in a criminal case is drawn into question is
3698 permitted to testify concerning the matters at issue, and is not precluded from disclosing
3699 the truth concerning the matters raised by his former client, even though this involves
3700 revealing matters which were given in confidence. Former counsel must act consistently
3701 with applicable confidentiality rules, and ordinarily may not reveal confidences unless
3702 necessary for the purposes of the proceeding and under judicial supervision.

3703

3704 (d) In a proceeding challenging counsel's performance, counsel should not rely
3705 on the prosecutor to act as counsel's lawyer in the proceeding, and should continue to
3706 consider the former client's best interests.

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3709 **-- END of Proposed Revisions to the DEFENSE FUNCTION Standards --**

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