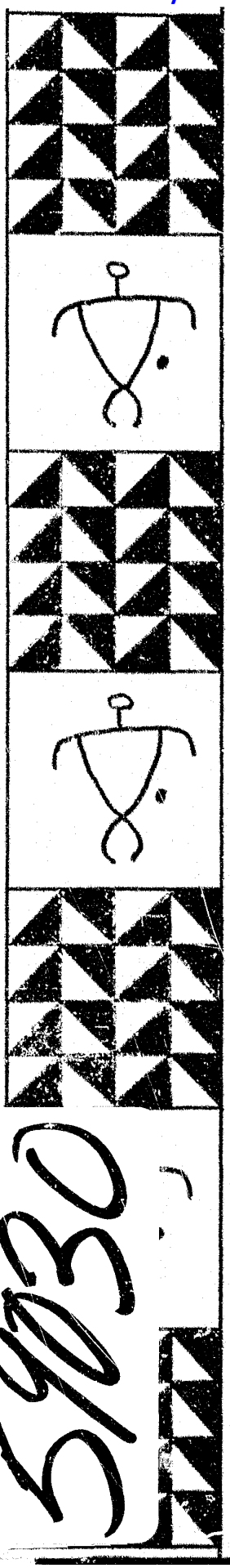

HAWAII CRIMINAL JUSTICE STANDARDS AND GOALS

COURTS

STATE LAW ENFORCEMENT AND JUVENILE DELINQUENCY
PLANNING AGENCY. HONOLULU, HAWAII.

HAWAII
CRIMINAL
JUSTICE
STANDARDS
AND
GOALS

COURTS

Chairperson:
DENNIS O'CONNOR

Staff:
LESTER CINGCADE,
Project Director

ADDISON BOWMAN,
Consultant

NEAL OKABAYASHI,
Research Director

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State of Hawaii

CRIMINAL JUSTICE STANDARDS AND GOALS

COURTS

State Law Enforcement and Juvenile Delinquency Planning Agency
Honolulu, Hawaii
May, 1977

STATE OF HAWAII
STATE LAW ENFORCEMENT AND JUVENILE DELINQUENCY PLANNING AGENCY
1010 RICHARDS STREET, ROOM 412
HONOLULU, HAWAII 96813

F O R E W O R D

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The result is a comprehensive range of interrelated standards to combat crime and to improve on criminal justice efficacy and efficiency. These standards should aid greatly in guiding, shaping and influencing Hawaii's formal criminal justice system for many years to come.

However, as important as the standards are, it must be remembered that the standards and goals developmental process is a dynamic, on-going one. These reports from the 5 areas really mark only the beginning of a detailed, long-term proceeding.

Judge Herman Lum
Chairman, Supervisory Board
State Law Enforcement & Juvenile
Delinquency Planning Agency

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RONALD AMEMIYA
Attorney General
State of Hawaii

LESTER CINGCADE
Administrative Director
Judiciary

PAUL DE SILVA
Prosecuting Attorney
County of Hawaii

JOHN EDMUNDS
Attorney-at-Law

WALTER HEEN
Judge
First Circuit

KASE HIGA
Judge
District Court, 2nd Circuit

KEI HIRANO
Judge
District Court, 5th Circuit

EDWIN H. HONDA
Judge
District Court, 1st Circuit

JAMES JUNG
Deputy Public Defender
Kauai County

MICHAEL KAKESAKO
Administrator
Corrections Division, DSSH

HARRY KANADA
Probation Supervisor
Judiciary

WAYNE KANAGAWA
Director
Intake Service Center

CAROLENE KAWANO
Probation Supervisor
Judiciary

SHUNICHI KIMURA
Judge
Third Circuit

PHILIP LOWENTHAL
Deputy Public Defender
Maui County

FATHER ROBERT MACKEY
John Howard Association

GERALD MATSUNAGA
Prosecuting Attorney
County of Kauai

DENNIS O'CONNOR, Chairperson
Senator
Hawaii State Legislature

JON OLSON
Deputy Public Defender
County of Hawaii

MASARU OSHIRO
Deputy Director
DSSH

MATTHEW PYUN
Attorney-at-Law

STANLEY ROEHRIG
Attorney-at-Law

THEODORE SAKAI
John Howard Association

MAURICE SAPIENZA
Prosecuting Attorney
City & County of Honolulu

RAYMOND TAM
Attorney-at-Law

DONALD TSUKIYAMA
Public Defender
State of Hawaii

ARTHUR UEOKA
Prosecuting Attorney
County of Maui

DENNIS YAMADA
House of Representatives
Hawaii State Legislature

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CHAPTER 1

SCREENING

Standard 1.1:

Criteria for Screening

The need to halt formal or informal action concerning some individuals who become involved in the criminal justice system should be openly recognized. This need may arise in a particular case because there is insufficient evidence to justify further proceedings or because--despite the availability of adequate evidence--further proceedings would not adequately further the interests of the criminal justice system.

An accused should be screened out of the criminal justice system if there is not a reasonably likelihood that the evidence admissible against him would be sufficient to obtain a conviction and sustain it on appeal. In screening on this basis, the prosecutor should consider the value of a conviction in reducing future offenses, as well as the probability of conviction and affirmance of that conviction on appeal.

An accused should also be screened out of the criminal justice system when the benefits to be derived from prosecution or diversion would be outweighed by the costs of such action. Among the factors to be considered in making this determination are the following:

1. Any doubt as to the accused's guilt;

2. The impact of further proceedings upon the accused and those close to him, especially the likelihood and seriousness of financial hardship or family life disruption;

3. The value of further proceedings in preventing future offenses by other persons, considering the extent to which subjecting the accused to further proceedings could be expected to have an impact upon others who might commit such offenses, as well as the seriousness of those offenses;

4. The value of further proceedings in preventing future offenses by the offender, in light of the offender's commitment to criminal activity as a way of life; the seriousness of his past criminal activity, which he might reasonably be expected to continue; the possibility that further proceedings might have a tendency to create or reinforce commitment on the part of the accused to criminal activity as a way of life; and the likelihood that programs available as diversion or sentencing alternatives may reduce the likelihood of future criminal activity;

5. The value of further proceedings in fostering the community's sense of security and confidence in the criminal justice system;

6. The direct cost of prosecution, in terms of prosecutorial time, court time, and similar factors;

7. Any improper motives of the complainant;

8. Prolonged nonenforcement of the statute on which the charge is based;

9. The likelihood of prosecution and conviction of the offender by another jurisdiction; and

10. Any assistance rendered by the accused in apprehension or conviction of other offenders, in the prevention of offenses by others, in the reduction of the impact of offenses committed by himself or others upon the victims, and any other socially beneficial

activity engaged in by the accused that might be encouraged in others by not prosecuting the offender.

Commentary:

By use of the term "screening", we mean "the discretionary decision to stop, prior to trial or plea, all formal proceedings against a person who has become involved in the criminal justice system." This is the definition employed by the NAC, in Courts, p. 17. This is to be distinguished from diversion which, although involving a cessation of formal criminal proceedings, includes a coercive condition that the individual engage in certain activity in return.

There are two fundamental reasons for screening. The most obvious case for screening is the defendant against whom the evidence is insufficient to sustain a conviction. The other results from an analysis of the costs of obtaining a conviction measured against the benefits of such a conviction. The task force followed the NAC recommendation and adopted the cost-benefit analysis approach, with the focus of the analysis on the goals of the criminal justice system: reducing criminal activity and treating defendants fairly. Thus the factors to be considered relate to the impact prosecution would have on the defendant and on society.

The first factor to be considered in screening is the lack of evidence to sustain a conviction. NAC Standard 1.1 and ABA Prosecution Standard 3.9 both stress the importance of this criterion. Screening done because of insufficient evidence should also be based upon

the value of a conviction in reducing future offenses and the probability of conviction and affirmance on appeal. ABA Prosecution Standard 3.9 indicates that these two factors should be considered also when the decision to charge is being made.

The remaining criteria are intended to facilitate a cost-benefit analysis. The standard states that, "an accused should be screened out of the criminal justice system when the benefits to be derived from prosecution or diversion would be outweighed by the costs of such action." The criteria resemble those suggested in ABA Prosecution Standard 3.9(2). ABA Prosecution Standard 3.9(ii) and 3.9(iii) also speak of the extent of harm caused by the offense and the disparity of potential punishment in relation to the particular offense.

Of the four prosecutors' offices in Hawaii, the one that has the most specialized screening function is the Honolulu office where the Intake Division has been performing a screening function since January, 1975. Screening decisions are based primarily on sufficiency of the evidence to obtain convictions and sustain them on appeal. Other factors considered by the Honolulu office include doubt as to the accused's guilt, the likelihood of prosecution and conviction in another jurisdiction, doubt as to the motives of the complainant, and the assistance of the accused in the apprehension or conviction of other offenders. In rare cases, usually arising out of a family situation, the screening division will consider the impact of further proceedings upon the accused and those close to the accused.

The Neighbor Island prosecutors' offices also identified the sufficiency of evidence as the major factor upon which a decision

to charge or screen is made. Hawaii practice is thus generally in accord with Standard 1.1, except that the practice sometimes ignores the cost-benefit analysis criteria listed in paragraphs 1 through 10.

Standard 1.2:

Procedure for Screening

Police, in consultation with the prosecutor, should develop guidelines for the taking of persons into custody. Those guidelines should embody the factors set out in Standard 1.1. After a person has been taken into custody, the decision to proceed with formal prosecution should rest with the prosecutor.

No complaint should be filed or arrest warrant issued without the formal approval of the prosecutor. Where feasible, the decision whether to screen a case should be made before such approval is granted. Once a decision has been made to pursue formal proceedings, further consideration should be given to screening an accused as further information concerning the accused and the case becomes available. Final responsibility for making a screening decision should be placed specifically upon an experienced member of the prosecutor's staff.

The prosecutor's office should formulate written guidelines to be applied in screening that embody those factors set out in Standard 1.1. Where possible, such guidelines, as well as the guidelines promulgated by the police, should be more detailed. The guidelines should identify as specifically as possible those factors that will be considered in identifying cases in which the accused will not be taken into custody or in which formal proceedings will not be pursued. They should reflect local conditions

and attitudes, and should be readily available to the public as well as to those charged with offenses, and to their lawyers. They should be subjected to periodic reevaluation by the police and by the prosecutor.

When a defendant is screened after being taken into custody, a written statement of the prosecutor's reasons should be prepared and kept on file in the prosecutor's office. Screening practices in a prosecutor's office should be reviewed periodically by the prosecutor himself to assure that the written guidelines are being followed.

The decision to continue formal proceedings should be a discretionary one on the part of the prosecutor and should not be subject to judicial review, except to the extent that pretrial procedures provide for judicial determination of the sufficiency of evidence to subject a defendant to trial. Alleged failure of the prosecutor to adhere to stated guidelines or general principles of screening should not be the basis for attack upon a criminal charge or conviction.

If the prosecutor screens a defendant, the private complainant should have recourse to the grand jury or to the court. If the court determines that the decision not to prosecute constituted an abuse of discretion, it may order the prosecutor to pursue formal proceedings or may appoint a special prosecutor.

Commentary:

Standard 1.2 resembles NAC Standard 1.2, which is designed to increase the visibility of the discretionary decision to charge or to screen, and to heighten the accountability of the discretionary decision-maker without sacrificing necessary flexibility.

NAC Standard 1.2 recommends that written guidelines be established to guide the discretion exercised by the prosecutor making the decision to charge and by the police officer making the decision to arrest. The NAC, in Courts, p. 26, suggests: "Guidelines are a protection against arbitrariness, and they bring discretionary decisions more in line with the concept of equal justice under law." This goal also informs the recommendations that policy guidelines be readily available to the public and that they be re-evaluated periodically. Both NAC Standard 1.2 and ABA Prosecution Standard 3.9 recommend that the prosecutor's policies be influenced by local attitudes.

The standard explicitly recognizes the screening function performed by the police, and suggests that the police develop their screening guidelines "in consultation with the prosecutor." The NAC recommendations in the Police volume, specifically NAC Police Standard 1.3, go into more detail on the exercise of discretion by the police. The NAC recommends coordination between the police and the prosecutor over screening decision policies. The ABA emphasizes control of police discretion through the police agency itself with additional guidance from legislatures and courts. ABA Standard 4.4 Relating to the Urban Police Function suggests that the input of courts and legislatures may serve as a stimulant to the development of appropriate administrative guidance and control over police discretion.

In Hawaii, each of the prosecutors' offices has developed some degree of cooperation with local police on the matter of screening. Of all the offices, Honolulu has probably produced the greatest degree of coordination. The Intake Division in the Honolulu office was created to improve coordination and cooperation

between the two agencies. However, the Honolulu office and the police administration have not developed guidelines for taking a person into custody.

The standard recommends that no complaint or arrest warrant be issued without the formal approval of the prosecutor. NAC Standard 1.2 and ABA Prosecution Standard 3.4 are consistent with this recommendation. ABA Prosecution Standard 3.4 states that the prosecutor should be "initially and primarily responsible" for the decision to institute criminal proceedings. These standards embody a strong policy favoring prosecutorial control over the disposition of complaints.

With respect to the issuance of arrest warrants, Rule 3 of the new Hawaii Rules of Penal Procedure requires that the complaint be subscribed before a prosecutor. In addition, H.R.P.P. 7(c) requires that the signature of the prosecutor before whom the complaint is sworn to appear on the charge. Hawaii law is therefore consistent with the recommended standard on this point.

The standard recommends that final screening decisions be made by a specifically designated "experienced member of the prosecutor's staff." This is consistent with the recommendation in NAC Standard 1.2, which notes that specialization of the screening function will be successful only if experienced trial attorneys are making the decisions. The commentary to ABA Prosecution Standard 3.4 is to the same effect.

The attorneys assigned to the Intake Division at the Honolulu Prosecutor's office are all experienced trial lawyers. The director of that division is strongly in favor of having only experienced trial attorneys perform the screening function. At the other three

prosecutors' offices, the screening task is not specifically assigned. At the Kauai office, which consists of only two prosecutors, specialization of the screening function is probably unnecessary but a written statement of office policy on factors to be considered would be desirable. The same is true of the County Attorney's Office on Maui, which prosecutes all cases originating on Maui, Molokai, and Lanai, and the prosecutor's office for Hawaii County.

The standard follows NAC Standard 1.2 in recommending that the decision to screen not be subject to judicial review, and that the alleged failure of the prosecutor to adhere to stated guidelines not be the basis for attack upon a criminal charge or conviction. However, the standard also recommends that "if the prosecutor screens a defendant, the private complainant should have recourse to the grand jury or to the court." NAC Standard 1.2 would also allow the police recourse to the court in this situation. In addition, Standard 1.2 recommends that "if the court determines that the decision not to prosecute constituted an abuse of discretion, it may order the prosecutor to pursue formal proceedings or may appoint a special prosecutor." Compare Pugach v. Klein, 193 F. Supp. 630 (S.D.N.Y. 1961), which held that the discretion of the U.S. Attorney was not subject to judicial control and that there was no power in the individual citizen to enforce the law when the U.S. Attorney, for whatever reason, chooses not to prosecute. See generally the Annotation in 66 ALR 3d 732 for an analysis of the individual's right to institute criminal proceedings.

A complainant in Hawaii has no apparent power to force prosecution of a case that has been screened by the prosecutor. At

the present time, even if the prosecutor has abused his discretion there is no method for a private citizen to have that decision reviewed and reversed. The task force believes that the limited review recommended in the standard is desirable, and should be made available to the private complainant.

CHAPTER 2

DIVERSION

Standard 2.1:

Criteria for Diversion

In appropriate cases offenders may be diverted into noncriminal programs before formal trial or conviction.

Such diversion is appropriate where there is a substantial likelihood that conviction could be obtained and the benefits to society from channeling an offender into an available noncriminal diversion program outweigh any harm done to society by abandoning criminal prosecution. Among the factors that should be considered favorable to diversion are: (1) the relative youth of the offender; (2) the absence of a prior criminal record of the offender; (3) the willingness of the victim to have no conviction sought; (4) any likelihood that the offender suffers or has suffered from a mental illness, psychological abnormality, or narcotic or alcohol addiction, which was related to his crime and for which treatment is available; and (5) any likelihood that the crime was significantly related to any other condition or situation such as unemployment or family problems that would be subject to change by participation in a diversion program.

Among the factors that should be considered unfavorable to diversion are: (1) any history of the use of physical violence toward others; (2) involvement with organized crime; (3) a history of antisocial conduct indicating that such conduct has become an ingrained part of the defendant's lifestyle and would be particularly resistant to change; (4) extent of injury to the

victim; and (5) any special need to pursue criminal prosecution as a means of discouraging others from committing similar offenses.

Another factor to be considered in evaluating the cost to society is that the limited contact a diverted offender has with the criminal justice system may have the desired deterrent effect.

Commentary:

By "diversion" we mean the "halting or suspending before conviction [of] formal criminal proceedings against a person on the condition or assumption that he will do something in return." This is the definition suggested by the NAC in Courts, p. 27. The criteria for diversion in the recommended standard suggest a cost-benefit analysis. The standard urges prosecutors to consider and balance these factors in order to ascertain whether the accused is a likely candidate for diversion. The standard is similar in this respect to NAC Standard 2.1. The ABA favors diversion programs in appropriate circumstances, but except for pointing out youth as a factor does not detail specific guidelines. See ABA Prosecution Standard 3.8.

In Hawaii, a recent statute, Act 154, approved May 27, 1976, provides for the deferred acceptance of guilty pleas resulting in non-criminal dispositions for those who successfully meet the requirements imposed by the court. Under this law, the defendant tenders a guilty plea to the charge, and the court defers acceptance of the plea for a specific period of time not exceeding the maximum allowable sentence for the crime charged, on the condition that the defendant not violate the terms or conditions set forth by

the court. If the defendant is successful in the latter effort, the charge against him is dropped and no criminal conviction results. This deferred acceptance of guilty (DAG) plea statute is Hawaii's only formal diversion mechanism.

The statute lists two factors favoring diversion. They are that the defendant is not likely to engage in criminal conduct again, and that justice and society's welfare do not require that the defendant suffer the penalty imposed by law. The statute also specifies certain offenses which are not properly the subject of a DAG plea. The first three statutory factors rendering a defendant ineligible for DAG plea consideration concern defendant's propensity toward violence, and are generally consistent with the recommended standard. The task force recognizes that defendants with a history of violent behavior may be too great a threat to community security to be proper subjects for diversion. In addition, the task force believes that the extent of injury to the victim should be considered. In general, the DAG plea statute affords an adequate vehicle for implementation of Standard 2.1, subject to our discussion of Standard 2.2, infra.

Standard 2.2:

Procedure for Diversion

The appropriate authority should make the decision to divert as soon as adequate information can be obtained. Guidelines for making diversion decisions should be established and made public. Where the diversion decision is to be made by the prosecutor's office, the guidelines should be promulgated by that office. Diversion decisions should ordinarily be made, in the first

instance, by the Intake Service Center, subject to final approval by the prosecutor. In cases where an indictment has been returned, the diversion decision must be approved by the court.

When a defendant is diverted in a manner not involving a significant deprivation of liberty, a written statement of the fact of, and reason for, the diversion should be made and retained. When a defendant who comes under a category of offenders for whom diversion regularly is considered is not diverted, a written statement of the reasons should be retained.

Where the diversion program involves significant deprivation of an offender's liberty, diversion should be permitted only under a court-approved diversion agreement providing for suspension of criminal proceedings on the condition that the defendant participate in the diversion program. Procedures should be developed for the formulation of such agreements and their approval by the court. These procedures should contain the following features.

1. Emphasis should be placed on the offender's right to be represented by counsel during negotiations for diversion and entry and approval of the agreement.

2. Suspension of criminal prosecution for longer than two years should not be permitted.

3. An agreement that provides for a substantial period of institutionalization should not be approved unless the court finds that the defendant may be subject to nonvoluntary detention in the institution under noncriminal statutory authorizations for such institutionalization.

4. The agreement submitted to the court should contain a full

statement of those things expected of the defendant and the reason for diverting the defendant.

5. The court should approve an offered agreement only if it would be approved under the applicable criteria if it were a negotiated plea of guilty.

6. Upon expiration of the agreement, the court should dismiss the prosecution and no future prosecution based on the conduct underlying the initial charge should be permitted.

7. The Intake Service Center is responsible for monitoring the performance of all individuals in diversion programs. In addition, the prosecutor's office should periodically review all outstanding diversion agreements to ensure that diversion programs are operating as intended. In cases where the Intake Service Center or the prosecutor concludes that the diversion program should be terminated and prosecution reinstated, the following procedures should govern: (a) where diversion was originally accomplished pursuant to a court-approved diversion agreement, the decision to terminate the agreement should be made by the court only after a hearing at which the offender has the right to counsel, to be heard, and to present witnesses; (b) where diversion was originally accomplished pursuant to an agreement with the prosecutor, the decision to terminate the agreement should be made by the prosecutor only after affording the offender an informal hearing at which the offender and his lawyer have the opportunity to be heard.

The decision by the prosecutor not to divert a particular defendant should not be subject to judicial review.

Commentary:

The standard follows NAC Standard 2.2 in recommending that appropriate procedures and guidelines be developed for those granted the authority to divert individuals out of the criminal justice system, and that such guidelines be made public. The goal is to promote uniformity and to eliminate arbitrariness. The ABA Standards do not speak to procedures for diversion.

The standard recommends that decisions to divert "ordinarily be made, in the first instance, by the Intake Service Center," which seems an appropriate role for that agency. Final approval of diversion decisions rests logically with the prosecutor, except for two situations in which court approval is required: (1) when an indictment has been returned against the defendant, and (2) where diversion "involves significant deprivation of an offender's liberty." Hawaii's DAG plea statute, Act 154, Approved May 27, 1976, (see commentary to Standard 2.1, supra), seems an adequate vehicle for court-approved diversion programs, with one exception. The recommended standard does not contemplate that the defendant invariably tender a guilty plea as a precondition to diversion. Conformance with this standard will thus require either that the statute be amended, or that the courts develop procedures for diversion of defendants who do not tender guilty pleas. Additionally, our standard recommends that criminal prosecution never be suspended for more than two years, whereas the statute permits suspension for a period equal to the maximum sentence authorized for the offense charged.

None of the Hawaii prosecutors' offices has promulgated diversion guidelines, because primary reliance has heretofore been

placed on the court-approved, DAG plea type of decision. This standard contemplates that the prosecutor, in connection with the Intake Service Center, will play a significant role in the diversion of offenders, and that many diverted cases will never reach the court. The standard thus calls upon the prosecutors to develop and implement diversion procedures.

CHAPTER 3

THE NEGOTIATED GUILTY PLEA

Standard 3.1:

Plea Negotiation

The practice of plea negotiation is approved, subject to the guidelines and procedures set forth in this chapter.

Commentary:

This standard departs from NAC Standard 3.1, which recommends the prohibition of plea bargaining on the ground that "plea negotiation is inherently undesirable." See Courts, p. 46. The NAC admitted reluctance "to align itself against such authorities as the President's Commission on Law Enforcement and Administration of Justice and the American Bar Association House of Delegates, both of which have concluded that efforts should be directed at improving plea negotiations rather than towards eliminating the process." Id. at 48. Indeed, the NAC rejected the recommendation of its own Courts Task Force, which had concluded "that reforms could be implemented that would render plea negotiations not only acceptable but valuable." Id. at 49.

This task force concludes that plea negotiation should be retained in Hawaii. The abuses that have attended plea bargaining practice in the past are addressed in Standards 3.2 through 3.8. We believe that, properly administered, a system of plea negotiation is of value to both prosecution and defense as a means of reducing, indeed eliminating, the risks of trial, which risks nearly always exist for both sides. No legitimate societal interest is devalued

by a system which permits the prosecution to settle for less than a trial might have yielded in the way of conviction, while eliminating the possibility that the trial might have resulted in an acquittal because of weakness of the evidence. Nor are the defendant's rights threatened by the availability of a settlement which reduces the risks of conviction and punishment resulting from a trial. The remaining standards in this chapter are designed to regulate the practice of plea negotiation so as to protect the legitimate interests of society and of defendants.

Standard 3.2:

Record of Plea and Agreement

Where a negotiated plea is offered, the agreement upon which it is based should be presented to the judge in open court for his acceptance or rejection. In each case in which such a plea is offered, the record should contain a full statement of the terms of the underlying agreement and the judge's reasons for accepting or rejecting the plea.

Commentary:

This standard calls for full disclosure of the terms of the plea bargain and the reasons of the judge for accepting the plea. This disclosure takes place in open court. This standard is in full accord with NAC Standard 3.2. The NAC believes that disclosure will enable officials to identify problem areas in need of remedial measures. An additional theory for this standard is offered by the NAC: "Standard 3.2 lays the groundwork for an additional method of encouraging fairness--that of regularizing the administrative

process by which the parties enter into plea agreements." See Courts, *p. 50. ABA Standard 4.1(b) Relating to the Function of the Trial Judge is generally consistent with Standard 3.2, except that the ABA has no requirement that the judge explain his reasons for the acceptance of the plea. ABA Standard 4.2(c) Relating to the Function of the Trial Judge does require that the judge state his reasons for not accepting the plea.*

H.R.P.P. 11(e) governs negotiated guilty pleas, and is consistent with the recommended standard. Rule 11(e) requires that a record of the plea agreement be made in open court, although it does not require that the judge disclose his reasons for accepting or rejecting the plea. The comments to Rule 11(e) point out that the judge should not be required to disclose his reasons because he is not to be bound by the agreement. The NAC's position is that "the need to raise the visibility of the entire plea negotiation process requires...that the reasons for accepting a plea be placed on the record." See Courts, *p. 51.*

Standard 3.3:

Uniform Plea Negotiation Policies and Practices

Each prosecutor's office should formulate a written statement of policies and practices governing all members of the staff in plea negotiations.

This written statement should provide for consideration of the following factors by prosecuting attorneys engaged in plea negotiations:

1. The impact that a formal trial would have on the offender and those close to him, especially the likelihood and seriousness

of financial hardship and family disruption;

2. The role that a plea and negotiated agreement may play in rehabilitating the offender;

3. The value of a trial in fostering the community's sense of security and confidence in law enforcement agencies;

4. The relative strength or weakness of the prosecution's cases; and

5. The assistance rendered by the offender:

a. in the apprehension or conviction of other offenders;

b. in the prevention of crimes by others;

c. in the reduction of the impact of the offense on the victim; or

d. in any other socially beneficial activity.

The statement of policies should be made available to the public.

The statement should direct that before finalizing any plea negotiations, a prosecutor's staff attorney should obtain full information on the offense and the offender. This should include information concerning the impact of the offense upon the victims, the impact of the offense (and of a plea of guilty to a crime less than the most serious that appropriately could be charged) upon the community, the amount of police resources expended in investigating the offense and apprehending the defendant, any relationship between the defendant and organized crime, and similar matters. This information should be considered by the attorney in deciding whether to enter into an agreement with the defendant.

The statement should be an internal, intraoffice standard only. Neither the statement of policies nor its applications should

be subject to judicial review. The prosecutor's office should be subject to judicial review. The prosecutor's office should assign an experienced prosecutor to review negotiated pleas to insure that the guidelines are applied properly.

Commentary:

This standard closely resembles NAC Standard 3.3, the purpose of which is to produce greater uniformity in plea negotiation. Although the ABA does not formulate guidelines for plea negotiations, the ABA guidelines relating to discretion in the charging decision (ABA Standard 3.9 Relating to the Prosecution Function) may serve as guidelines for plea bargaining. Also, ABA Standard 2.5(a) Relating to the Prosecution Function recommends that each prosecutor's office develop a statement of general policies to guide the exercise of prosecutorial discretion within the office.

The NAC standard differs from the Hawaii standard in one important respect. The NAC forbids the prosecutor from plea bargaining because of weakness in the case. The NAC explains: "If a prosecutor entertains doubt as to his ability to convict, accepting a plea of guilty--even to an offense less serious than that charged --unjustifiably creates a danger that innocent individuals will be convicted through the negotiated plea process." See Courts, p. 53. We do not believe that a defendant properly represented by counsel is endangered by our standard. See the discussion following Standard 3.1. We also recommend, in Standard 3.6, infra, that prosecutors not engage in a practice of overcharging defendants. Our recommended standard is consistent with ABA Standard 3.9 Relating

to the Prosecution Function which does permit a plea bargain to be founded upon the strength or weakness of the government's case.

Present Hawaii practice varies from county to county. The Honolulu office has more formal guidelines than the other counties, but the Honolulu office rarely engages in plea bargaining at the present. In a case involving multiple counts of identical charges, the Honolulu prosecutor may agree to drop some of the charges in return for a guilty plea. In cases involving murder, rape, and sodomy, the Honolulu office policy is aginst plea bargaining. There is enough flexibility to provide for exceptional circumstances, but approval must be obtained from the chief prosecutor.

Hawaii county has no formal guidelines for plea bargaining, which is left to the discretion of individual attorneys. The same is true for Kauai County. Maui County does have a policy of permitting reduction of a felony charge by one degree through plea bargaining. This means that a Class A felony could be reduced to a Class B felony, and a Class B felony to a Class C felony. All Hawaii prosecutors' offices will need to issue new guidelines to conform to Standard 3.3.

Standard 3.4:

Reserved.

Standard 3.5:

Representation by Counsel During Plea Negotiations

No plea negotiations should be conducted until a defendant has been afforded an opportunity to be represented by counsel. If the defendant is represented by counsel, the negotiations should

be conducted only in the presence of and with the assistance of counsel.

Commentary:

Standard 3.5 is similar to NAC Standard 3.5 and ABA Standard 4.1 Relating to the Prosecution Function, although the ABA standard would permit direct discussion between a prosecutor and a defendant if defense counsel is present or has approved in advance. Current Hawaii practice is consistent with the recommended standard.

Standard 3.6:

Prohibited Prosecutorial Inducements to Enter a Plea of Guilty

No prosecutor should, in connection with plea negotiations, engage in, perform, or condone any of the following:

1. Charging or threatening to charge the defendant with offenses for which the admissible evidence available to the prosecutor is insufficient to support a guilty verdict.

2. Charging or threatening to charge the defendant with a crime not ordinarily charged in the jurisdiction for the conduct allegedly engaged in by him.

3. Threatening the defendant that if he pleads not guilty, his sentence may be more severe than that which ordinarily is imposed in the jurisdiction in similar cases on defendants who plead not guilty.

4. Failing to grant full disclosure before the disposition negotiations of all exculpatory evidence material to guilt or punishment.

Commentary:

Hawaii Standard 3.6 is in full agreement with NAC Standard 3.6 forbidding certain prosecutorial practices which constitute an abuse of the prosecutorial power. Standard 3.6(1) would prohibit the prosecutor from charging or threatening to charge the defendant with an offense more serious than the evidence will support. This is a step beyond the ABA recommendation that he not bring charges not supported by probable cause, see ABA Standard 3.9(a) Relating to the Prosecution Function.

The thrust of subparagraphs 1 and 2 is to prevent deliberate overcharging designed to improve the bargaining position of the prosecutor. The NAC notes that: "Overcharging may be vertical, i.e., charging an offense more serious than the circumstances of the case seem to warrant; or horizontal, i.e., charging an unreasonable number of offenses based upon the same or closely related conduct." Courts, p. 57. Standard 3.6(3) prohibits prosecutors from threatening the defendant with the possibility of a more severe sentence should he decide to exercise his right to trial. This should also include a prohibition against a prosecutorial threat to move for an extended term of imprisonment should a guilty plea not be forthcoming. Standard 3.6(4) would require the prosecutor to disclose to the defendant all exculpatory evidence prior to plea negotiations.

ABA Standard 4.3 Relating to the Prosecution Function warns prosecutors not to engage in conduct which may undermine the voluntariness of the plea. The ABA states that the prosecutor should avoid implying greater power to influence the disposition

of a case than he possesses. The purpose of this ABA standard is to make clear to the defense that the prosecutor cannot assure any particular consequence of a guilty plea. The ABA standards are not as specific as the NAC, but they both seek to insure fairness in the negotiation process.

H.R.P.P. 11(e)(3) enjoins the court not to accept a plea pursuant to a plea bargain until the defendant is warned that the court is not bound by such agreement. Thus the defendant is properly warned that the defendant cannot expect anything regarding the judicial consequences of the plea. There have not been any specific guidelines in Hawaii prohibiting prosecutorial inducements to enter a guilty plea other than a footnote in State v. Wakinekona, 53 Hawaii 574, 499 P.2d 678 (1972), noting that due process requires that the prosecutor keep his bargain and not use his position to induce the plea.

In the future, the defense will have copies of the statements of potential witnesses and exculpatory material pursuant to H.R.P.P. 16. Thus the defendant will have the material contemplated in Standard 3.6(4) prior to plea negotiations. Hawaii practice is thus in accord with the recommended standard.

Standard 3.7:

Acceptability of a Negotiated Guilty Plea

The court should not participate in plea negotiations. It should, however, inquire as to the existence of any agreement whenever a plea of guilty is offered and carefully review any negotiated plea agreement underlying an offered guilty plea. It should make specific determinations relating to the acceptability of a plea before accepting it.

Before accepting a plea of guilty, the court should ascertain that there is a factual basis for the plea. In the event that the plea is not accepted, any statements made by the defendant at the time the plea was tendered and any evidence obtained through use of such statements should not be admissible against the defendant in any subsequent criminal prosecution.

The review of the guilty plea and its underlying negotiated agreement should be comprehensive. If any of the following circumstances is found and cannot be corrected by the court, the court should not accept the plea:

1. Counsel was not present during the plea negotiations but should have been;

2. The defendant is not competent or does not understand the nature of the charges and proceedings against him;

3. The defendant was reasonably mistaken or ignorant as to the law or facts related to his case and this affected his decision to enter into the agreement;

4. The defendant does not know his constitutional rights and how the guilty plea will affect those rights; rights that expressly should be waived upon the entry of a guilty plea include:

   a. Right to the privilege against compulsory self-incrimination (which includes the right to plead not guilty);

   b. Right to trial in which the government must prove the defendant's guilt beyond a reasonable doubt;

   c. Right to a jury trial;

   d. Right to confrontation of one's accusers;

   e. Right to compulsory process to obtain favorable

witnesses; and

f. Right to effective assistance of counsel at trial;

5. During plea negotiations the defendant was denied a constitutional or significant substantive right that he did not waive;

6. The defendant did not know at the time he entered into the agreemement the mandatory minimum sentence, if any, and the maximum sentence that may be imposed for the offense to which he pleads, or the defendant was not aware of these facts at the time the plea was offered;

7. The defendant has been offered improper inducements to enter the guilty plea;

8. The admissible evidence is insufficient to support a guilty verdict on the offense for which the plea is offered; and

9. Accepting the plea would not serve the public interest.

When a guilty plea is offered and the court either accepts or rejects it, the record must contain a complete statement of the reasons for acceptance or rejection of the plea.

Commentary:

Standard 3.7 is similar to NAC Standard 3.7, which sets forth basic concepts to guide the court during the tender of the plea of guilty pursuant to plea bargaining. The standard recommends that the court not participate in plea negotiations, and inquire into the existence of any agreement at the time of the plea. This is consistent with ABA Standard 3.3 Relating to Pleas of Guilty, and ABA Standard 4.1 Relating to the Function of the Trial Judge. H.R.P.P. 11(d) is to the same effect.

The standard omits the NAC requirement that the defendant make a detailed statement of the offense to which he pleads guilty in the belief that the court need ascertain only that a factual basis exists for the plea. The ABA standards require only that the trial court determine that there is a factual basis for the plea. ABA Standard 4.2(b) Relating to the Function of the Trial Judge; ABA Standard 1.6 Relating to Pleas of Guilty. H.R.P.P. 11(f) requires the court to satisfy itself that there is a factual basis for the plea. The factual basis need not be provided by the defendant. The prosecutor, defense attorney, or a pre-sentence report may be the foundation for a finding of a factual basis. The Hawaii rule thus conforms with the recommended standard and with the ABA standard.

The standard proposes that should the plea not be accepted, any statements made by the defendant during the course of the plea should not be admissible in subsequent criminal prosecutions. This is consistent with ABA Standard 3.4 Relating to Pleas of Guilty, and is specifically provided for in H.R.P.P. 11(c)(4).

Standard 3.7 also calls for a comprehensive review of the proposed plea and the underlying agreement. The guidelines resemble those set forth in NAC Standard 3.7. This proposal exceeds the scope of present Hawaii practice which is basically designed to fulfill the requirements of H.R.P.P. 11 that the plea be voluntary with an understanding of the nature of the charge. H.R.P.P. 11(c) mandates that a plea not be accepted until the court is satisfied that the defendant is aware of certain rights he is waiving by pleading guilty, the nature of the charge, and the possible consequences of his plea. This is consistent with ABA Standard 4.2 Relating to the Function of the Trial Judge and ABA Standard 1.4

Relating to Pleas of Guilty. Circuit court judges utilize a guilty plea form which sets forth many of these factors and is signed by the defendant when he pleads guilty.

Standard 3.7(4) lists several rights which are waived upon entry of a plea of guilty. These rights are enumerated in the plea of guilty form used in Hawaii Circuit Court. In addition, the court will ask the defendant whether he understands he is waiving these rights. ABA Standard 1.4 Relating to Pleas of Guilty states that the defendant need only be advised of his right to trial, but ABA Standard 4.2(a)(ii) Relating to the Function of the Trial Judge dictates that the court also determine whether the defendant understands that he is waiving his right to trial by jury, right to remain silent, and right of confrontation. Although H.R.P.P. 11(c) indicates that the defendant need only be informed of his right to proceed to trial, in actual practice Hawaii courts comply fully with Standard 3.7(4).

The Hawaii standard and the NAC standard diverge on the question of the acceptability of a plea of guilty by a defendant who asserts his innocence. The NAC recommendation that a guilty plea should not be accepted under such circumstances is omitted in the Hawaii standard. The United States Supreme Court has held that it would not be violative of the U.S. Constitution to accept a guilty plea though the defendant continues to assert innocence. North Carolina v. Alford, *400 U.S. 25 (1970). The courts have permitted defendants in Hawaii to plead guilty without admitting guilt. The commentary to H.R.P.P. 11 indicates that the court should treat such a plea as a plea of nolo contendere, acceptable at the discretion of the court. See H.R.P.P. 11(b).*

The ABA states that prosecutors and defense attorneys should not participate in pleas of guilty when the defendant asserts his innocence unless disclosure is made to the court of this fact. ABA Standard 4.2 Relating to the Prosecution Function; ABA Standard 5.3 Relating to the Defense Function. The Hawaii standard would not require that a defendant admit guilt prior to acceptance of the plea. The danger of convicting an innocent person is alleviated by the requirement of a factual basis. To require that it come from the mouth of the defendant rather than witnesses, the police report, or from some other source serves no useful purpose. Of more critical importance is whether the defendant pleads voluntarily and with a full understanding of the consequences of his plea.

Standard 3.8:

Effect of the Method of Disposition on Sentencing

The fact that a defendant has entered a plea of guilty to the charge or to a lesser offense than that initially charged should not be considered in determining sentence.

Commentary:

Standard 3.8 recommends that the fact of a guilty plea be given no consideration by the court in determining the defendant's sentence. The rationale is that there is no direct relevance between such a plea and the appropriate disposition of the offender. NAC Standard 3.8 is to the same effect.

ABA Standard 1.8 Relating to Pleas of Guilty is at sharp variance with the Hawaii and NAC Standards. According to the ABA standard it is proper for the court to grant charge or sentence concessions to a defendant who enters a guilty plea. The ABA

lists six factors that a court should consider in determining whether to grant charge or sentence concessions. The Hawaii Supreme Court has never addressed the issue, although in State v. Hayashida, 55 Hawaii 453, 455 P.2d 184 (1974), the court intimated that it would not favor differential sentencing based on whether the defendant admits guilt and forgoes appeal. Our recommended standard is based on what we believe to be sound policy for Hawaii.

CHAPTER 4

THE LITIGATED CASE

Standard 4.1:

Time Frame for Prompt Processing of Criminal Cases

The period from arrest to trial in a felony prosecution generally should not be longer than six months. In a misdemeanor prosecution, excluding less serious traffic offenses, the period from arrest to trial generally should not be longer than 30 days.

Commentary:

The Sixth Amendment to the U.S. Constitution grants to all accused the right to a speedy trial. In Klopfer v. North Carolina, 386 U.S. 23 (1967), the Court ruled that due process required that defendants be accorded the right to a speedy trial in state prosecutions. The Hawaii State Constitution (Article I, Section 11) also guarantees the right to a speedy trial.

Implementation of this right is one of the purposes of Standard 4.1. In addition, the NAC notes that it "views as the relevant issue prompt processing of cases for the good of the community." Courts, p. 68. The NAC, in its Standard 4.1, recommends that the period from arrest to trial in felony cases be reduced to 60 days. The task force rejected this time frame as too short and not sufficiently protective of defendants' rights to prepare for trial.

A major problem in defining the right to speedy trial is determining when the time period begins to run. In State v. Bryson, 53 Hawaii 652, 500 P.2d 1171 (1972), the Hawaii Supreme Court held that the right to speedy trial attaches when the defendant is

charged or otherwise detained. Thus the triggering mechanism for activation of the speedy trial right is either arrest or formal indictment. The triggering mechanism for H.R.P.P. 48(b)(1) is the filing of the charge or the arrest, whichever is sooner. The ABA states that the time period commences when the charge is filed. ABA Standard 2.2 Relating to Speedy Trial.

Absent extenuating circumstances, H.R.P.P. 48 requires that the trial commence within six months of the event requiring trial. H.R.P.P. 48 has certain "safety valve" features which permit extensions of the six-month period. H.R.P.P. 48(c) excludes certain time periods, such as delay occasioned by a mental examination, a defense requested continuance, exceptional congestion of the trial docket, or a continuance based on the complexity of the case. An additional feature of flexibility is the provision allowing a judge to dismiss a case without prejudice. This would allow the prosecutor to re-file charges and thereby begin the six-month period again.

In State v. Almeida, 54 Hawaii 443, 509 P.2d 549 (1973), the Hawaii Supreme Court ruled that a seven-month delay was presumptively prejudicial and necessitated an inquiry into the factors outlined by the U.S. Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972). The triggering mechanism is the length of delay. The other three factors to be weighed are: reasons for the delay, defendant's assertion of (or failure to assert) the right, and prejudice to the defendant. It thus appears that Standard 4.1 is consistent with federal and state speedy trial standards, particularly H.R.P.P. 48.

Standard 4.2:

Citation and Summons in Lieu of Arrest

Upon the apprehension, or following the charging, or a person for a misdemeanor or certain less serious felonies, citation or summons should generally be used in lieu of taking the person into custody.

All law enforcement officers should be authorized to issue a citation in lieu of continued custody following a lawful arrest for such offenses. All judges should have the authority to issue a summons rather than an arrest warrant in all cases.

Appropriate criteria and procedures should be developed to guide law enforcement officers and judges in the use of citations and summons.

Commentary:

Standard 4.2 recommends the use of citations and summons in lieu of arrest and is consistent with NAC Standard 4.2. The ABA Pretrial Release Standards deal separately with citations, which are issued by law enforcement officers (2.1, 2.2, and 2.3), and with summons, which are issued by judicial officers (3.1, 3.2, and 3.3). Both sets of standards recommend policies favoring the use of citations and summons in lieu of arrest.

The NAC standard details situations where the use of citations or summons is not appropriate, including: "(a) The behavior or past conduct of the accused indicates that his release presents a danger to individuals or to the community; (b) The accused is under lawful arrest and fails to identify himself satisfactorily; (c) The accused refuses to sign the citation; (d) The accused has no ties

to the jurisdiction reasonably sufficient to assure his appearance; or (e) The accused has previously failed to appear in response to a citation or summons." See Courts, p. 70.

Additionally, the NAC recommends that citations and summons should contain: (a) the offense charged; (b) the time and place of misdemeanor trial or felony preliminary hearing; (c) the rights of the accused and consequences of failure to appear; (d) advice on the right to counsel; and (e) time limit for filing of motions. The NAC is thus far more comprehensive than the recommended Hawaii standard, which simply calls for the development of "appropriate criteria and procedures."

In 1975 the Hawaii Legislature amended former H.R.S. §723-6, dealing with arrest. Police officers are given the discretion to issue citations in lieu of effecting a warrantless arrest for misdemeanors, petty misdemeanors, and violations. By way of criteria, the new statute, H.R.S. §803-6, provides:

> b) In any case in which it is lawful for a police officer to arrest a person without a warrant for a misdemeanor, petty misdemeanor, or violation, he may, but need not, issue a citation if he finds and is reasonably satisfied that the person:
>
> 1) Is a resident of the State of Hawaii;
>
> 2) Will appear in court at the time designated;
>
> 3) Has no outstanding arrest warrants which would justify his detention or give indication that he might fail to appear in court; and
>
> 4) That the offense is of such nature that there will be no further

police contact on or about the date in question, or in the immediate future.

The statute also describes the contents of such a citation. The statute is thus in compliance with the recommended standard, except that it fails to include felonies and fails to express a preference for citations.

H.R.P.P. 9 provides for the judicial use of warrants and summons as a means of obtaining the appearance of defendants. In Honolulu, summons are generally used to obtain the appearance of defendants for whom indictments have been returned. H.R.P.P. 9(a)(1) commands the court clerk to issue a summons if the prosecutor so requests. H.R.P.P. 9(b)(2) provides that the summons shall describe the offense alleged and the time and place to appear. Thus, Hawaii law is consistent with the recommended standard in the use of summons, except that criteria for the issuance of summons have not been articulated.

Standard 4.3:

Procedure in Misdemeanor Prosecutions

Preliminary hearings should not be available in misdemeanor prosecutions, but if a defendant is arrested without a warrant and is held in custody for more than 48 hours after his first appearance in court without a commencement of trial, he should be released to appear on his own recognizance unless the court finds from a sworn complaint or from an affidavit or affidavits filed with the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it.

All motions and an election of a nonjury trial should be required within 14 days after arraignment. Copies of all motions should be served upon opposing counsel.

Upon receipt of the motions, the court should evaluate the issues raised. Motions not requiring testimony should be heard well in advance of trial. All other motions should be heard immediately preceding trial in nonjury trials. However, should a continuance be needed the court should notify the prosecution and defense that the motions will be heard on the scheduled trial date and that trial will be held at a specified time within ten days thereafter.

Commentary:

The standard recommends that preliminary hearings not be available in misdemeanor cases. Consistent with the mandate of Gerstein v. Pugh, *420 U.S. 130 (1975), holding that the Fourth Amendment requires a judicial determination of probable cause as a pre-requisite to extended incarceration following arrest, the standard requires a separate procedure for a defendant arrested without a warrant and held in custody for more than 48 hours after his initial court appearance without a commencement of trial. Such a defendant, on his own motion, is to be released on his own recognizance unless the court finds probable cause from a sworn complaint or affidavit filed with the complaint. H.R.P.P. 5(b), adopted after the* Gerstein *decision, is fully in accord with our recommended standard in this respect.*

The standard requires that motions be filed within 14 days after arraignment, and that motions not requiring testimony be heard "well in advance of trial." Hawaii practice has permitted

motions to be made orally at the time of trial, and is thus not in conformity with this standard. The current Hawaii practice is to set the case for a District Court bench trial unless the defendant specifically requests a jury trial. Sometimes a written waiver of the right to a jury trial is obtained. In Hawaii county, the District Court judges do not automatically schedule a bench trial, but ask the defendant if he wants a jury trial at the time of the arraignment and plea. This is done in Kauai County when the defendant is proceeding pro se. Otherwise, the case is set for a bench trial unless defense counsel requests a jury trial. Under H.R.P.P. 5(b)(3) the defendant must waive his right to a jury trial at or before the entry of plea or the case is transmitted to the Circuit Court for a jury trial. If after the transfer to the Circuit Court the defendant wishes to waive jury trial, the Circuit Court may remand the case to the District Court for further proceedings.

Standard 4.4:

The Grand Jury in Hawaii

Unless waived by defendant, grand jury indictment should be required in all felony prosecutions. If a grand jury indictment has been returned in a particular case, no preliminary hearing should be held in that case. In all cases, all testimony before the grand jury relating to the charges contained in the indictment returned against the defendant should be disclosed to the defense. The prosecutor should generally present to the grand jury only evidence which would be admissible at trial. Rules of procedure for grand juries should be promulgated by the Supreme Court.

Should the grand jury refuse to return an indictment, the transcript of the grand jury proceedings should remain secret unless a complaint is filed with the Supreme Court regarding the manner in which the case was handled by the prosecutor's office. If such a complaint is filed, the transcript should be made available to the Supreme Court for investigation and charging.

The grand jury should be utilized for investigation in appropriate cases.

Commentary:

The Hawaii Constitution, Article I, Section 8, provides that "no person shall be held to answer for a [felony] unless on a presentment or indictment of a grand jury." Current practice of requiring grand jury indictment in all felony cases is thus mandated by the Hawaii Constitution. The task force, by a closely divided vote, decided to recommend retention of the grand jury requirement, reasoning that the grand jury can provide a valuable buffer against improperly motivated and unwarranted prosecutions, and can serve as a useful screening device in all cases. The screening function is safeguarded by the additional requirement that the prosecutor "present to the grand jury only evidence which would be admissible at trial."

The task force minority supported the following standard:

> *Grand jury indictment should not be required in any criminal prosecution, and Article I, Section 8 of the Hawaii Constitution should be accordingly amended. Pending constitutional amendment, provision should be made for the waiver of indictment by the accused in appropriate cases. Prosecutors should develop procedures that encourage and*

facilitate such waivers. If a grand jury indictment has been returned in a particular case, no preliminary hearing should be held in that case. In all cases, all testimony before the grand jury relating to the charges contained in the indictment returned against the defendant should be disclosed to the defense.

The grand jury should remain available: (1) to subpoena witnesses, compel testimony, investigate and indict in those cases where the techniques of independent investigation have been exhausted and the prosecutor is unable to determine whether a crime has been committed or by whom; and (2) to obtain an indictment against an accused person who cannot be located, thereby preventing the statute of limitations from running.

The foregoing standard was based in part of NAC Standard 4.4 ("Grand jury indictment should not be required in any criminal prosecution"), and in part on a study of the grand jury in Hawaii, see National Center for State Courts, The Grand Jury System of Hawaii (1976). The NAC standard was based on the belief that "any benefits to be derived from a requirement that all offenses be charged by grand jury indictment are, in the Commission's view, outweighed by the probability that the indictment process will be ineffective as a screening device, by the cost of the proceeding, and by the procedural intricacies involved." See Courts, p. 75. The Hawaii study reached the same conclusions following an empirical study of grand jury operations here.

The recommendation that a preliminary hearing not be held following the return of an indictment is consistent with Chung v. Ogata, 53 Hawaii 364, 494 P.2d 1342 (1972). H.R.P.P. 5(c)(1) codifies this result. All members of the task force agreed that the grand jury should be retained in special cases for investigative purposes.

Standard 4.5:

Presentation Before Judicial Officer Following Arrest

When a defendant has been arrested and he has not been released, the defendant should be presented before a judge within twelve hours of the arrest or as soon thereafter as a judge first becomes available. At this appearance, the defendant should be advised orally and in writing of the charges aginst him, of his constitutional rights (including the right to bail and to assistance of counsel), and of the date of his trial or preliminary hearing. If the defendant is entitled to publicly provided representation, arrangements should be made at this time. If it is determined that pretrial release is appropriate, the defendant should then be released.

At the initial appearance, the judge should have the authority, upon showing of justification, to remand the defendant to police custody for custodial investigation not involving interrogation. Such remands should be limited in duration and purpose, and care should be taken to preserve the defendant's rights during such custodial investigation.

Commentary:

Based on NAC Standard 4.5, this standard seeks to provide an accused with the panoply of rights he is entitled to under the constitution. In Courts, p. 77, the NAC explains that "denial of personal liberty is such an extreme step that the government should be required to provide the accused with an almost immediate opportunity to be informed of the charges against him and to be released if appropriate."

The NAC and the ABA are in agreement that the defendant should be taken before a judicial officer promptly following his arrest. ABA Standard 4.1 Relating to Pretrial Release states that the accused should be taken before a judicial officer "without unnecessary delay." NAC Standard 4.5 specifies a six-hour time limit within which this should be done. H.R.P.P. 5(a) requires that an arrested person be taken before the district court "promptly." In practice, this means that most defendants are taken to court the day following arrest.

The standard requires that the defendant be presented within twelve hours of the arrest or as soon thereafter as a judge first becomes available. H.R.S. §803-9(5) mandates that a person not be held for more than 48 hours following arrest without charging him with a crime and taking him before a judge. Since judges are not available for presentation of defendants on Sundays, we do not suggest that H.R.S. §803-9(5) be amended to substitute the 12 for the 48 hour limit, at least in the forseeable future. The 48-hour period is a mandatory outer limit, backed up with a misdemeanor penalty provision, see H.R.S. § 803-10. Our standard provides a workable goal for police departments to follow. We express no opinion whether violation of the 12 or 48 hour time limit should result in the exclusion of evidence obtained by the police as a result of the violation, but we note that, in State v. Kitashiro, 48 Hawaii 204, 397 P.2d 558 (1964), the Supreme Court refused to hold that an unlawful delay between arrest and the initial appearance before a judicial officer ipso facto rendered a confession obtained during the delay inadmissible.

The standard recommends that both oral and written notice of the charge, the defendant's rights, and the trial or hearing date be provided at the initial appearance. Under H.R.P.P. 10.1 the judge must "be satisfied that [the defendant] is informed of the charge against him," and H.R.P.P. 5(c)(1) requires that a copy of the charge and affidavits in support thereof be provided to the defendant. H.R.P.P. 10.1 requires the court to advise the defendant of his rights, including right to counsel and to bail, but written notice of rights and of the next appearance date is not provided for at present. This standard contemplates the development of a simple form that can be handed to defendants at initial appearance in court.

The commentary to NAC Standard 4.5 indicates that the explanation should be in the language the accused understands best. The Honolulu District Court has a Filipino and a Japanese interpreter. Interpreters for other languages are available, but there is no consistent policy regarding the use of interpreters, nor is there an enunciated policy of using the language understood best by the defendant. The Hawaii Supreme Court has found no due process right to have an interpreter at trial unless the defendant is unable to understand the questions posed through the proceedings or is unable to convey his thoughts to the jury. Should the defendant have some knowledge of English, the matter of providing an interpreter is left to the discretion of the trial court. State v. Faatiti, *54 Hawaii 637, 513 P.2d 697 (1973). We believe that every effort should be made at initial presentation to assure that the defendant understands the proceedings, the charge against him, and his constitutional rights.*

The standard points out that "arrangements" for publicly provided counsel should be made at initial presentation. The comments to NAC Standard 4.5, from which this language is taken, stress that every defendant should be represented by counsel at this hearing. "If the accused has an attorney who cannot appear at the hearing, if he needs time to employ counsel, or if he professes indigency and the question of entitlement to counsel on the basis of indigency cannot be resolved immediately, the court should appoint counsel for the limited purpose of representing the accused at this hearing." Courts, p. 78. ABA Standard 4.3 Relating to Pretrial Release is to the same effect. In Hawaii, counsel is not provided until after a determination of indigency, see H.R.S. §802-5, so that many defendants are not represented at initial appearance time.

All persons accused of offenses in which the potential maximum sentence is less than life imprisonment without parole are entitled to have bail set. H.R.S. §804-3. District Court judges routinely set bail at the time of initial appearance, but they do so pursuant to a bail schedule which means a fixed amount of money bail in each case, with bail reduction and release available only following a motion in Circuit Court. This practice must be modified if our standard is to be followed, because the standard contemplates pretrial release at initial appearance when appropriate without recourse to another court.

Hawaii has no law authorizing judges to remand a defendant to police custody for investigative purposes. As previously noted, H.R.S. §803-9(5) permits the police to detain a person for 48 hours before charging him and bringing him before a judge. In effect,

an accused can be held without bail for 48 hours while the police continue to investigate his case. This standard contemplates prompt presentation before the court so that the accused can be quickly advised of the charges and of his rights, but permits limited remands for "custodial investigation not involving interrogation." Limited in purpose and duration, such a remand will enable police to place the defendant in a line-up and accomplish other investigative tasks not including questioning. Implementation of such a remand procedure should help to realize the goal of prompt, initial presentment.

Standard 4.6:

Pretrial Release

Adequate investigation of defendants' characteristics and circumstances should be undertaken to identify those defendants who can be released prior to trial solely on their own promise to appear for trial. Release on this basis should be made whenever the court is satisfied that a defendant will appear when directed to do so. If a defendant cannot be appropriately released on this basis, consideration should be given to releasing him under certain conditions, such as the deposit of a sum of money to be forfeited in the event of nonappearance, or assumption of an obligation to pay a certain sum of money in the event of non-appearance, or the agreement of a third person to maintain contact with the defendant and to assure his appearance. Private bail bond agencies should be used when all other methods of assuring a defendant's appearance are inadequate.

Commentary:

This standard is similar to NAC Standard 4.6, except that the task force rejected the last two sentences in the NAC standard, which read as follows: "Participation by private bail bond agencies in the pretrial release process should be eliminated. In certain limited cases, it may be appropriate to deny pre-trial release completely." The task force felt that a call for the elimination of bail bonds, although a worthy goal, would be premature at this time. The standard, however, envisions bail bond agencies as a last-resort means of accomplishing pretrial release.

The commentary to NAC Standard 4.6 suggests: "Extensive experimentation has shown that most defendants can safely be released on nothing more than their own promise to reappear at a designated time." This belief is substantiated by Hawaii's experience with the Release on Recognizance program, and is reflected in our proposed standard on pretrial release. This standard is substantially similar to the recommendations in the following ABA Pretrial Release Standards: 1.1 Policy favoring release; 1.2 Conditions on release; 5.1 Release on order to appear or on defendant's own recognizance; and 5.2 Conditions on release.

Hawaii statutes guarantee the setting of bail for all persons accused of offenses in which the potential maximum sentence is less than life imprisonment without parole, see H.R.S. §804-3. Persons accused of offenses carrying punishment of life imprisonment without parole may be denied bail on a showing that "the proof is evident or the presumption great," see H.R.S. §804-3. The Hawaii Constitution, Article 1, Section 9, provides that "excessive bail shall not be required," and the Supreme Court has the power to

reduce excessive bail, see State v. Sakamoto, 56 Hawaii 447, 539 P.2d 1197 (1975). According to the court in Sakamoto, three factors are assessed in the determination of excessiveness: the likelihood of conviction, the pecuniary circumstances of the accused, and the probability that the accused will appear at trial.

The Hawaii Constitution, Article 1, Section 9, also provides: "The court may dispense with bail if reasonably satisfied that the defendant or witness will appear when directed, except for a defendant charged with an offense punishable by life imprisonment." Although Hawaii has not implemented this constitutional norm with bail reform legislation (compare the Federal Bail Reform Act, 18 U.S.C. §§3146 et seq.), a substantial measure of bail reform has been provided by the Release on Recognizance program, which has been in operation in Hawaii since the late 1960's. Defendants are interviewed and investigated by the Adult Probation department, and based on an assessment of residence, family ties, employment, and prior criminal record, may be recommended for release on personal recognizance, without the posting of cash bail. The Court, pursuant to such a recommendation, may grant ROR, reduce bail or order a supervised release. Supervised release is often accomplished by acceptance of the defendant in a group program such as Habilitat, Liliha House, Alcoholic Treatment Unit or Teen Challenge. In addition, employers who need or want an employee to continue working may assist in securing the defendant's release. The fact that the defendant is married and has children in need of care may be sufficient to allow supervised release.

The ROR program will refuse to recommend release for anyone who has previously violated arrangements or conditions imposed by the criminal justice system (probation, parole, bail, ROR), anyone who has wilfully failed to appear in court when required, and anyone accused of a Class A felony.

Hawaii practice thus accords generally with Standard 4.6, although Hawaii statutory law dealing with pretrial release is out of date and in need of revision.

Standard 4.7:

Nonappearance After Pretrial Release

Substantive law should deal severely with defendants who fail to appear for criminal proceedings. Programs for the apprehension and prosecution of such individuals should be established to implement the substantive law.

1. Substantive Law Concerning Failure to Appear. The substantive law regarding failure to appear after pretrial release should have the following features:

a. The offense of intentional and knowing failure to appear should be defined as the failure to appear on the designated date by an individual who, after receipt of a citation or summons to appear in court of after arrest, has been released from custody or has been permitted to continue at liberty upon the condition that he will appear subsequently in connection with the criminal action or proceeding, and who has had due notice of the date on which his appearance is required.

b. It should be an affirmative defense to the offense

of intentional and knowing failure to appear that the defendant was prevented from appearing at the specified time and place by unavoidable circumstances beyond his control.

c. The penalty for intentional and knowing failure to appear should not exceed 30 days if the substantive crime originally charged was a petty misdemeanor; should not exceed one year if the substantive crime originally charged was a misdemeanor; and should not exceed five years if the substantive crime originally charged was a felony.

2. Programs for apprehension of fugitives should have the following features:

a. If a defendant fails to appear at any scheduled court appearance, the trial court should immediately issue a warrant for his arrest and notify the prosecutor and the police.

b. Each police department should place special emphasis on securing the arrests of defendants who fail to appear for court proceedings.

Commentary:

Based on NAC Standard 4.7, this standard recommends criminal penalties for a defendant who fails to appear at scheduled court proceedings. Hawaii currently has two statutes providing penalties for bail jumping, H.R.S. §§ 710-1024 and 710-1025. Section 1024, which defines "bail jumping in the first degree," provides a possible five-year imprisonment penalty for intentionally failing

to appear in a felony prosecution, while Section 1025 provides a misdemeanor or petty misdemeanor cases. The commentary to these sections points out: "Hawaii previously [to the 1972 penal code revision] did not have criminal penalties for forfeiture of bail. This is a reflection of the philosophy of a number of jurisdictions that rely too heavily upon the monetary sanction to secure compliance with an order to appear at some future date.... The code espouses a more general use of the criminal sanction for failure to appear, encouraging the release of relatively poor people either on minimal bail or on their own recognizance, and assuring the appearance ... the more wealthy people who might otherwise be inclined to forfeit." Minor revisions to Sections 1024 and 1025 will be needed to conform them to Standard 4.7.

Standard 4.8:

Preliminary Hearing and Arraignment

If a preliminary hearing is held, it should be held within two weeks following arrest. If the defendant is in custody the preliminary hearing should be held within 48 hours after initial appearance. Evidence received at the preliminary hearing should be limited to that which is relevant to a determination that there is probable cause to believe that a crime was committed and that the defendant committed it.

If a defendant intends to waive preliminary hearing, he should give notice to this effect at least 24 hours prior to the time set for the hearing.

Commentary:

The standard follows NAC Standard 4.8 in providing for a preliminary hearing within two weeks of arrest. If the defen-

dant is not in custody, H.R.P.P. 5(c)(2) calls for a preliminary hearing within thirty days. For defendants in custody, the Standard and H.R.P.P. 5(c)(2) are in agreement that the preliminary hearing must begin within 48 hours. If the hearing is not begun, the defendant is entitled to be released from custody.

The standard recommends that the scope of the hearing be limited to a determination of probable cause. Hawaii law on the scope of the preliminary hearing is expressed in Chung v. Ogata, 53 Hawaii 364, 493 P.2d 1343 (1972), stating that the purpose of a preliminary examination is to prevent a person from being held in custody without a prompt determination of probable cause. However, the Court's suggestion on the scope of examination permitted pursuant to that purpose is found in State V. Faafiti, 54 Hawaii 637, 513 P.2d 697 (1973): "We also advise the district judges to permit the counsel for a defendant to examine fully and thoroughly witnesses at all preliminary hearings." 54 Hawaii at 641, 513 P.2d at 701.

Our standard omits the NAC recommendation that "arraignment should be eliminated as a formal step in a criminal prosecution." This omission is tied to our recommendation, in Standard 4.4, that the grand jury be retained. Arraignment is the point at which the defendant is called upon to plead to the indictment returned by the grand jury.

Standard 4.9:

Discovery

The prosecution should disclose to the defendant tall its evidence. The evidence disclosed should include, but not be

limited to, the following:

1. The names and last known addresses of persons whom the prosecutor intends to call as witnesses at the trial, together with their relevant written or recorded statements;
2. Any written or recorded statements and the substance of any oral statements made by the defendant or by any codefendant, together with the names and last known addresses of persons who witnessed the making of such statements;
3. Any reports or statements of experts which the prosecutor intends to introduce, or which were made by persons the prosecutor intends to call as witnesses, including results of physical or mental examinations, and of scientific tests, experiments or comparisons, and of analyses of physical evidence.
4. All relevant physical evidence, including but not limited to books, papers, documents, photographs, or tangible objects;
5. Whether there has been any electronic surveillance (including wiretapping) of conversations to which the defendant was a party or occurring on his private or business premises;
6. Prior criminal record of the defendant and all prospective prosecution witnesses; and
7. Any material or information which tends to negate the guilt of the defendant as to the offense charged, or would tend to reduce his punishment therefor, or might reasonably

be regarded as potentially valuable to the defense.

The intent of the foregoing provisions is that the prosecutor should turn over to the defense his entire file, except for matters specifically authorized by the court to be withheld. In addition, to the extent that discoverable items are in the possession or control of other governmental agencies or personnel, the prosecutor should use diligent good faith efforts to cause such material or information to be made available to defense counsel; and if the prosecutor's efforts are unsuccessful the court should issue suitable subpoenas or orders to cause such meterial or information to be made available to defense counsel.

The defendant should disclose to the prosecutor all the defense evidence which is not privileged. The evidence disclosed should include, but not be limited to, the following:

1. The names and last known addresses of persons whom the defense intends to call as witnesses at the trial, together with their relevant written or recorded statements;
2. Any reports or statements of experts which the defense intends to introduce, or which were made by persons the defense intends to call as witnesses, including results of physical or mental examinations, and of scientific tests, experiments, or comparisons, and of analyses of physical evidence;
3. All relevant physical evidence, including but not limited to books, papers, documents, photographs, or tangible objects;
4. The nature of any defense which the defense intends to use at the trial.

The intent of the foregoing provisions is that the defense should turn over to the prosecutor its entire file, except for privileged material and matters specifically authorized by the court to be withheld. In addition, to the extent that discoverable items are in the possession or control of investigators or employees of the defendant, the defendant should use diligent good faith efforts to cause such material or information to be made available to the prosecutor.

The disclosure contemplated in this standard should begin within five days after arraignment and should be completed within fifteen days after arraignment. In misdemeanor cases, disclosure should be completed at least five days before trial. If, subsequent to compliance with these rules or orders entered pursuant to these rules, a party discovers additional material or information which would have been subject to disclosure, he should promptly notify the other party of the existence of such additional material or information, and if the additional material or information is discovered during trial, the court should also be notified.

Rules and procedures should be developed to provide for the parties to depose prospective witnesses upon appropriate notice. In cases where defendants are provided public representation, the cost of depositions should be borne by the government.

The trial court should have the power to authorize either side to withhold evidence upon a showing that a substantial risk of harm to the witness or others would be created by the disclosure and that there is no reasonable way to eliminate such a risk.

Sanctions available to the trial judge upon the failure of a party to disclose non-privileged discoverable evidence should

include but not be limited to the exclusion of such evidence at trial, the initiation of contempt proceedings against the attorney for failure to disclose, a court order mandating compliance with proper discovery procedure, and granting a continuance to afford opportunity for rebuttal. The desire to maximize the tactical advantage of either the defense or the prosecution should not be regarded as justification under any circumstances.

Commentary:

The standard, although generally in accord with NAC Standard 4.9, goes beyond all existing criminal discovery recommendations of which we are aware by suggesting that both sides be required to reveal "all" the evidence. The standard makes this clear: "The intent of the foregoing provisions is that the prosecutor [there is similar language for the defense] should turn over to the defense his entire file, except for matters specifically authorized by the court to be withheld."

The ABA Standards Relating to Discovery and Procedure Before Trial provide that the prosecution should allow discovery "as soon as practicable" after charges are filed against the defendant. (All ABA standards discussed in this section are from the ABA Standards Relating to Discovery and Procedure Before Trial.) Discovery need not be requested by the defendant. Items of discovery include the identity and statements of witnesses and tangible evidence which the prosecution intends to introduce at trial. Experts' statements and test results are discoverable regardless of the prosecutor's intention to use such evidence at trial. The prosecutor is further required to disclose to the

defendant any exculpatory evidence in his possession. The ABA Standards further provide that upon request of defense counsel, the prosecution should disclose whether any unsubscribed grand jury testimony exists and whether the defendant was the subject of any electronic surveillance.

The ABA provides for disclosure by the defendant of the names and addresses of witnesses intended to be called at trial, the nature of any defense intended to be used at trial, and expert statements and test results, subject to constitutional limitations. The defendant is also required to submit to line-up procedures, fingerprinting, physical or mental examination, provision of handwriting or speech exemplars, and any investigation of his person which would be constitutionally permissible in the investigatory stages prior to formal charging.

With respect to sanctions for failure to comply with disclosure requirements, the ABA takes the position that sanctions should affect the evidence and merits of the case as little as possible. For this reason, the ABA rejects the sanction of excluding and evidence and proposes that other less drastic sanctions be imposed. Under the ABA standards, the trial court should either order discovery, order a continuance, or make other orders as the trial court deems just.

H.R.P.P. 16 is derived substantially from the above ABA Standards. The primary difference between the two is that in Hawaii, discovery is triggered by a formal request for discovery from the opposing side.

H.R.P.P. 16 is a broad, reciprocal discovery provision, mandating "upon written request" the disclosure of names and

addresses of witnesses, reports and statements of experts, and relevant books, papers, photographs and tangible objects. The defendant may be required, under Rule 16(c)(1), to submit to tests and examinations and, under Rule 16(c)(2), to disclose his defense or defenses. The prosecution must divulge the defendant's statements and criminal record, the fact of electronic surveillance, and exculpatory information. The Hawaii rule is derived substantially from the ABA Standards. It is a modern, comprehensive discovery rule, but it stops short of requiring disclosure of "all" evidence, and thus is not as liberal in providing discovery as is our proposal. Our proposal does not speak to the alibi defense in particular, but it would require the defendant to disclose the "nature" of the defense and both sides to disclose all their witnesses.

The major difference between our proposal and existing practice is our suggestion that "rules and procedures would be developed to provide for the parties to depose prospective witnesses upon appropriate notice." This discovery deposition recommendation goes beyond any proposed or existing criminal discovery rule of which we are aware. We recognize the potential costs involved, especially since the costs of depositions for indigent defendants "should be borne by the government," but we note that depositions have proved effective as discovery devices in civil cases. It may be that the increased costs would be substantially offset by the savings resulting from decreased numbers of cases going to trial, a result we anticipate would follow the implementation of our proposal. In any event, we suggest that Hawaii assume a leadership role in experimenting with vastly increased use of the deposition

procedure in criminal cases.

H.R.P.P. 12.1 provides that the defendant must give notice to the prosecutor and the court of his intention to rely upon the defense of alibi. Such notification must be made in writing and must generally be filed within the time allotted for the filing of pre-trial motions. Upon receipt of such notice, the prosecution must inform the defense of the specific time, date and place at which the offense was alleged to have been committed. The defendant must then reveal the specifics of his alibi, including the witnesses he intends to use to establish his alibi. The prosecution then must reveal the identity of its witnesses. The rule further provides for a continuing duty to disclose information as it becomes known, and provides that failure to comply with the rule may result in exclusion of testimony from any witness whose identity was not properly disclosed.

Standard 4.10:

Pretrial Motions and Conferences

All pretrial motions in jury trials should be filed within 21 days of the arraignment. A hearing should be held on such motions within 14 days of the filing of the motions. The court should rule on such motions within 72 hours of the close of the hearing.

At this hearing, the court should utilize a checklist to insure that all appropriate motions have been filed and all necessary issues raised. All issues raised should be resolved at this point; reserved rulings on motions should be avoided.

No case should proceed to trial until a pretrial conference

has been held, unless the trial judge determines that such a conference would serve no useful purpose. At this conference, maximum effort should be made to narrow the issues to be litigated at the trial.

Where possible, this conference should be held immediately following and as a part of the motions hearing. In any event, it should be held within five days of the motions hearing.

Commentary:

The standard follows NAC Standard 4.10 in providing for an omnibus hearing for the disposition of all pretrial motions. The standard requires that motions be filed within 21 days of arraignment and that "a hearing should be held on such motions within 14 days of the filing of the motions." The trial court is charged with maintaining a checklist to ensure that all appropriate motions are filed, and with ruling on all motions "within 72 hours of the close of the hearing."

The standard further provides for a pretrial conference following the resolution of pretrial motions for the purpose of narrowing the issues for trial "unless the trial judge determines that such a conference would serve no useful purpose." This recommendation also tracks NAC Standard 4.10.

The ABA Standards Relating to Discovery and Procedure Before Trial (Standards 5.1 through 5.4) call for substantially similar procedures. See also ABA Standard 2.52 Relating to Trial Courts.

H.R.P.P. 12 does not specifically require an omnibus motion hearing, but does require that most motions be raised prior to trial and that "a motion made before trial shall be determined

before trial unless the court orders that it be deferred...." Moreover, the commentary to Rule 12 points out that the rule is designed to encourage the use of a single motions hearing. Thus, Rule 12 substantially comports with our proposed standard. One major difference is the responsibility which the proposed standard places on the court to "insure that all appropriate motions have been filed." Existing rules contain no such requirement.

H.R.P.P. 1711 provides for a pretrial conference "upon motion of any party or upon [the court's] own motion." The purpose of the conference is to "promote a fair and expeditious trial." Thus, Hawaii practice is in substantial compliance with Standard 4.10.

Standard 4.11:

Priority Case Scheduling

Immediately following the arraignment, the prosecutor and defense attorney should advise the court of those cases that are to be tried and that should be given priority in assigning cases for trial. Cases should be given priority for trial where any of the following factors are present:

1. The defendant is in pretrial custody;
2. The defendant is a recidivist; or
3. The defendant's personal or professional circumstances render appropriate an early trial.

The prosecutor should also advise the court, in the presence of defense counsel, if the prosecutor believes that the case should be given priority for trial because the defendant poses a significant threat of violent injury to others or is a professional

criminal. The court should also consider, in setting priorities for trial, the age of the case and whether the defendant was arrested in the act of committing a felony.

Commentary:

The standard places upon counsel the responsibility for suggesting case scheduling priorities according to specified standards. The standard's procedures and criteria resemble those proposed in NAC Standard 4.11. The objectives of the standard are to protect the interests of defendants who are in custody, and to serve the public interest "by recognizing that certain offenders present a greater threat to the community than others and that rapid trial of such offenders reduces this threat." See Courts, p. 95.

ABA Standard 1.1 Relating to Speedy Trial states that:

> *To effectuate the right of the accused to a speedy trial and the interest of the public in prompt disposition of criminal cases, insofar as it practicable:*
>
> *a) the trial of criminal cases should be given preference over civil cases; and*
>
> *b) the trial of defendants in custody and defendants whose pre-trial liberty is reasonably believed to present unusual risks should be given preference over other criminal cases.*

Our standard assumes that the three specified kinds of criminal trials will be given priority over all other trials, but chooses not to recommend that all criminal trials have priority over all civil trials. In Hawaii all courts currently

follow a policy of assigning priority in case scheduling for trials of defendants in pretrial custody. We recommend that that policy be supplemented by the inclusion of the additional factors and procedures set forth in Standard 4.11.

Standard 4.12:

Continuances

Continuances should not be granted except upon a showing of good cause.

Commentary:

The standard follows NAC Standard 4.12 except that the latter's requirement of verified, written motions for continuances is deleted as unnecessary. The point of the standard is to reduce delay, and we believe that the requirement of "good cause" will enhance that result.

ABA Standard 1.3 Relating to Speedy Trial provides the same basic guidelines for granting continuances. See also ABA Standard 2.56 Relating to Trial Courts. The ABA states that the interest of the public in the prompt disposition of the case should be taken into account in evaluating a request for continuance. ABA Standard 1.4 Relating to the Function of the Trial Judge also charges the trial judge with responsibility for avoiding delays and extended recesses except for good cause.

There are several references to continuances in the Hawaii Rules of Penal Procedure. H.R.P.P. 5(c)(4) provides for the continuance of a preliminary hearing upon a showing of good cause; Rule 15(b) allows the court to extend the time for

the taking of depositions upon a showing of cause; and Rule 16(e)(8)(i) provides that the court may grant a continuance when one party has failed to comply with the regulations pertaining to discovery. Finally, the commentary to H.R.P.P. 48 indicates that when the rule is "combined with a policy of granting continuances only where fully justified" it articulates the concept that both society and the criminal justice system have an interest in speedy trials. Hawaii practice measures up to the proposed standard.

Standard 4.13:

Jury Selection

Questioning of prospective jurors should be conducted by the trial judge and the attorneys for the prosecution and defense. The trial judge's examination should cover matters relevant to statutory qualifications and potential jurors' general backgrounds. The balance of the examination should be conducted by attorneys for the prosecution and defense. Such examination should cover all matters relevant to the potential jurors' qualifications to to sit as jurors in the case on trial. Questions that are irrelevant, repetitive, or beyond the scope of proper juror examination should not be permitted.

The number of peremptory challenges should correspond to the gravity of the offense and should be established by court rule. The prosecution should be entitled to a number of peremptory challenges equal to the total number to which the defendants are entitled.

Commentary:

Standard 4.13 departs from NAC Standard 4.13 which proposes that "questioning of prospective jurors should be conducted exclusively by the trial judge." The NAC would permit counsel to submit proposed voir dire questions to the judge, and would require that such questions be put to prospective jurors unless repetitive, irrelevant, or "beyond the scope of proper juror examination." Our standard is more in line with ABA Standard 2.4 Relating to Trial by Jury which recommends that the judge permit questioning by the defense and the prosecutor.

H.R.P.P. 24 gives the trial court the option of allowing the parties to conduct the voir dire examination or conducting the examination itself. If the latter option is chosen, "the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper." Our standard is to the same effect.

The statutory qualifications for jury duty are contained in H.R.S. §612-4. In brief, the statute requires that a potential juror be an eighteen-year-old citizen of the U.S. and the State and a resident of the circuit; that he read, speak, and understand English, that he suffer from no physical or mental disability; and that he not be a convicted felon. Section 612-5 adds the further provision that a juror not be related to a party to the case.

H.R.P.P. 24 also provides that each side is entitled to twelve peremptory challenges if the offense charged is punishable by life imprisonment. In such cases involving multiple defendants, each defendant is allowed six peremptory challenges. In

all other non-capital criminal cases, each side is allowed three peremptory challenges. If such other cases involve multiple defendants, each defendant is entitled to two peremptory challenges. The prosecution, in all cases, is allowed the same number of peremptory challenges allowed to all defendants. We take no position on whether the existing Hawaii scheme of peremptory challenges complies with our proposal that the number of peremptories "should correspond to the gravity of the offense." We note that the Hawaii Supreme Court, in State v. Pokini, 55 Hawaii 640, 526 P.2d 94 (1974), stressed the importance of the voir dire examination to the intelligent exercise of peremptory challenges. Moreover, the U.S. Supreme Court, in Pointer v. United States, 151 U.S. 396 (1894), pointed out that the peremptory challenge is "one of the most important rights secured to the accused."

Standard 4.14

Jury Size and Composition

Juries in criminal prosecutions should be composed of twelve persons. A reduction in jury size during the course of a trial to not less than ten members for reasons of illness or other good cause should be permitted when all parties stipulate to such a reduction.

Commentary:

We rejected the recommendation of NAC Standard 4.14 that criminal trial juries, in cases not punishable by life imprisonment, "should be composed of less than 12 but of at least six persons." See Courts, p. 101. The NAC characterizes the twelve-

person jury as an "accident of history," and suggests that juries of less than twelve can reliably perform the fact-finding function. We believe that Hawaii is committed to the twelve-person jury, whatever its origin.

ABA Standard 1.1 Relating to Trial by Jury states that "the right to jury trial may be limited...by the use of juries of less than twelve without regard to the consent of the parties." However, recently adopted ABA Standard 2.10(a) Relating to Trial Courts states that juries should be composed of twelve persons except when the potential term of imprisonment is not more than six months. In such cases a jury numbering between six and twelve would be satisfactory. The ABA believes that "the criminal jury should consist of the traditional twelve persons to assure the breadth of viewpoint ordinarily included in such a relatively large group." We concur in this view.

The U.S. Supreme Court in Williams v. Florida, 399 U.S. 78 (1970), said that the Sixth Amendment right to trial by jury is satisfied by the use of juries composed of less than twelve members, as long as the group is "large enough to promote group deliberation, free from outside attempts at intimidation, and ...provide a fair possibility for obtaining a representative cross-section of the community." The Williams court held that Florida's use of a six-person jury did not violate the defendant's right to trial by jury. This interpretation of the Sixth Amendment permits but does not require that states provide for juries of less than twelve.

H.R.P.P. 23(b) provides that "juries shall be of 12 but at any time before verdict the parties may stipulate in writing

with the approval of the court that the jury shall consist of any number less than 12." This rule is consistent with Standard 4.14.

Standard 4.15:

Trial of Criminal Cases

In every court where criminal proceedings are held, the court and attorneys should make every effort to expedite the proceedings.

Commentary:

Standard 4.15 is designed to place responsibility on the court and counsel to expedite trial proceedings. The task force rejected the specific suggestions contained in NAC Standard 4.15 to the effect that court sessions should begin and end at certain times, that opening statements be clear and nonargumentative, that evidence be relevant, and that summations be subject to time limits, as obvious but unnecessary to detail. In Hawaii the courts open at 7:45 a.m. and close at 4:30 p.m. Most trials are scheduled to begin at 8:30 a.m. Jury selection for the following case begins when the jury retires to consider its verdict in the preceding case. An alternative procedure for picking juries has been to require the presence of the jury panel on Monday and pick the juries for the scheduled trials during the upcoming week. We believe that the courts in Hawaii are in compliance with our standard.

CHAPTER 5

SENTENCING

Standard 5.1:

The Court's Role in Sentencing

When sentencing a defendant convicted of a felony to a term of imprisonment, the trial judge shall impose a sentence, which in accordance with applicable statutes, fixes the maximum period that a defendant's liberty may be restricted and the minimum term of imprisonment which must be served before parole eligibility commences. In imposing sentence, the judge should obtain and consider as much individualized information about the defendant as is available. The Intake Service Center should provide individualized sentencing information to the court. Within the maximum and minimum sentences fixed by the court, other agencies may be given the power to determine the manner and extent of interference with the defendant's liberty.

Commentary:

The task force considered three methods of defining the court's sentencing function: (1) that the court "have no function in the sentencing of criminal defendants"; (2) that the court impose only the maximum term of imprisonment, and that other agencies be given the power to determine the minimum sentence for parole eligibility; and (3) the chosen standard, that the court fix both the maximum and minimum term of imprisonment. Option (2) is the method recommended by NAC Standard 5.1, and this is the method currently employed in Hawaii. In

selecting option (3), the task force, by a split vote, recommends that the court be given greater power in assuring that a particular minimum sentence be served by a particular defendant than is the case at present.

NAC Standard 5.1 is as follows:

> *Jury sentencing should be abolished in all situations. The trial judge should be required to impose a sentence that, within limits imposed by statute, determines the maximum period a defendant's liberty may be restricted. Within this maximum period, other agencies may be given the power to determine the manner and extent of interference with the offender's liberty. Continuing jurisdiction in the trial court over the offender during the sentence imposed is not inconsistent with this standard.*

ABA Standard 2.1 Relating to Sentencing Alternatives and Procedure is as follows:

> *(a) All crimes should be classified for the purpose of sentencing into categories which reflect substantial differences in gravity. The categories should be very few in number. Each should specify the sentencing alternatives available for offenses which fall within it. The penal codes of each jurisdiction should be revised where necessary to accomplish this result.*
>
> *(b) The sentencing court should be provided in all cases with a wide range of alternatives, with gradations of supervisory, supportive and custodial facilities at its disposal so as to permit a sentence appropriate for each individual case.*
>
> *(c) The legislature should not specify a mandatory sentence for any sentencing category or for any particular offense.*
>
> *(d) It should be recognized that in many instances in this country the prison sentences which are now authorized, and sometimes required, are significantly*

> *higher than are needed in the vast majority of cases in order adequately to protect the interests of the public. Sentences of twenty-five years or longer should be reserved for particularly serious offenses or, under the circumstances set forth in sections 2.5(h) and 3.1(c) (special term), for certain particularly dangerous offenders. For most offenses, on the other hand, the maximum authorized prison term ought not to exceed ten years except in unusual cases and normally should not exceed five years.*

The Hawaii Penal Code contains a comprehensive sentencing scheme. The court may suspend the imposition of sentence, may impose a fine authorized by statute, or may imprison a convicted defendant. If the court sentences a defendant to prison, the maximum term is automatically fixed by Hawaii Penal Code §660: 20 years for a class A felony, 10 years for a class B felony, and 5 years for a class C felony. Sections 661-663 of the penal code deal with extended terms of imprisonment for certain offenders and with misdemeanor sentencing, and would not be affected by our recommendation. Section 669 requires that the board of paroles and pardons, "as soon as practicable but no later than six months after commitment...hold a hearing, and on the basis of the hearing make an order fixing the minimum term of imprisonment to be served before the prisoner shall become eligible for parole." Standard 5.1 would place the function of minimum term setting with the court.

CHAPTER 6

REVIEW OF THE TRIAL COURT PROCEEDINGS

Standard 6.1:

Unified Review Proceedings

Every convicted defendant should be afforded the opportunity to obtain a full and fair judicial review of his conviction and sentence by a tribunal other than that by which he was tried or sentenced. Review in that proceeding should extend to the entire case, including:

1. The legality of all proceedings leading to the conviction;
2. The legality and appropriateness of the sentence;
3. Errors not apparent in the trial record that might also be asserted in collateral attack.

Commentary:

The standard is similar to NAC Standard 6.1, except that the latter would include in the unified appellate proceeding "matters that have heretofore been asserted in motions for new trial." The NAC standard articulates the basic proposal of the NAC regarding appellate review, and the NAC commentary points out that the premise of the NAC proposal "is that there should be a single, unified review proceeding in which all arguable defects in the trial proceeding can be examined and settled finally." See Courts, p. 113. The NAC seeks to accomplish this goal by incorporating in a unified proceeding nearly all possible appellate issues including review of guilty pleas, review of sentences, and review of matters not necessarily

apparent in the trial record which have heretofore been raised in motions for new trials and collateral attack proceedings. The task force adopted the substance of the NAC standard, but omitted mention of motions for new trials, which are governed by H.R.P.P. 33.

Such a unified appellate proceeding would presumably "discover and dispose of all conceivably arguable defects in the trial proceeding" (see Courts, p. 117), thereby imparting a high degree of finality to the reviewing court's disposition. The standard thus envisions one expeditious and efficient review procedure which would reduce the number of appeals, the time period from appeal to final decision, and the number of collateral attacks and appeals therefrom. Because of the novelty of this proposal, it conflicts with the ABA recommendations and with Hawaii law and practice.

The ABA position on review of criminal cases is contained in three volumes: ABA Standards Relating to Criminal Appeals, ABA Standards Relating to Appellate Review of Sentences, and ABA Standards Relating to Post-Conviction Remedies. Although the ABA does not specifically recommend the retention of the traditional mode of appellate review, a reading of the three relevant ABA volumes indicates that the ABA appellate model is the traditional one. Hawaii also follows this traditional mode. H.R.S. § 641-16 limits the Supreme Court to correcting errors appearing on the record. The statute further limits appeals to matters brought to the attention of the trial court and reserved for appeal. See Kawamoto v. Yasutake, 49

Hawaii 42, 410 P.2d 976 (1967). However, when justice requires, the Supreme Court may confront issues raised for the first time on appeal. In Re Taxes, Hawaiian Land Co., 53 Hawaii 45, 487 P.2d 1070 (1971).

The NAC, the ABA, and Hawaii all agree on the propriety of an appeal of the sentence. See ABA Standard 1.1 Relating to Appellate Review of Sentences, and H.R.S. §541-16 which permits the Hawaii Supreme Court to correct or reduce an "illegal or excessive" sentence. The balance of Standard 6.1, however, will require legislative implementation.

Standard 6.2:

Professional Staff

The reviewing court should have a full-time professional staff of lawyers, responsible directly to the judges, to perform the following functions in review of criminal cases:

1. Monitoring. The staff, assisted by the clerks of the Supreme Court, should affirmatively monitor each case to insure compliance with the court's rules and to avoid unnecessary delay in the review process.
2. Shaping the Record. The full trial transcript should be expeditiously provided the reviewing court, and the staff should take action to insure that those portions of transcripts, trial court papers, and other matters that are essential to a full and fair adjudication of the issues are put before the judges.
3. Identification of Issues. The staff should take affirmative steps to discover all arguable issues in the case, even though not asserted by defendant and apparent on the record, so that all matters that might be asserted later as a basis for further review can be considered and decided in the initial review proceeding.
4. Screening. The staff should review all cases, identify those that contain only insubstantial issues, and prepare pre-hearing memoranda recommending appropriate disposition so that those cases may be decided with a minimum involvement of judicial time.

The function of this staff should be to supplement rather than replace the work of attorneys representing the prosecution

and the defendant in each case.

Commentary:

This standard is the key to the unified proceeding envisioned in Standard 6.1. It is similar to NAC Standard 6.2, the commentary to which notes that "staff attorneys are useful to any appellate court, but they are essential to the concept of a single review of the case...if such review is to be expeditious and is to embrace all issues." The proposal would have the professional staff handle many of the court's administrative duties, thereby freeing the justices for more important responsibilities. Additionally, the screening function of the staff is designed to allow the justices to concentrate on cases with substantial legal issues by disposing of insignificant cases with a minimum amount of judicial involvement. The professional staff should evaluate the case prior to review by the appellate judges. After such a review, the staff would recommend appropriate disposition if there are no issues of substance and thus screen frivolous appeals. The ABA has no comparable provision.

Current Hawaii practice, under H.R.S. §602-5, requires indigent appellants to move the trial court for leave to appeal in forma pauperis, thus providing one means of screening frivolous appeals. In State v. Hayashida, 55 Hawaii 453, 522 P.2d 184 (1974), the Hawaii Supreme Court ruled that unless the issues raised by the indigent defendant in his motion are so frivolous that an appeal based on such issues would be dismissed, the appeal request must be granted. Should the trial

court deny the motion, the defendant would have the right to appeal such a determination. *In Re Carvelo*, *44 Hawaii 31 (1944). The task force believes that the business of screening frivolous appeals is more appropriately lodged in the appellate court, assuming a staff adequate to perform this function.*

The professional staff is assigned other tasks which are important to a smoothly functioning appellate procedure. The staff would be responsible for the monitoring of the case to insure its prompt resolution. ABA Standard 3.1(a) Relating to Criminal Appeals is to the same effect.

In Hawaii, H.R.P.P. 39(a) places "the supervision and control of the proceedings on appeal...in the supreme court from the time the notice of appeal is filed with its clerk." The Hawaii Supreme Court has no staff of lawyers other than two law clerks assigned to each of the four associate justices. The Chief Justice has three law clerks. The responsibilities of the individual law clerks are determined by the justices, but certainly are not as extensive as contemplated by Standard 6.2. Also, most law clerks are recent law graduates and lack the requisite trial experience to go outside the record to determine the presence of additional issues and to gather evidence on such a point. This standard envisions additional personnel than are currently available to the Supreme Court.

Standard 6.3:

Flexible Review Proceedings

The reviewing court should utilize procedures that are flexible and that can be tailored in each case by the staff and

the judges to insure maximum fairness, expedition, and finality through a review of the trial court proceeding. The review procedures should provide for:

1. Receiving and considering new evidence on the issue of guilt, or on the sentence, or on the legality of the trial court proceedings; or referral to the trial court for the receipt of new evidence and resolution of appropriate issues;
2. Means of identifying and deciding all arguable points in the case, whether or not apparent on the record, including points that might also be raised in a collateral attack on the conviction or sentence;
3. Internal flexibility permitting the reviewing court to control written briefs and oral argument, including leeway to dispose of the case without oral argument or on oral argument without written briefs on some or all of the issues;
4. Authority in the reviewing court, at its discretion, to require or permit the presence of the defendant at a review hearing;
5. Authority in the reviewing court to remand the case for reconsideration of sentence.

Commentary:

Standard 6.3 resembles NAC Standard 6.3, the commentary to which says: "Flexible and distinctive procedures for criminal review are especially important in implementing the concept of unified review, under which provisions must be made

for receiving evidence outside the record and spotting issues not asserted by the defendant. There is an interrelationship between the flexible procedures provided for in this standard and the staff functions contemplated in Standard 6.2. Each is dependent on the other." See Courts, p. 123.

Regarding the control of written briefs and oral argument, Rule 2(e) of the Rules of the Supreme Court of Hawaii permits the Supreme Court to approve a written stipulation of the parties that the case be submitted on briefs without oral argument. However, this rule does not permit the elimination of written briefs and, more importantly, does not allow submission on the briefs without a stipulation by the parties. Thus, Hawaii rules permit the parties to initiate a variation from standard procedure, but the standard contemplates that the reviewing court can unilaterally alter the appellate procedure, such as by eliminating oral argument altogether in appropriate cases.

Neither Hawaii law nor the ABA speaks to the issue of the presence of the defendant at the appellate argument. Appellants on bail are free to attend the proceedings in their cases, but Standard 6.3(4) would enable the court to require the presence of a jailed defendant.

Standard 6.3(5) enables the Supreme Court "to amend the case for reconsideration of sentence." NAC Standard 6.3(6) would enable the reviewing court "to substitute for the sentence imposed any other disposition that was open to the sentencing court, if the defendant has asserted the excessiveness of his

sentence as error." ABA Standard 3.3 Relating to Appellate Review of Sentences states that the appellate court should have the authority to increase sentence. Hawaii law is expressed in H.R.S. §641-16: "In case of a conviction and sentence in a criminal case, if in its opinion the sentence is illegal or excessive it [the Supreme Court] may correct the sentence to correspond with the verdict or finding or reduce the same, as the case may be." Standard 6.3(5) provides the additional remedy of remand for sentencing reconsideration by the trial judge.

Standard 6.4: Dispositional Time in Reviewing Cases

The reviewing court should establish time limits for the disposition of appellate cases.

Commentary:

In recommending that the reviewing court "establish time limits for the disposition of appellate cases," the task force rejected the guidelines proposed in NAC Standard 6.4: 30 days for initial action, 60 days for final disposition of cases "containing only insubstantial issues," and 90 days for other cases. The task force perceived no need to specify appellate time limits, but did think it appropriate to call upon the appellate court to establish guidelines. Compare ABA Standard 3.4 Relating to Criminal Appeals, which urges courts to develop and employ techniques for the expeditious processing of appeals.

H.R.P.P. 37(c) provides that a convicted defendant must file a notice of appeal "within 10 days after the entry of the judgment or order appealed from." The prosecution is given 30

days. "Upon a showing of excusable neglect" either party may be granted an additional 30 days.

H.R.P.P. 39(c) requires that the appellant docket his appeal within 40 days from the date of filing of the notice of appeal. Hawaii Supreme Court Rule 3(b) requires the filing of the opening brief within 60 days after the docketing of the appeal, and Rule 3(c) specifies that answering briefs are due within 60 days of receipt of the opening brief. Rule 3(d) permits appellant to file a reply brief within 30 days after receipt of the answering brief. Time limits for scheduling oral arguments and final disposition of appeals have not been promulgated.

Standard 6.5:

Exceptional Circumstances Justifying Further Review

After a reviewing court has affirmed a trial court conviction and sentence, or after expiration of a fair opportunity for a defendant to obtain review with the aid of counsel, the conviction and the sentence generally should be final and not subject to further review in the state courts. Further review should be available only in the following limited circumstances:

1. An appellate court determines that further review would serve the public interest in the development of legal doctrine or in the maintenance of uniformity in the application of decisional and statutory law;
2. The defendant asserts a claim of newly discovered evidence, which was not known to him and which could not have been discovered through the exercise of due

diligence prior to conclusion of the unified review proceeding or the expiration of the time for seeking review, and which in light of all the evidence raises substantial doubt as to the defendant's guilt; or

3. The defendant asserts a claim of constitutional violation which, if well-founded, undermines the basis for or the integrity of the trial or review proceeding; or impairs the reliability of the fact-finding process at the trial.

Commentary:

Standard 6.5 should be viewed in conjunction with Standard 6.1, which expands the scope of direct review. "Further" or collateral review is correspondingly restricted by this standard, which resembles NAC Standard 6.5. The NAC points out that, even with unified review proceedings as recommended in Standard 6.1, "there will still be exceptional circumstances in which a further review of certain issues will be justifiable."

The ABA proposes a unified post-conviction review proceeding. ABA Standard 1.1 Relating to Post-Conviction Remedies reads: "There should be one comprehensive remedy for post-conviction review (i) of the validity of judgements of conviction or (ii) of the legality of custody or supervision based upon a judgement of conviction. The unitary remedy should encompass all claims whether factual or legal in nature and should take primacy over any existing procedure or process for determination of such claims." Thus the ABA would opt for a unified review process at the post-conviction stage rather than at the direct appeal stage. While Standard 6.5 limits further review to three

circumstances, the ABA lists eight grounds of proper post-conviction relief. See ABA Standard 2.1 Relating to Post-Conviction Remedies. An analysis of these grounds indicates that most of them could fit into one of the three categories listed in Standard 6.5.

H.R.P.P. 40, a new provision entitled "Post-conviction proceeding," measures up in most respects to the spirit of Standard 6.5. Rule 40's remedy "shall encompass all common law and statutory procedures for the same purpose, including habeas corpus and coram nobis." Relief from judgments of conviction can be based on the following grounds: "(i) that the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawaii; (ii) that the court which rendered the judgment was without jurisdiction over the person or the subject matter; (iii) that the sentence is illegal; (iv) that there is newly discovered evidence; or (v) any ground which is a basis for collateral attack on the judgment." Rule 40 also provides for appeals to the supreme court, and for public defender representation in appropriate cases.

Standard 6.6:

Further Review of Issues Previously Adjudicated at the Appellate Level.

If, after initial appellate review, a defendant seeks further review, claiming a constitutional violation in the exceptional circumstances described in subparagraph 3 of Standard 6.5, the court should not adjudicate the claim if it has been adjudicated previously on the merits by any appellate court in

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the state court system.

Commentary:

Standard 6.6 is similar to NAC Standard 6.6, which employs the principle of res judicata to bar repetitious litigation. The NAC comments point out: "[T]here is little justification within a single court system for allowing the relitigation of any issue, constitutional or otherwise. If a State court already has adjudicated the matter, a court of that same State need not afford a second adjudication." See Courts, p. 132.

If an issue has been litigated and ruled upon in a habeas corpus action, then it cannot be raised again in a subsequent habeas corpus action. H.R.S. §660-5(4). H.R.P.F. 40(a)(3), governing post-conviction proceedings in Hawaii, establishes that post-conviction relief "shall not be available and relief ...shall not be granted where the issues sought to be raised have been previously ruled upon or were waived." This accords with Standard 6.6, and with ABA Standard 6.1(a) Relating to Post-Conviction Remedies, which provides: "Unless otherwise required in the interests of justice, any ground of post-conviction relief...which has been fully and finally litigated in the proceedings leading to the judgment of conviction should not be re-litigated in post-conviction proceedings." The ABA suggests that finality be an affirmative defense to be pleaded and proved by the state upon the filing of a repetitious petition. The ABA also holds that a question has been fully and finally litigated when the highest court of the state has ruled on the merits of the question.

Standard 6.7:

Further Review of Prior Factual Determinations

When a defendant seeks further review, claiming a constitutional violation in the exceptional circumstances described in subparagraph 3 of Standard 6.5, determinations of basic or historical facts previously made by either a trial or reviewing court, evidenced by written findings, should be conclusive, unless the defendant shows that there was a constitutional violation that undermined the integrity of the fact-finding process.

Commentary:

This standard resembles NAC Standard 6.7, the comments to which point out: "[I]t is desirable to treat underlying factual issues--the historical or basic facts--as settled for all purposes, once they have been tried and reviewed in a constitutionally valid proceeding in any court." Under this standard, a decision on the facts underlying the legal decision cannot be relitigated unless the prior factual determination was constitutionally infirm.

Hawaii law is in accord with Standard 6.7. H.R.P.P. 40(f), applicable to post-conviction proceedings, empowers a court to "deny a hearing or a specific question of fact when a full and fair evidentiary hearing upon that question was held at the original trial or at any later proceeding." ABA Standard 6.2 Relating to Post-Conviction Remedies is to the same effect.

Standard 6.8:

Further Review of a Claim Not Asserted Previously

When a defendant seeks further review, claiming a constitutional

violation in the exceptional circumstances described in sub-paragraph 3 of Standard 6.5, the court should not adjudicate the merits of the claim if in the trial court or the review proceeding it was not adjudicated because it was expressly disclaimed by the defendant or his lawyer.

Commentary:

This standard is based upon NAC Standard 6.8, the comments to which note that a disclaimer by the defendant or his counsel "may occur more often if the unified review proceeding embodied in these standards is adopted, because the reviewing court would probe affirmatively for possible constitutional defects in the trial proceeding by directing inquiries to the defense lawyer and the defendant." See Courts, p. 135.

H.R.P.P. 40(a)(3), governing post-conviction proceedings, provides that relief "shall not be granted where the issues sought to be raised...were waived. An issue is waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under this rule, and the petitioner is unable to prove the existence of extraordinary circumstances to justify his failure to raise the issue."

Standard 6.9:

Stating Reasons for Decisions

A reviewing court should always state its reasons for its decision in a criminal case.

As to insubstantial issues, the statement of reasons should be brief and designed only to inform the defendant of what contentions the court considered and why, by citation to authority or otherwise, it rejected them.

Commentary:

The Hawaii Supreme Court employs a policy that measures up to Standard 6.9. Written opinions are rendered in all cases, although not all are published in the official reports.

CHAPTER 7

THE JUDICIARY

Standard 7.1:

Judicial Selection

The selection of judges should be based on merit qualifications for judicial office. A selection process should aggressively seek out and consider the best potential judicial candidates.

Judges should be appointed from a list of names supplied by the Judicial Council. The Hawaii Bar Association should review all proposed judicial appointments and make appropriate evaluations and recommendations.

Commentary:

The first paragraph of Standard 7.1 is similar to NAC Standard 7.1, which also calls for "merit qualifications for judicial office." The NAC also proposes a judicial nominating commission to recommend candidates to fill judicial vacancies. Our standard calls for the names of candidates to be supplied by the Hawaii Judicial Council.

Article V, Section 3, of the Hawaii Constitution provides for the appointment of Supreme Court Justices and Circuit Court Judges by the Governor with the advice and consent of the Senate. H.R.S. §604-2 empowers the Chief Justice to appoint all District Court Judges.

Standard 7.2:

Judicial Tenure

Appointment should be for a term of ten years for appellate

and circuit court judges. At the end of each term, should the appointing authority desire to reappoint an appellate or circuit court judge to another ten year term, he should seek and obtain the recommendation of the Judicial Council.

District Court judges should be appointed for a term of six years. At the end of each term, should the appointing authority desire to reappoint a district court judge to another six year term, he should seek and obtain the recommendation of the Judicial Council.

An mandatory retirement age of 65 years should be set for all judges, subject to a provision enabling judges over that age to sit thereafter at the discretion of the Chief Justice of the Supreme Court.

Commentary:

NAC Standard 7.2 proposes that judges be appointed for an initial term, and that "at the end of each term, the judge should be required to run in an uncontested election at which the electorate is given the option of voting for or against his retention." ABA Standard 1.2 Relating to Court Organization also favors the uncontested election procedure.

Hawaii Supreme Court Justices and Circuit Court Judges serve terms of ten years, see Hawaii Constitution, Art. V, Sec. 3. Under H.R.S. §604-2, District Court Judges are appointed for terms of six years. Retention of judges occurs through re-appointment. The task force opted for the existing scheme, with the provision that the power to re-appoint should be exercised only after consultation with the Judicial Council.

The current mandatory retirement age in Hawaii is 70. The task force chose the NAC-recommended retirement age of 65.

Standard 7.3:

Judicial Compensation

Judges should be compensated at a rate that adequately reflects their judicial responsibilities. The salaries and retirement benefits of the federal and various state judiciaries should be considered as guides. Where appropriate, salaries and benefits should be increased during a judge's term of office.

Commentary:

Standard 7.3 is similar to NAC Standard 7.3, which recommends that the salaries and retirement benefits of the Federal Judiciary serve as a model for the states. As of January 1, 1976, Federal District Court judges earned $42,000 a year. As of January 1, 1976, Hawaii were compensated in the following manner:

Positions	*Compensation*
Chief Justices of the Supreme Court	*$47,500*
Associate Justices of the Supreme Court	*$45,000*
Circuit Court Judges	*$42,500*
District Court Judges	*$40,000*

(See H.R.S. §§602-2, 603-5, and 604-2.5)

After retiring, Hawaii judges receive a pension equal to 3.5 percent of their average final compensation for each year of service. Average final compensation is defined as the salary earned during the three highest salaried years of service.

H.R.S. §88-21. This means that if a judge served for ten years, upon retirement he would be entitled to receive 35 percent of his average final compensation as retirement benefits. However, retirement benefits may not exceed 75 percent of the average final compensation. According to 28 U.S.C. §371, federal judges receive as retirement salary the salary they were receiving at the time of retirement, provided they have served at least ten years.

ABA Standard 1.23(a)(i) Relating to Court Organization recommends that pension systems should provide at least three-quarters salary upon retirement at age 70 if the judge has served on the bench for more than ten years. If the judge has served less than ten years, a lesser amount would be provided. The ABA further recommends that pensions be based on current judicial salaries which means that pensions should keep up with inflation.

Hawaii practice is thus inconsistent with the ABA in the area of retirement benefits. Both Hawaii and the ABA agree that the pension should be a percentage of a base figure. Hawaii sets a limit of three-quarters on the percentage figure while the ABA uses three-quarters as the minimum level. Hawaii also uses average final compensation as the base figure, whereas the ABA recommends that the current judicial salary be used as the base figure.

Standard 7.4:

Judicial Discipline and Removal

A judge should be subject to discipline or removal for permanent physical or mental disability seriously interfering

with the performance of judicial duties, willful misconduct in office, willful and persistent failure to perform judicial duties, or conduct prejudicial to the administration of justice.

A five-member commission for judicial qualifications should be created, appointed by the governor from a list submitted to him by the Judicial Council. The commission should have the power to initiate, receive, investigate, and consider charges regarding judicial misconduct. If the evidence warrants, the commission should certify to the governor that probable cause for removal or retirement exists. The governor should appoint a three-member board to conduct a hearing on the alleged misconduct. One of these members should be the Chief Justice of the Supreme Court or a designated associate justice who shall be the chairperson of the board. At this hearing, all parties shall have the opportunity to be heard, the right to subpoena witnesses, the right to counsel and cross-examine. The decision must be based on competent and substantial evidence. Should the board recommend removal from office, within 30 days of receipt of such recommendation, the governor shall retire or remove the judge from office.

Commentary:

H.R.S. §610-3 provides that a judge may be removed for incapacity substantially preventing him from performing his judicial duties, willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance or conduct prejudicial to the administration of justice bringing the judicial office into disrepute. NAC Standard 7.4 is similar.

ABA Standard 1.22 Relating to Court Organization specifies misconduct, disability, or gross incompetence amounting to disability as grounds for discipline or removal. It further describes a nine-member board of judicial inquiry which would investigate all charges and recommend appropriate disposition to the State Supreme Court. The Supreme Court would then invoke the sanction it deemed appropriate.

NAC Standard 7.4 recommends that a judicial conduct commission of judges, lawyers, and lay members be formed and empowered to investigate allegations lodged against judges and take appropriate action regarding their conduct. In the NAC scheme the investigating body also has the power to discipline, while the ABA places this power in the Supreme Court.

Hawaii has a commission for judicial qualifications composed of five members. These five members are appointed by the Governor, subject to confirmation by the State Senate, from a list of ten names provided by the Judicial Council. H.R.S. §610-1. This commission is empowered to initiate, receive and consider charges concerning Supreme Court justices or circuit court judges. The removal of district court judges is accomplished by the Supreme Court. H.R.S. §604-2.

This Commission for Judicial Qualification receives all charges against judges which are signed under oath. It has the power to subpoena witnesses, administer oaths, and take testimony. If the majority of the members determine that there is probable cause to believe that a judge should be removed, the Commission certifies such findings to the governor. H.R.S.

§610-3.

Upon receipt of the Commission's certification, the governor appoints a board to adjudicate the charge, and this board conducts a hearing to determine whether the judge should remain in office. H.R.S. §610-12. The board consists of three members appointed by the governor, one member being the Chief Justice or an associate justice who acts as the chairman of the board. At the hearing before this board of judicial removal, all parties have the opportunity to be heard, to subpoena witnesses, the right to counsel, and the right of cross-examination. Witnesses testify under oath and the hearings are closed to the public unless the party charged requests an open hearing. Although the board is not bound by strict rules of evidence, the board's findings must be based upon competent and substantial evidence. If the board recommends that a justice or judge should not remain in office, within thirty days thereafter the governor must remove or retire him from office. H.R.S. §610.13. Since the governor is bound by the board's recommendations, in practice it is the board that determines whether or not the judge should be removed from office.

The task force examined the statutory scheme for judicial removal just described, and decided to recommend it as the standard for Hawaii.

Standard 7.5:

Judicial Education

Hawaii should create and maintain a comprehensive program of continuing judicial education. Planning for this program should recognize the extensive commitment of judge time, both as faculty

and as participants for such programs, that will be necessary. Funds necessary to prepare, administer, and conduct the programs, and funds to permit judges to attend appropriate national and regional educational programs, should be provided.

The program should have the following features:

1. All new trial judges, within one year of assuming judicial office, should attend both local and national orientation programs as well as one of the national judicial education programs. The local orientation program should be attended immediately before or after the judge first takes office. It should include visits to all institutions and facilities to which criminal offenders may be sentenced.

2. The failure of any judge, without good cause, to pursue educational programs as prescribed in this standard should be considered by the judicial conduct commission as grounds for discipline or removal.

3. Hawaii should prepare a bench manual on procedural laws, with forms, samples, rule requirements and other information that a judge should have readily available. This should include sentencing alternatives and information concerning correctional programs and institutions.

4. Hawaii should publish periodically--and not less than quarterly--a newsletter with information from the Chief Justice, the court administrator, correctional authorities, and others. This should include articles of interest to judges, references to new literature in the judicial and correctional fields, and citations to important appellate and trial court decisions.

5. Hawaii should adopt a program of sabbatical leave for the purpose of enabling judges to pursue studies and research relevant to their judicial duties.

Commentary:

Standard 7.5 closely resembles NAC Standard 7.5, which also calls for "a comprehensive program of continuing judicial education." Hawaii does maintain a program of continuing judicial education, but the scope of the program is not as broad as the standard recommends. Within six months of appointment, Hawaii judges attend national seminars on judicial education. District court judges go to a two-week session at the National College of State Judiciary in Reno, Nevada. Circuit court judges attend a four-week session at the National College of the State Judiciary. Appellate judges attend a two-week seminar at the New York University Law School and a one-week judicial opinion writing seminar conducted by the American Academy of Judicial Education at Boulder, Colorado. Judges are also given the opportunity to attend specialized graduate courses at the National College of the State Judiciary.

Hawaii does not provide a local orientation program as recommended in Standard 7.5 and NAC Standard 7.5. A bench manual for judges is being prepared. No sabbatical program is in existence. The task force rejected the NAC recommendation that each state develop a judicial college. Hawaii has only eighteen circuit court judgeships, twenty-two district court judgeships, and five Supreme Court judicial positions. There simply aren't enough judicial positions in Hawaii to warrant

creation of a judges' college. Standard 7.5, the task force believes, establishes an adequate judicial education program for this state.

CHAPTER 8

THE LOWER COURTS

Standard 8.1:

Unification of the State Court System

State courts should be organized into a unified judicial system financed by the state and administered through a state-wide court administrator under the supervision of the Chief Justice of the Hawaii Supreme Court.

All trial courts should be unified into a single trial court system with general criminal jurisdiction. The Hawaii Supreme Court should promulgate rules for the conduct of minor as well as major criminal prosecutions.

All judicial functions in the trial courts should be performed by full-time judges, except in special situations. All judges should possess law degrees and be members of the bar.

A transcription or other record of the pretrial court proceedings and the trial should be kept in all criminal cases. The criminal appeal procedure should be the same for all cases.

Pretrial release services, probation services, and other rehabilitative services should be available in all prosecutions in each county.

Commentary:

Standard 8.1 is similar to NAC Standard 8.1, which advocates a "fully unified court system, consolidating all trial courts into a single court of general trial jurisdiction." This is in accord with ABA Standard 1.10 Relating to Court Organization, which recommends that the trial court have

jurisdiction of all cases and proceedings. Hawaii practice conforms with the NAC and ABA recommendations except that Hawaii retains the District Court with limited criminal jurisdiction (H.R.S. §604-8).

Hawaii has a unified judicial system, financed by the State, administered by an Administrative Director of the Courts (see Chapter 9, infra), and supervised by the Chief Justice of the Hawaii Supreme Court. Thus, Hawaii has already solved the principal problem identified by the NAC in Chapter 8 of the Courts volume: lack of coordination between different levels of courts financed and administered at different levels of government. In this context, the retention of a two-tiered trial court structure does not violate the unified "single trial court system" recommended by the standard.

The Hawaii Supreme Court promulgates rules for the conduct of criminal trials, as evidenced by the Hawaii Rules of Penal Procedure. Judges are full-time except for a few District Court judges who serve on a need basis when an absence creates a vacancy for a short period of time. Judges have law degrees and all are members of the bar. All courts are now courts of record, and transcriptions of proceedings are kept in all criminal cases. Appeals from Circuit and District Courts proceed directly to the Supreme Court, and thus all appelllate procedure is uniform. Pretrial release services, probation services, and othe rehabilitative services are available in all trial court jurisdictions throughout the state. Current court organization in Hawaii thus measures up in all important respects to Standard 8.1.

Standard 8.2:

Disposition of Certain Matters Now Treated as Criminal Offenses

All traffic violation cases, except certain serious offenses, such as driving while intoxicated, reckless driving, driving while a license is suspended or revoked, homicide by motor vehicle, and eluding police officers in a motor vehicle, should be decriminalized and treated as violations under the Hawaii Penal Code. Penalties for such violations should be limited to fines; outright suspension or revocation of driver's license; and compulsory attendance at educational and training programs, under penalty of suspension or revocation of driver's license. Procedures for the administrative disposition of offenses thus decriminalized, and for appeals from such dispositions, should be explored and implemented where feasible.

Commentary:

Standard 8.2, based on NAC Standard 8.2, proposes to alleviate court congestion by treating less serious traffic offenses as an administrative problem. The standard suggests that the penalties for such offenses be limited to fines, suspension or revocation of driver's license, and compulsory attendance at driver education programs. The NAC standard contemplated the creation of a special administrative agency which would accept pleas by mail, dispose of contested cases by non-jury hearing before a law-trained referee, and handle all appeals subject to judicial review "only for abuse of discretion." Our standard calls for the exploration of administrative dispostion of

decriminalized traffic offenses.

Current Hawaii practice will require substantial modification to conform to Standard 8.2. Though the penalties actually imposed for minor traffic offenses are typically limited to fines, suspension or revocation of driver's licenses, or attendance at the Driver Improvement Program or the Driving While Intoxicated Program, the statutes defining these less serious offenses frequently include the possibility of incarceration. (We point out in our comments to Standard 13.1 the difficulties occasioned by the failure to provide counsel in some of these cases.) Though no jury trial is available, the burden of proof is beyond a reasonable doubt at a trial conducted before a judge of the District Court. Appeals proceed to the Hawaii Supreme Court. In short, Hawaii continues to treat traffic offenses within the traditional criminal court structure, whereas, the standard would decriminalize all less serious offenses. The essential purpose of Standard 8.2 is to reduce the court congestion created by the traffic calendar, and to enable criminal court judges to devote their attention to serious criminal matters.

Hawaii does permit defendants to plead by mail in certain cases. Parking tickets are an obvious example, but for certain other moving traffic offenses, a defendant can telephone to find out the amount of the fine and send the required amount to the court through the mail. In other words, Hawaii has taken a number of steps to simplify and to streamline the traffic court practice, but has stopped short of decriminalization.

CHAPTER 9

COURT ADMINISTRATION

Standard 9.1:

State Court Administrator

The state court administrator should be selected by the Chief Justice of the Hawaii Supreme Court and serve at his pleasure, subject to approval by the Supreme Court. The performance of the state court administrator should be evaluated periodically by performance standards adopted by the Supreme Court.

The Chief Justice of the Hawaii Supreme Court should establish policies for the administration of the state's courts. The state court administrator shall be responsible for implementing these policies, and for monitoring and reporting their implementation. Specifically, the office of state court administrator shall assist the Chief Justice of the Supreme Court in performing the following administrative duties:

1. Budgets. A budget for the operation of the entire court system of the state should be prepared and submitted to the appropriate legislative body.

2. Personnel Policies. The state court administrator should establish uniform personnel policies and procedures governing recruitment, hiring, removal, compensation, and training of all nonjudicial employees whose responsibilities are unique to the judiciary such as bailiffs, court clerks, and court reporters. For nonjudicial employees not unique to the judiciary, such as file clerks and typists, there shall be cooperation and coordination between the judiciary and the appropriate executive agency on personnel matters.

3. Information Compilation and Dissemination. A statewide information system shall be developed including both statistics and narrative regarding the operation of the entire state court system. An official report containing information regarding the operation of the courts shall be issued at least yearly.

4. Control of Fiscal Operations. Policies and guidelines relating to accounting and auditing, as well as procurement and disbursement for the entire statewide court system, shall be established.

5. Liaison duties. Liaison should be maintained with other government agencies, departments and bodies, and private organizations.

6. Continuing Evaluation and Recommendation. The effectiveness of the court system should be continually evaluated and needed changes recommended.

Commentary:

The thrust of this chapter is to establish standards and goals relating to court administration. Court administration is a relatively new specialty and, as the NAC points out, "is a matter of high priority in any reexamination of court processing of criminal defendants." See Courts, p. 171. The basic purpose of court administration is to relieve judges of certain administrative duties and assist them in carrying out administrative duties judges cannot relinquish. NAC Standard 9.1 recommends that an office of state court administrator be established within each state and headed by an administrator selected by the Chief Justice or the presiding judge of the highest appellate court. Subject to the control of the state Supreme Court, this

executive officer establishes administrative policy and formulates methods of executing such policy. He is responsible for budget preparation, establishing personnel policies, information compilation and dissemination, control of fiscal operations, liaison and public relations duties with other agencies, evaluation of the system and recommendations to correct problems, and assignment of judges as required.

ABA Standard 1.41 Relating to Court Organization recommends that an administrative office be established, headed by an executive director, appointed by the chief justice, and serving at his pleasure. The duties and responsibilities of the executive director are similar to those proposed by the NAC, except that the ABA administrator would not establish court policy. The ABA would place the responsibility for establishing administrative policy with either a judicial council composed of representatives of different courts within the state, or with the Supreme Court acting as a judicial council. ABA Standard 1.30 Relating to Court Organization.

Hawaii practice is largely in conformity with Standard 9.1. H.R.S. §601-2 designates the Chief Justice as the administrative head of the judiciary. Subject to rules that may be adopted by the Supreme Court, he has the following powers:

1. *to assign trial judges from one circuit to another;*
2. *to make assignments of calendar among the circuit judges and to appoint an administrative judge;*
3. *to determine a method for keeping and reporting statistics;*

4. to apportion the judiciary funds equitably among the different courts of the state;

5. to prepare the budget and exercise control over fiscal practices;

6. to do all other acts necessary for the proper administration of the judiciary.

H.R.S. §601-2, enumerating the duties of the Chief Justice, is an implementation of Article V, Section 5, of the Hawaii Constitution, which reads as follows:

> The chief justice of the supreme court shall be the administrative head of the courts. He may assign judges from one circuit court to another for temporary service. With the approval of the supreme court he shall appoint an administrative director to serve at his pleasure.

The Legislature gave effect to this provision in H.R.S. §601-3, which provides that the Chief Justice, with the approval of the Supreme Court, shall appoint an Administrative Director of the Courts to assist the Chief Justice in directing the administration of the judiciary. Hawaii thus conforms in the most important respect to Standard 9.1. Chapter 8 recommends a unified court system--Hawaii has one--and Chapter 9 recommends unified court administration, which has been accomplished here. Difference in the amount of authority and responsibility exercised by the Chief Justice and the Administrative Director are not differences of substance.

H.R.S. §601-3 outlines the functions of the Administrative Director:

1. to examine the administrative methods of the courts and to make appropriate recommendations to the Chief

Justice;

2. *to examine the dockets of the court and secure information to determine areas of assistance, deal with the statistical aspects of court management, and recommend appropriate actions to the Chief Justice;*
3. *to examine the estimates of the courts for needed appropriation and make recommendations to the Chief Justice on them;*
4. *to examine the statistical systems of the courts and make recommendations to the Chief Justice for a uniform system of judicial statistics;*
5. *to make a report to the Chief Justice concerning the business of the courts based on statistical data;*
6. *to assist the Chief Justice in budget preparation and other reports to be presented to the legislature;*
7. *to assist the Chief Justice in other matters.*

These responsibilities are consistent with the responsibilities assigned to the Administrative Director by both the ABA and the NAC. Under the supervision of the Chief Justice, the Administrative Director also has responsibility for personnel matters, fiscal operation, and courthouse facilities. Thus, Hawaii practice is in accord with the recommendations of Standard 9.1.

Standard 9.2:

Senior Criminal Judge and the Administrative Policy of the Trial Court

Local administrative policy governing the operation of local trial courts should be determined on the local level. Such policies should be consistent with the statewide policy set forth by the Chief Justice. The judges of each circuit should meet on a

regular schedule with an agenda, to consider and resolve problems facing the court and to set policy for the operation of the court.

Each circuit should have a senior criminal judge at the circuit court level designated by the Chief Justice of the Supreme Court. Each circuit should have a senior criminal judge at the district court level designated by the Chief Justice. The senior criminal judge should be selected on the basis on administrative ability rather than seniority.

The functions of the senior criminal judge should be consistent with the statewide policy and should include the following:

1. Personnel Matters. The senior criminal judge should work with the state court administrator to insure that personnel matters are appropriately handled.

2. Trial Court Case Assignment. Cases should be assigned under the supervision of the senior criminal judge. In circuits where there are three or more criminal courts the business of the court should be apportioned among the trial judges as equally as possible and cases should be reassigned as convenience or necessity requires. A judge should accept the assigned case unless the interests of justice require that he disqualify himself or otherwise not hear the case. In all other circuits, assignments should be divided equally on a rotation basis unless convenience, necessity, recusal or the interests of justice require that the case not be heard by that judge. He also should require that when a judge has finished or continued a matter that the judge immediately notify the senior judge of that fact.

3. Judge Assignments. The senior criminal judge should

prepare an orderly plan for judicial vacation, attendance at educational programs, and similar matters. The plan should be approved by the judges of the court and should be consistent with the statewide guidelines.

4. Information Compilation. The senior criminal judge should work with the state court administrator to develop and co-ordinate statistical and management information schemes.

5. Fiscal Matters. The senior criminal judge should work with the state court administrator on appropriate fiscal matters and help prepare the court's proposed annual budget.

6. Court Policy Decisions. The senior criminal judge should appoint the standing and special committees of judges of the court necessary for the proper performance of the duties of the court. He also should call meetings of the judges as needed.

7. Rulemaking and enforcement. The senior criminal judge should, with the assistance of appropriate committees, propose local rules for the conduct of the court's business. These rules should include such matters as the times of convening regular sessions of the court and should be submitted to the judges and the Supreme Court for approval. The senior criminal judge should have the authority to enforce these rules.

8. Liaison and public relations. The senior criminal judge should work with the state court administrator in establishing liaison with other court systems, and other governmental and civic agencies. He should represent the court in certain business, administrative, or public relations matters.

9. Improvement in Functioning of the Court. The senior criminal judge should continually evaluate the effectiveness of the court in administering justice. He should recommend changes

in the organization, jurisdiction, operation, or procedures of the court when he believes these would increase the effectiveness of the court.

Commentary:

Based on NAC Standard 9.2, Standard 9.2 dealing with the local administrative policies of trial courts, recommends that each court establish its policies and that ultimate authority and responsibility for implementation rest with the senior criminal judge of each court. The task force stresses that senior criminal judges "should be selected on the basis of administrative ability rather than seniority." Under the ABA system, the chief justice would appoint presiding judges to handle the administrative affairs of the courts under him. The responsibilities of the presiding judge are enumerated in ABA Standard 2.33 Relating to Trial Courts, and are similar to those enumerated in NAC Standard 9.2.

As mentioned in the preceding section, the Hawaii Constitution, Article V, Section 5, designates the Chief Justice as "the administrative head of the courts." In addition, Article V, Section 6 specifies that "the supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law." Because of this constitutional scheme, most trial court administrative policies are determined by the state Supreme Court. Personnel matters for all trial courts in Hawaii are handled by the Office of the Administrative Director under the supervision

of the Chief Justice. Trial court case assignments are handled by two non-judicial personnel under the supervision of the senior criminal judge. The senior criminal judge is the ranking judge in the criminal courts. Generally speaking, the caseload is distributed equally so that the burden is shared by all. Cases are refused by judges if it would be inappropriate for them to hear the cases or if individual caseloads are such that retention of new cases would result in delayed proceedings. The judges are under no obligation to inform the case assignment judge of continuances or terminations of cases.

Although there is no fixed rule requiring judges to coordinate vacations or absences from court, this is accomplished in Hawaii on an informal basis. In Hawaii the power to assign judges to various branches within the trial court rests with the Chief Justice of the Supreme Court. (See the discussion of H.R.S. §601-2 in our discussion of Standard 9.1, supra.) In matters of information compilation and fiscal planning, such responsibilities are delegated to the Administrative Director. The NAC recommends further that trial court policy decisions be reached by means of various committees and meetings. The ABA also recommends that the judges meet at regular intervals to discuss and formulate policy regarding the courts' administrative problems. See ABA Standard 2.36 Relating to Trial Courts. Hawaii does not have a formalized system for such meetings or committees, but problems are discussed on an informal basis. The NAC would also give the presiding judge responsibility over the conduct of the court's business, public relations, and evaluation of the

criminal justice system, whereas in Hawaii these duties are largely taken care of by the Administrative Director or left to the discretion of each individual judge.

Standard 9.3:

Reserved.

Standard 9.4:

Caseflow Management

Ultimate responsibility for the management and movement of cases should rest with the judges of the trial court. In discharging the responsibility, the following steps should be taken:

1. Scheduling of cases should be delegated to nonjudicial personnel, utilizing a method so that prosecutors and defense attorneys do not exercise improper influence on scheduling.

2. Record keeping should be delegated to nonjudicial personnel.

3. Subject-in-process statistics, focusing upon the offender at each stage of the criminal process, should be developed to provide information concerning elapsed time between events in the flow of cases, recirculations (multiple actions concerning the same defendant), and defendants released at various stages of the court process.

4. The flow of cases should be monitored by the senior criminal judge, and the status of the court calendar should be reported to the Chief Justice of the Hawaii Supreme Court at least once a month.

5. The Chief Justice of the Hawaii Supreme Court should

assign judges to areas of the court caseload that require special attention.

6. A central source of information concerning all participants in each case--including defense counsel and the prosecuting attorney assigned to the case--should be maintained. This should be used to identify as early as possible conflicts in the schedules of the participants to minimize the need for later continuances because of schedule conflicts.

Commentary:

Hawaii practice is consistent with Standard 9.4 in assigning responsibility for caseflow management to the judges of the various trial courts. The ABA, in ABA Standards 2.50 and 2.51 Relating to Trial Courts, suggests that the courts should supervise and control the movement of cases until final disposition. Basically, the ABA standards are consistent with NAC Standard 9.4, on which our standard is based.

In Hawaii, cases are scheduled for trial week at the arraignment and plea. Trial dates are set by two non-judicial personnel, but they are subject to the approval of the senior criminal judge. After the case is sent to the assigned court, caseflow management is conducted by the clerks of that court, with each court following its own system. No system, of monitoring caseflow has yet been established in Hawaii, but we have no reason to believe that this represents a current deficiency, given caseloads and judicial resources. The Administrative Director of the Courts has general supervisory authority over

the statistical systems of the trial courts, and we perceive no problem in the gathering, evaluation and dissemination of statistical data here.

We recommend that a source of information concerning all participants in each case be maintained. NAC Standard 9.4 suggests that such a source of information is useful to avoid conflicts in the schedules of participants so that the need for continuances can be obviated. In Hawaii, no such formal system exists, but at the time of arraignment and plea each lawyer informs the court if there is a conflict during the scheduled trial week. Should a conflict later develop, the individual lawyer calls up the judge's clerk and informs him of the conflict. Since public defenders and prosecutors are usually assigned to particular courtrooms for a period of time, the problem of trials in different courtrooms does not usually arise with defenders and prosecutors.

We also recommend that "subject-in-process" statistics which focus upon the offender at each stage of the criminal process be developed. Hawaii, with assistance from the State Law Enforcement Planning Agency, has developed the Hawaii Criminal Justice Statistical Analysis Center (SAC), which is described in a March, 1975, report entitled "The Development of a Comprehensive Data System in Hawaii." A division of the Judiciary of the State of Hawaii, SAC describes its function as follows: "[D]ata acquisition, analysis and dissemination relative to all criminal justice agencies including the police, courts, public prosecutors, public defender, probation divisions, parole board and correctional institutions." SAC has received a grant to develop the Offender-Based-Transaction-Statistics

technique, which will involve every criminal justice agency reporting each transaction it has with an offender. This system will enable SAC to determine "what really happens to those arrested for particular offenses, or how long adjudication takes, or the results of plea bargaining, or whether one correctional program is more effective than another." Another advantage is that this data "will give police, prosecutors, and the courts instantaneous use of information about individuals to aid them in making decisions that will protect the public and treat the individual fairly."

Standard 9.5:

Reserved.

Standard 9.6:

Public Input into Court Administration

Adequate procedures should be established to insure citizen input into the judiciary through a forum for interchange. Representatives of the prosecutor's office, the public defender's office, the defense bar, the bar association, and the law school should participate in such a forum. Representatives of minority, church, and civic groups should also be included.

Commentary:

In 1972 a Citizens' Conference on the Administration of Justice was held in Honolulu, and a major emphasis of that three-day conference was the criminal law, the criminal courts, police, and corrections. We believe that periodic citizens' conferences would provide the kind of interchange contemplated

by Standard 9.6, and recommend that such conferences be included in future criminal justice planning.

CHAPTER 10

COURT-COMMUNITY RELATIONS

Standard 10.1:

Courthouse Physical Facilities

Adequate physical facilities should be provided for court processing of criminal defendants. These facilities include the courthouse structure itself, such internal components as the courtroom and its adjuncts, and facilities and conveniences for witnesses, jurors, and attorneys. Facilities provided should conform to the following requirements:

1. The courthouse structure should be adequate in design and space in terms of the functions housed within and the population served. In areas served by a single judge, adequate facilities should be provided in an appropriate public place. In Honolulu, there should be one centrally located courthouse. All rooms in the courthouse should be properly lighted and air-conditioned.

2. The detention facility should be near the courthouse.

3. The courtroom should be designed to facilitate interchange among the participants in the proceedings. The floor plan and acoustics should enable the judge and the jury to see and hear the complete proceedings. A jury room, judge's chambers, staff room, and detention area should be convenient to each courtroom.

4. Each judge should have access to an adequate law library.

5. Provision should be made for witness waiting and assembly

rooms. Separate rooms for prosecution and defense witnesses should be provided. The rooms should be large enough to accommodate the number of witnesses expected daily. They should be comfortably furnished, adequately lighted, and should contain reading materials, television, and telephones.

6. Juror privacy should be maintained by establishing separate entrances, elevators, and food service facilities for exclusive use of jurors. Similarly, lounges and assembly rooms should be provided for jurors; these should not be accessible to witnesses, attorneys, or spectators. They should be furnished comfortably, and lighted adequately. Television, magazines, and other diversions should be provided.

7. A lawyers' workroom should be available in the courthouses for public and private lawyers. The room should be furnished with desks of tables, and telephones should be available. It should be located near a law library. There also should be rooms in the courthouse where defense attorneys can talk privately with their clients, without compromising the security needed.

8. The physical facilities described in this standard should be clean and serviceable at all times.

The foregoing standards should be followed as closely as possible in the planning and construction of the new court complex in Honolulu. Neighbor Island court facilities should conform to these standards to the extent appropriate and feasible.

Commentary:

Standard 10.1 is similar to NAC Standard 10.1, which recommends that adequate physical facilities be provided "for

court processing of criminal defendants." The Standard also makes specific recommendations pertaining to the courthouse structure and the design and layout of courtrooms, and suggests that "the detention facility should be near the courthouse."

All courthouse buildings currently in use in Honolulu are centrally located. At present the Honolulu detention facility is far removed from the courthouse. Unless the accused is being transported from the Honolulu Police Station cellblock or is an inmate at Hawaii State Prison, he will be detained at the Halawa Correctional Facility pending trial. This creates problems since the defendant must be transported back to the facility for lunch and when the court is awaiting a verdict. Thus, after the jury has reached a verdict, there is a time delay while the defendant is transported to the courthouse. At present, the only courthouse with a holding cell is the Honolulu District Court Building.

At present nearly all courthouse facilities in Honolulu are inadequate. Rather than deplore the existing situation, however, the task force has examined the three-volume work entitled "Project Development Report for the State Judiciary Complex, Honolulu, Hawaii," prepared by Space Management Consultants, Inc. Hawaii is committed to the construction of new facilities for the First Circuit Court and for the Honolulu District Courts. We note that the consultant's report speaks to all the concerns voiced in Standard 10.1, and are satisfied that the proposed facilities will measure up to the standard. Thus, we conclude that further analysis of courthouse facilities in Honolulu is unnecessary.

On the Neighbor Islands, the Circuit and District Courts in Hilo are located in a new state building. Courthouse facilities on Maui are considered inadequate, and a new courthouse is being planned. The courthouse in Lihue, which includes Circuit and District Courts, is considered functional. We recommend that all planning for courthouse facilities be accomplished with Standard 10.1 in mind.

Every judge in Hawaii has access to a library which is judged adequate.

Standard 10.2:

Court Information and Service Facilities

Facilities and procedures should be established to provide information concerning court processes to the public and to participants in the criminal justice system:

1. Each court facility should develop a method of supplying information about court proceedings currently in progress to defendants and their friends and relatives, witnesses, jurors, and spectators. This can be accomplished by a manned information desk strategically located, by visual display, or by a combination of the two.

2. In Honolulu, there should be provided an information service to answer questions concerning the agencies of the criminal justice system and the procedures to be followed by those involved in the system. On the neighbor islands similar information should be available over the telephone.

3. The defendant, in addition to being told of his rights, should be provided with a pamphlet detailing his rights and

explaining the various steps in the criminal justice process from arrest through trial and sentencing. This pamphlet should be prepared by the public defender's office, and should be given to every arrested person by the police at the time of booking. The pamphlet should be drafted in language readily understood by those to whom it is directed.

4. The prosecutor and the court should establish procedures whereby witnesses requesting information relating to cases or court appearances in which they are involved may do so by telephone. The prosecutor and the public defender, in consultation with the court, should develop pamphlets containing information about the rights and responsibilities of witnesses and crime victims, and describing the various steps in the criminal justice process from arrest through trial and sentencing. These pamphlets should be distributed to all potential witnesses. In addition, each witness should be given particularized information about the case in which he is expected to be called to testify, such as the name of the defendant, the court docket number, the judge assigned, and the probable appearance date.

5. The court should instruct each jury panel, prior to its members sitting in any case, concerning its responsibilities, its conduct, and the proceedings of a criminal trial. The court should prepare, and distribute to each juror, a pamphlet describing the duties and responsibilities of jurors and explaining the various steps in the criminal justice process from arrest through trial and sentencing.

Commentary:

The goal of this standard is to insure that "information services concerning the court's functions and participants' rights and responsibilities [be available to] the general public, the defendant, witnesses, and jurors." See Courts, p. 199. The immediate goal of this standard is to provide ready information about particular cases to interested persons, and the ultimate goal is suggested by Chapter Ten's title: "Court-Community Relations." Based on NAC Standard 10.2, this standard proposes the creation of information facilities, pamphlets, and procedures to facilitate the dissemination of vital information.

There is a desk in the rotunda of the Honolulu Judiciary Building staffed by state security personnel, who are able to direct persons to particular judges' courtrooms. However, if a person is not familiar with the name of the judge hearing a particular case, the process of arriving at the proper courtroom is more complicated, because the security guards do not have the information contemplated in Standard 10.2. Thus, current practice in Honolulu Circuit Court fails to comport with Standard 10.2(1) regarding information desks or visual displays. We note that the plans for the new court facilities include public "reception areas," and recommend that the information desk concept be incorporated in the plans for the new facilities. At present, it might be feasible to provide the security guards with information about cases in progress, or to set up a visual display with current information. The "information desk" concept seems inapplicable on the Neighbor Islands, where courtrooms are few and are located right next to each other. Both Hawaii County

and Maui County have but four courtrooms (two circuit, two district), and they are located in the same area so that finding the proper courtroom is not a problem. The District Court system in Honolulu has a reception desk on the ground floor that adequately serves an informing function.

Hawaii has no information service of the type contemplated in Standard 10.2(2). We believe that this kind of information service should be provided in Honolulu, and recommend that the public defender employ paralegal assistants to provide the service. The public defender, in consultation with other interested groups, including the police, should prepare a pamphlet of the sort described in Standard 10.2(3), and this pamphlet should be given by the police to all persons arrested as soon as possible after their arrest. Suggestions for the contents of an "Arrestee Pamphlet" are contained on p. 199 of the NAC Courts volume.

There are no formal mechanisms established so that witnesses can obtain information regarding their court appearances. On an informal level, the witness is usually aware of the prosecutor or defense lawyer handling the case, and can telephone that person or the court to gather further information.

Except for the Hawaii County Prosecutor, no county prosecutor has adopted formal procedures to inform victims of crime of the existence of the State Criminal Injuries Compensation Act, see H.R.S. Chapter 351.

Though Hawaii does not have a jury handbook detailing the responsibilities of a juror, oral instructions governing jury behavior and deliberation are given jurors at the beginning of their 30-day term, and are often repeated during the course of

their duty. We recommend that a juror pamphlet of the sort described in Standard 10.2(5) be prepared and distributed.

Standard 10.3:

Court Public Information and Education Programs

The court, the news media, the public, and the bar should have coordinate responsibility for informing and educating the public concerning the functioning of the courts. The court should pursue an active role in this process:

1. Each court should designate an individual responsible for liaison between courts and the news media. Where a court has a court administrator, that individual should act as the public information officer or should designate someone in his office to perform this function. The court shall specify guidelines for media coverage of trials.

2. Each courthouse should have a readily identifiable and locatable office for receiving citizen complaints and suggestions. Prompt, individual response to offered comments should be provided.

3. The court should take affirmative action to educate and inform the public of the function and activities of the court. This should include:

a. The issuance of periodic reports concerning the court's workload, accomplishments, and procedural changes;

b. The issuance of handbooks for court employees;

c. Preparation and distribution of educational materials describing the functions of the court for the general public, and for use in schools;

d. Preparation of pamphlets described in Standard 10.2 (4) and (5);

e. Organization of courthouse tours; and

f. Personal participation by the judges and court personnel in community activities.

All court personnel should contribute to this function.

4. The Court should encourage citizen groups to inform themselves of the functions and activities of the courts and in turn share this information with other members of the public.

5. The court should work together with the bar association to educate the public, and should cooperate by arranging speaking programs and by preparing written materials for public dissemination.

Commentary:

Based on NAC Standard 10.3, this standard proposes that courts take an active role in educating and informing the public about the criminal justice system. Hawaii does employ certain procedures similar to those proposed in Standard 10.3, but not to the extent recommended.

The Office of the Administrative Director is the public information center of the Judiciary and has accordingly established the Office of Public Information Officer. This office "furnishes information about the organization and operation of the courts to public and private agencies, as well as the general public." See The Judiciary, State of Hawaii, Annual Report, July 1, 1973, to June 30, 1974, at p. 9. Since the media cover the courts on a regular basis, rare is the need for the Public Information Officer to formulate press releases. If inquiries are to be made, the media usually go directly to the judges and parties involved. Guidelines for media coverage of trials are

set by each court on a case-by-case basis. H.R.P.P. 53 prohibits the taking of photographs during court sessions or radio broadcasting from the courtroom, but these are the only restrictions imposed by statute or rules.

The Public Information Office does receive and answer many phone calls pertinent to the operations of the judiciary during the year. The NAC recommends that this office be "specifically and prominently identified as the office for receiving complaints, suggestions, and reactions of members of the public conerning the court process." See Courts, p. 202.

The Judiciary publishes an annual report to the legislature regarding court operations in the past fiscal year. Tours of the Judiciary Building are conducted by the Volunteers in Probation (VIP). There is a Speakers Bureau comprised of judges and probation officers that provides volunteer speakers to organizations upon request. It might be desirable to include prosecutors and public defenders in the Speakers Bureau.

It should be borne in mind that the University of Hawaii School of Law has a mandate to provide public education programs about the law. Some community education is being accomplished by the Paralegal Program at Kapiolani Community College. We recommend that representatives of the Law School, the Paralegal Program, and the prosecutors' and defenders' offices meet with the judges and the Administrative Director to explore the feasibility of implementing a comprehensive public information and education program of the sort envisioned in Standard 10.3.

Standard 10.4:

Representativeness of Court Personnel

Court personnel should be representative of the community served by the court. Special attention should be given to recruitment of members of minority groups.

Commentary:

This standard is taken from NAC Standard 10.4. This standard is currently being met in Hawaii.

Standard 10.5:

Participation in Criminal Justice Planning

Judges and court personnel should participate in criminal justice planning activities as a means of disseminating information concerning the court system and of furthering the objective of coordination among agencies of the criminal justice system.

Commentary:

Judicial participation on this very task force is evidence of the interest of the judiciary in criminal justice planning. We believe the judicary appreciates the critical role of judges and other court personnel in the planning process, and will encourage appropriate participatory efforts.

Standard 10.6:

Production of Witnesses

Prosecution and defense witnesses should be called only when their appearances are of value to the court. No more witnesses should be called than necessary.

1. Witnesses Other Than Police Officers. Steps that should be taken to minimize the burden of testifying imposed upon

witnesses other than police officers should include the following:

a. Prosecutors and defense counsel should carefully review formal requirements of law and practical necessity and require the attendance only of those witnesses whose testimony is required by law or would be of value in resolving issues to be litigated.

b. Procedures should be instituted to place certain witnesses on telephone alert. To insure that such a procedure will be capable of producing witnesses on short notice on the court date, citizen witnesses should be required as early as possible to identify whether and how they may be contacted by telephone on court business days and whether, if so contacted, they can appear likely to respond to telephone notification should be identified by both the prosecution and the defense and placed on telephone alert. On the morning of each court date, the prosecutor and defense counsel should determine the status of cases in which witnesses are on alert and should notify promptly those witnesses whose presence will be required later in the day. Witnesses who unreasonably delay their arrival in court after such notification should not be placed on telephone alert for subsequent appearances.

c. Upon the initiation of criminal proceedings or as soon as thereafter as possible the prosecutor and defense counsel should ask their witnesses which future dates would be particularly inconvenient for their appearance at court. The scheduling authority should be apprised of these dates and should, insofar as is possible, avoid

scheduling court appearances requiring the witnesses' attendance on those dates.

2. Police Officers. Special efforts should be made to avoid having police officers spend unnecessary time making court appearances. Among the steps that should be taken are the following:

a. Police agencies should establish procedures whereby police officers may undertake their regular police duties and at the same time be available for prompt appearance at court when a notification for such appearance is communicated to police command. Whenever possible, this procedure should be used.

b. Routine custodial duties relating to the processing of a criminal case should be undertaken by a central officer to relieve the individual arresting officer of these duties. Electronic document transmission equipment should be used when feasible in place of police transportation of documents to court.

c. Police agencies should provide to the authority scheduling court appearances the dates on which each police officer will be available. The schedules list a sufficient number of available dates for each month or term of court to permit the scheduling authority flexibility in choosing among them when assigning court dates. The scheduling authority should consult the schedules in selecting dates for criminal proceedings. Insofar as possible, the scheduling authority should schedule court appearances that inconvenience the officer

and his department as little as possible.

3. Defendants. Consideration of convenience of time of trial and other court appearances should be afforded defendants, especially those maintaining regular employment.

Commentary:

This standard seeks to address a deficiency noted in the introduction to Chapter 10 of the NAC Courts volume: "Witnesses are often required to make appearances that serve no function. Police officers, for example, often are required to attend a defendant's initial appearance, although they serve no function at this proceeding." This is an important deficiency, not only in terms of cost, but, more importantly, in the context of court-community relations.

Standard 10.6(1) would place duties on prosecutors and defense counsel to minimize the calling of witnesses who will not be called to testify, to use telephone alert with witnesses whenever possible, and to accommodate witnesses' future plans in the scheduling of cases. We understand that office policy of this sort has not been articulated in the prosecutors' and defenders' offices, and suggest that each chief prosecutor and the public defender issue office policy memoranda to this effect. We also suggest that greater reliance on telephone alert be coordinated with trial judges in all courts, because an alert system will occasionally result in "no-shows" which in turn call for judicial understanding and indulgence.

In Hawaii, the arresting police officer does not bring the accused into court for initial appearance. This is done by

police personnel assigned to station duties. Routine custodial duties are handled by the booking desk personnel, thus bringing Hawaii practice in line with Standard 10.6(2). However, Hawaii practice is deficient regarding scheduling of police witnesses. The police are usually not placed on a standby basis and, except for traffic trials, there is no systematic effort to coordinate the scheduling of court dates and police officer availability. We recommend that an ad hoc committee composed of a judge, a prosecutor, and a police officer be formed to develop a plan for the implementation of Standard 10.6(2).

Current practice in traffic cases is to schedule court appearances pursuant to a police officer availability schedule prepared in advance and given to the court clerk. This system appears to function well.

Standard 10.7:

Compensation of Witnesses

All witnesses should be compensated for their attendance at criminal court proceedings at an adequate rate which ensures that most witnesses will not be financially disadvantaged because of their court appearances. Compensation should cover the actual time spent in the court process, including travel time. An officer of the court should certify the time spent by the witness in court between arrival and dismissal. Witnesses should be paid for roundtrip travel between the court and their residence or business address, whichever is shorter.

Commentary:

Hawaii practice does not meet the standard for compensation of civilian witnesses, who, pursuant to H.R.S. §621-7, receive $4.00 per day for court attendance and $6.00 per day if inter-island travel is required. This is grossly inadequate, and implementation of this standard will require an amendment to the statute.

CHAPTER 12

THE PROSECUTION

Standard 12.1:

Professional Standards for the Chief Prosecuting Officer

The complexities and demands of the prosecution function require that the chief prosecutor be a full-time, skilled professional selected on the basis of demonstrated ability and high personal integrity. He should be authorized to serve a minimum term of four years at an annual salary determined with reference to the salaries paid trial judges, attorneys in private practice, and attorneys with comparable responsibility in other areas of public service.

In order to meet these standards, the jurisdiction of every prosecutor's office should be designed so that population, geographic considerations, caseload and other relevant factors warrant at least one full-time prosecutor.

Commentary:

Standard 12.1 addresses the qualifications, tenure and salary of the chief prosecutor. It closely resembles NAC Standard 12.1. The two ABA Standards which most closely parallel NAC Standard 12.1 are Prosecution Standards 2.3 and 2.2(a), which do not specify a minimum term of service but rather stress "continuity of service and broad experience in all phases of the prosecution function." In discussing compensation, ABA Standard 2.3(d) recommends salaries "commensurate with the high responsibilities of the office." According to current information, the salary of

the chief prosecutor ranges from a low of almost $30,000 a year on Kauai to a high of $36,000 on Maui. Maui is the only county where the prosecutor has authority over the civil work done by the county as well as the criminal prosecutions. The NAC standard recommended for the chief prosecutor "an annual salary of no less than that of the presiding judge of the trial court of general jurisdiction." The task force opted for a more flexible standard related to trial judge's salaries and salaries of lawyers with comparable responsibilities. We believe the chief prosecutors' salaries should be raised. (See the discussion of Standard 13.7 regarding the salary of the public defender.)

Both the ABA and NAC Standards require that the office of the chief prosecuting officer be a full-time position. It appears that the position of chief prosecutor in Honolulu measures up to the standard, because H.R.S. §78-6 prohibits full-time county officers from engaging "in other gainful occupational employment or the private practice of any profession." The prosecutors in Hawaii, Kauai and Maui Counties, however, are governed by H.R.S. §62-76, which merely prohibits "the private practice of law during office hours." Whether or not this statute satisfies the full-time requirement is questionable, since the NAC commentary points out that chief prosecutors should "devote their full efforts" to their official duties and should not engage in "part-time law practice."

The second paragraph of the standard recommends that the jurisdiction of a prosecutor's office should be large enough to maintain at least one full-time prosecutor. In the NAC report,

a population base of 30,000 is deemed normally sufficient. This portion of the standard closely resembles ABA Standard 2.2(a). This standard is met within the State of Hawaii.

The NAC took no position on the method of selection of chief prosecutors because it "was not able to find adequate evidence to convince it that one method of selection is preferable to any other." See Courts, p. 230. The prosecutor should be a skilled professional selected on the basis of ability and personal integrity. The ABA standard does not recommend a mode of selection but expresses its desire to remove the chief prosecutor's office from political influences. Therefore, the commentary to ABA 2.3(c) suggests that the office should be insulated from the pressures and demands of partisan politics, and that nominations should be based on merit after appropriate consultation with the bar. There are no statutory requirements for prosecutors in Hawaii other than those applicable to public officials generally, and we believe that the NAC and ABA standards do not lend themselves readily to statutory drafting. We believe that the chief prosecutor should be a person with demonstrated professional skill and high personal integrity, and conclude that the prosecutors in Hawaii measure up to this standard.

Regarding method of selection, Honolulu and Maui use the appointive method, while Hawaii and Kauai have recently changed to the elective method. The elected prosecutors serve terms of four years while the appointed prosecutors serve at the pleasure of the respective mayors.

Standard 12.2:

Professional Standards for Assistant Prosecutors

The primary basis for the selection and retention of assistant prosecutors should be demonstrated legal ability. Care should be taken to recruit lawyers from all segments of the population. The prosecutor should undertake programs, such as legal internships for law students, designed to attract able young lawyers to careers in prosecution.

The position of assistant prosecutor should be a full-time occupation, and assistant prosecutors should be prohibited from engaging in outside law practice. The starting salaries for assistant prosecutors should be comparable to starting salaries paid by private law firms and by other governmental agencies and the chief prosecutor should have the authority to increase periodically the salaries for assistant prosecutors to a level that will encourage the retention of able and experienced prosecutors. For the first five years of service, salaries of assistant prosecutors should be comparable to those attorney associates in private law firms and other governmental agencies.

The caseload for each assistant prosecutor should be limited to permit the proper preparation of cases at every level of the criminal proceedings. Assistant prosecutors should be assigned cases sufficiently in the advance of the court date in order to enable them to interview every prosecution witness, and to conduct supplemental investigations when necessary. The chief prosecutor should develop caseload guidelines which enable him to fix the maximum number of cases per attorney per year, depending upon the

level of experience of the attorney, the amount of collateral or administrative duties assigned the attorney, and the kinds of cases which comprise the attorney's workload. These guidelines should be reconsidered and refined at least once a year, and should be used to project the number of assistant prosecutors required to discharge the work of the office.

Commentary:

Both NAC Standard 12.2 and ABA Prosecution Standard 2.3(c) provide for merit selection of assistant prosecutors. The NAC also encourages the recruitment of lawyers "from all segments of the population." Factors involved in the selection of assistant prosecutors in Hawaii are legal competence, attitudes, experience, and ethnic background. The Honolulu office has established a screening committee of senior deputies which committee forwards recommendations to the chief prosecutor. Thus, in the area of selection of assistant prosecutors, Hawaii practice conforms to the NAC and ABA standards.

In all counties the position of assistant or deputy prosecutor is full-time, and all are prohibited from engaging in the private practice of law. The starting salaries for prosecutors are comparable with attorneys in private practice. In the Honolulu office, for example, the starting salary for a recent law school graduate would be $16,004 per year (compare our discussion of public defenders' salaries in Standard 13.11). Starting salaries are at least as high in the neighbor island offices. Starting salaries in private law firms are in the range of $16,500 to $17,000, plus bonus. Thus, prosecutors' starting salaries are consistent with

Standard 12.2. The question of starting salary relates to the quality of applicants the prosecutor can attract, but the question of raises relates to the retention problem. In Honolulu, salaries are subject to the discretion of the chief prosecutor and the range is up to $32,000. On Maui, the discretion of the county attorney is limited by the salaries set for a position. When a vacancy occurs at a higher position, the county attorney has the discretion to elevate someone to that position based on merit. In Hawaii, the pay of the prosecutors reflects experience. The Mayor of Hawaii County has absolute discretion in setting the salary but generally follows the recommendation of the prosecutor. Generally speaking, the range of pay levels for prosecutors in the first five years of practice is comparable to that of attorneys in private practice.

We do not propose specific figures as caseload guidelines because it is impossible to establish abstract workload standards for prosecutors. Instead, the standard follows NAC Standard 12.2 in suggesting that assistant prosecutors are overloaded when they are not able to prepare cases properly. The inference is that prosecutors are overloaded when preparation time does not permit pre-trial interviews with all prosecution witnesses, supplemental factual investigation, and necessary legal research. Based on this, current practice is only partially in line with the standard. In felony cases prosecution witnesses are interviewed prior to trial but misdemeanor trials are not accorded the same preparation. Although efforts are made to interview prosecution witnesses prior to some misdemeanor trials, under

the current practice most misdemeanor witnesses are not interviewed prior to trial. This is not consistent with the standard. Should the problem be one of staff shortages, the different counties should take appropriate action to alleviate this problem. Should the problem be the method of assigning cases to attorneys, the current operational system should be reviewed and evaluated to determine if another system can be devised.

In Honolulu, the chief prosecutor needs more assistants. There are currently a total of 29 attorneys in the Honolulu office, of which nine to twelve handle misdemeanor and traffic cases, ten handle felonies in circuit court, three to four perform the screening function, and the remainder handle varied responsibilities including research. The addition of new courts, increased responsibilities for the Special Crime Unit (where one attorney is currently in a supervisory capacity), and rising caseloads point strongly to a need for a staff estimated at between 35 and 40 attorneys. All attorneys participate in appeals, although the chief prosecutor sees a need for an appellate unit. An additional assistant is needed in the Big Island office. On Kauai, increasing caseloads have resulted in a request for an additional deputy in the 1976-77 budget. These needs should be addressed.

All prosecution offices have availed themselves of federal funds to hire law students as summer interns. Their primary duty is legal research but time is allotted for trial observation and participation in the other duties of the office so that they may better understand the role of the prosecutor.

Hawaii County presents a special situation where geography creates a need for a branch prosecutor's office in Kona. Based on the amount of travel time spent by attorneys in servicing the district courts in Waimea, North Kohala, South Kohala, Kau and the Hamakua area, the addition of an area office could save an estimated 8-10 days per month attorney travel time.

Standard 12.3:

Supporting Staff and Facilities

The office of the prosecutor should have an adequate secretarial, investigative, and paralegal support staff. Where applicable, the prosecutor's office should employ an office manager with the responsibility for program planning and budget management, procurement of equipment and supplies, and selection and supervision of nonlegal personnel. Paraprofessionals should be utilized for law-related tasks to the extent possible. There should be adequate secretarial help for all staff attorneys. Special efforts should be made to recruit members of the support staff from all segments of the community.

The budget of the prosecutor for operational expenses other than the costs of personnel should be substantially equivalent to, and certainly not less than, that provided for other components of the justice system with whom the prosecutor must interact, such as the courts, public defender, private bar, and the police. The budget should include: (1) sufficient funds to provide quarters, facilities, copying equipment, and communications comparable to those available to similar-size private law firms; (2) funds for the employment of experts and specialists as needed;

and (3) sufficients funds or means of transportation to permit the office personnel to fulfill their travel needs in preparing cases for trial and in attending court or professional meetings.

The prosecutor's office should have immediate access to a library sufficiently extensive to fulfill the research needs of the office. Staff attorneys should be supplied with personal copies of books, such as the Hawaii Penal Code and the Hawaii Rules of Penal Procedure, and with personal copies of Hawaii Supreme Court slip opinions.

Commentary:

Based on NAC Standard 12.3, this standard represents an effort to ensure that the prosecutor's office has the necessary support services to function properly. ABA Prosecution Standard 2.4 suggests that the prosecutor should also have sufficient funds to employ special prosecutors as needed, professional investigators and expert witnesses. (We deal with the investigative aspects of the prosecution function in Standard 12.8, infra.) All offices in Hawaii have office managers responsible for clerical personnel and administrative tasks. Dissatisfaction was expressed by both the Honolulu office and the Hawaii office about the number of secretarial personnel available to the deputies. Adequate secretarial personnel available to the functioning of any law office, especially one heavily involved in trial work, and we recommend that funding be provided in those two offices to increase the level of clerical help. In its introduction to Chapter 12, the NAC points out that "the standards in this chapter are designed to promote the development

of professional prosecutors' offices [which] should be on the same level of professionalism as private law firms of comparable size." The commentary to NAC Standard 12.3 suggests that "one secretary for every two attorneys is likely to be the minimum secretarial staff essential to efficient functioning of the office." See Courts, p. 235. We recommend that all prosecutors seek funding to bring their secretarial staffs to this minimum level.

The prosecutors' offices have taken advantage of federal funds to hire law students as interns, and we believe intern programs should continue to be employed, with state funding if necessary. None of the offices uses paralegal assistance as recommended. We recommend that paralegal personnel be employed in all offices because, as the NAC recognizes: "An assistant prosecutor is a valuable resource. He should not be required to do tasks that could be accomplished by a paraprofessional at a lower cost to the public." See Courts, pp. 234-35.

Library holdings are generally adequate. Each office's library includes: H.R.S. with supplements, Session Laws, Hawaii Penal Code, Municipal/County Ordinances, Hawaii Reports, Shepard's Citations, Hawaii Digest, treatises on evidence and criminal law, criminal law and supreme court weekly reporters. These libraries could profitably be supplemented with the other (especially federal) books recommended by NAC Standard 12.3.

Standard 12.4:

Statewide Organization of Prosecutors

There should be a state-level organization of prosecutors

controlled by the four chief county prosecutors and the Attorney General, which performs the following functions: (1) development and coordination of training and other prosecution programs; and (2) coordination and, where necessary, provision upon request, to prosecutors' offices of support services such as laboratory assistance, special counsel, investigators, accountants, and other experts, data services, appellate research services and office management assistance.

This entity should provide for at least four meetings each year at which prosecutors from throughout the state can engage in continuing education and exchange with other prosecutors. In administering its program, the entity should try to eliminate undesirable discrepancies in law enforcement policies. The agency and its program should be funded by the state or the counties. A full-time executive director should be provided to administer the agency and its program.

Commentary:

Standard 12.4 closely resembles the NAC Standard 12.4, which calls for a statewide prosecutors' organization. ABA Prosecution Standard 2.2 also recommends the creation of a state council of prosecutors to provide support services, to assure the maximum practicable uniformity of law enforcement throughout the state, and to improve the administration of justice.

There has been created in Hawaii the Prosecuting Attorneys Association. Created as a non-profit corporation in 1976, the Association aims "to promote the common welfare of the criminal justice system in areas of mutual concern, such as appellate

review, training, communication, public education, and the equal administration of the laws." (Statement of Purpose, Art. III, Sec. A-7). The Association also intends "to actively participate, when appropriate, in the legislative process with respect to legislation which affects the criminal justice system." The Association's Board of Directors includes the four chief prosecutors and the state Attorney General. The organization meets four times a year to discuss matters of mutual concern, and has the potential to become the kind of statewide entity recommended by the Standard 12.4.

The principal purpose of the statewide organization is to provide services, and thus we recommend that there be a full-time executive director to administer the organization, and that the organization be funded by the state. The Hawaii organization is funded only by membership dues, and consequently has no executive director and no full-time staff. Without state funding the support function cannot be accomplished by the Association.

Hawaii has another agency named the Prosecutor-Public Defender Clearinghouse, headed by a full-time director, and equipped to facilitate appellate research, to organize seminars and to publish a monthly bulletin. Although its name suggests that the Clearinghouse services both prosecutors' and defenders' offices, its history has been primarily one of providing prosecution support. This was perhaps a natural development since the four prosecutors are separate and independent, whereas the Hawaii Public Defender is a unified, statewide organization. We recommend that the Hawaii Prosecuting Attorneys Association and

the Clearinghouse be merged, and that the organization thus created provide the assistance to prosecutors envisioned by Standard 12.4. Centralized support services are critical to the functioning of the neighbor island prosecutors' office.

This recommendation should be appraised in connection with our recommendations in Standards 13.14, 13.15 and 13.16. We believe that adequate support and training resources should be provided directly to the defender organization, as recommended by the NAC. The defender organization, because its administration is centralized, does not need an independent support agency, and in any event the propriety of providing services beyond research and case briefing through one agency to both prosecutors and defenders seems questionable.

Standard 12.5:

Education of Professional Personnel

The training of prosecutors should be systematic and comprehensive. Any prosecutor's office employing more than 25 attorneys should have an in-house training staff, headed by an attorney whose principal function is staff training. This training staff should establish a comprehensive entry-level and in-service training program for all assistant prosecutors, and should be adequately funded to be able to develop orientation materials and other materials relating to trial practice and trial evidence, and to employ videotape equipment. Offices not large enough to justify an in-house training staff should have their training needs served by the statewide organization recommended in Standard 12.4. All offices should supplement their training

programs by sending staff attorneys to appropriate training seminars and conferences on the mainland.

Commentary:

Standard 12.5 speaks to prosecutor training and recommends as "in-house" training program for the Honolulu prosecutor's office. This standard is based upon NAC Standard 12.5, which recommends that "in-house training programs for new assistant prosecutors should be available in all metropolitan prosecution offices."

All new prosecutors in Hawaii undergo basic orientation and training. The Honolulu and Hawaii County offices have developed orientation manuals, and all offices use senior personnel for the orientation function. The Kauai office has but two attorneys. All offices send attorneys to mainland prosecutors' schools such as the Northwestern Prosecutors' Short Course and the National College of District Attorneys in Houston. However, no in-service training program of the type contemplated has been developed. The Prosecutor-Public Defender Clearinghouse has organized statewide training seminars, and plans to continue to sponsor such programs on a quarterly basis in the future. All four offices participate in these programs. In addition, the Honolulu office holds its own periodic training sessions under the direction of senior deputies.

We believe that the Honolulu office should have a full-time training assistant with law student assistance (compare our discussion of Standard 13.16) to develop a comprehensive in-house training program. We believe that the statewide entity envisioned

in Standard 12.4 should be adequately funded to provide in-service training to the other three offices, and to develop a prosecutor's trial manual for all offices. We recommend that all offices continue to avail themselves of mainland training programs.

Standard 12.6:

Filing Procedure and Statistical Systems

The prosecutor's office should have a file control system capable of locating any case file upon demand, and a statistical system, either automated or manual, sufficient to permit the prosecutor to evaluate and monitor the performance of his office.

Commentary:

The proposed "file control system" enabling any particular case file to be located upon demand is designed to avoid "the misplacing of files [which] can result in the continuance or outright dismissal of serious criminal charges because the prosecutor is not prepared." See Courts, p. 241. Immediate access to any case file is the goal, and Hawaii prosecutorial practice is in conformity. Each office maintains an active case file, and individual files are in the possession of assigned attorneys. File control procedures in effect include cross-indexed card files and attorney and secretarial accountability for file entries. We recommend that each office continue to articulate and support efficient file control policies.

The second part of Standard 12.6 relates to statistics and record keeping, and the goal is to develop a system which "not only should satisfy [the office's] operational and planning

requirements, but also should be capable of integration with other criminal justice information systems." See Courts, p. 242.

We understand that the Honolulu office is in the process of revising its statistical system. The Maui office uses statistical sheets to evaluate performance, but no office has yet developed a system specifically designed for improvement in the areas of resource allocation, operational processing, management control, research and analysis, and interagency coordination.

Standard 12.7:

Development and Review of Office Policies

Each prosecutor's office should develop a detailed statement of office practices and policies including guidelines governing screening, diversion, and plea negotiations. This statement should be distributed to every assistant prosecutor, and should be reviewed every six months. Those practices and policies affecting the public should be available generally to the bar and to the public.

Commentary:

Recognizing the vast discretion reposed in every prosecutor's office, the NAC stresses that "decisions [about charging, plea negotiation, and sentencing recommendations] that affect the lives of individuals as drastically as these should not be made in a purely random, ad hoc, and informal manner [but] should be made in accordance with policies that have been carefully developed and frequently reviewed." See Courts, p. 243. The standard contemplates a detailed, written statement of office

policy in these areas. It seems vitally important that differences in the treatment of cases reflect even-handed implementation of policy rather than individual attorneys' ad hoc judgements. (Compare the discussion of Standard 3.3, supra.) NAC Standard 12.7 and ABA Standard 2.5 are to the same effect.

Honolulu and Hawaii Counties have office manuals setting forth guidelines about screening, diversion, plea negotiation, sentence recommendations and other internal office practices. These manuals are periodically reviewed, but are not available to the public. While NAC Standard 12.7 is silent on the issue of public access to this material, the ABA makes a useful distinction between "directives as to strategic and tactical matters which a chief prosecutor may give to his staff," which items the ABA would approve being treated confidentially, and general office policies, as to which the ABA recommends: "The public interest will be best served by having general policies, procedures and guidelines known to the bar and, indeed, to the courts." We recommend that prosecutors in Hawaii maintain written office policy in accordance with the ABA standard.

Standard 12.8:

The Prosecutor's Investigative Role

The prosecutor's primary function should be to represent the state in court. He and the police should cooperate with each other in their investigation of crime. Each prosecutor also should have investigatorial resources at his disposal to assist him in case preparation, to supplement the results of police investigation when police lack adequate resources for such

investigation, and, in a limited number of situations, to undertake an initial investigation of possible violations of the law.

The office of the prosecutor should review all applications for search and arrest warrants prior to their submission by law enforcement officers to a judge for approval; no application for a search or arrest warrant should be submitted to a judge unless the prosecutor or assistant prosecutor approves the warrant.

Commentary:

Recognizing the prosecutor's "primary function," Standard 12.8, which is based on NAC Standard 12.8, contemplates a limited investigative role in "cases involving complex issues that require legal evaluation during the investigation, such as some fraud cases, and cases where political expediency makes the prosecutor's participation of value in assuring the community of adequate investigation [including] serious police misconduct or corruption within governmental bodies." See Courts, *pp. 244-45. ABA Proseccution Standard 3.1 places on the prosecutor an "affirmative responsibility" to conduct independent investigation in such cases, and ABA Prosecution Standard 2.4 admonishes the prosecutor to employ "a regular staff of professional investigative personnel." The need for an investigative resource in the prosecutor's office increases if the prosecutor decides to combat white collar crime in a systematic way, because the police often lack the resources, expertise and inclination to investigate the businessman or public official. Some mainland urban prosecutors have established separate white-collar-crime departments with specially trained investigators.*

H.R.S. §62-78, applicable only to Hawaii, Kauai, and Maui Counties, provides that the prosecutor "may appoint an investigator [who] shall have all the powers and privileges of a police officer of the county." Section 6-704 of the Charter of the City and County of Honolulu authorizes the prosecutor to "appoint investigators who shall have all the powers and privileges of a police officer of the city." Section 6-704 also permits the assignment of police officers to the prosecutor's office for "necessary investigative work."

At present the Honolulu office employs six investigators pursuant to Section 6-704, and one police officer is assigned to the office. These investigators are used for supplementary investigative work, and several are assigned to a special investigative unit for work on unsolved murders and organized crime intelligence. The Honolulu prosecutor feels that he should have one investigator for every three prosecutors, and we concur, although much of the investigative work in progress and contemplated could be performed by paralegal personnel.

The counties of Kauai and Maui are generally satisfied with their investigative resources, utilizing police investigative services. On Kauai the investigator is assigned to the prosecutor's office and was selected on the basis of a competetive examination. Hawaii County has one full-time investigator pursuant to H.R.S. §62-78, and the prosecutor feels that an additional investigator is necessary.

Standard 12.8 states that the prosecutor's office should review applications for search and arrest warrants prior to

submission to a judge for approval. The standard further states that applications for search or arrest warrants should not be submitted to the judge unless the prosecutor or assistant prosecutor approves the warrant. This procedure is designed to ensure that the probable cause requirement of the Fourth Amendment is met. Prior approval of applications would have the effect of reducing the number of suppressions based on defective warrant applications. Local practice indicates that all county prosecutors' offices review and approve applications for search and seizure warrants prior to submission to a judge. Although the police do have the right to seek approval of the warrant despite prosecutorial disapproval, the practice indicates that the police do not do so.

Standard 12.9:

Prosecutor Relationships with the Public and with Other Agencies of the Criminal Justice System

The prosecutor should be aware of the importance of the function of his office for other agencies of the criminal justice system and for the public at large. He should maintain relationships that encourage interchange of views and information and that maximize coordination of the various agencies of the criminal justice system.

The prosecutor should maintain regular liaison with the police department in order to provide legal advice in the context of particular cases to the police, to identify mutual problems and to develop solutions to those problems. He should participate in police training programs and keep the police informed about

current developments in law enforcement, such as significant court decisions. He should develop and maintain liaison with the police legal adviser in those areas relating to police-prosecutor relationships.

The prosecutor should develop for the use of the police a basic police report form that includes all relevant information about the offense and the offender necessary for charging, plea negotiations, and trial. The completed form should be routinely forwarded to the prosecutor's office after the offender has been processed by the police. Police officers should be informed by the prosecutor of the disposition of any case with which they were involved and the reasons for the disposition.

The relationship between the prosecutor and the court and defense bar should be characterized by professionalism, mutual respect and integrity. It should not be characterized by demonstrations of negative personal feelings or excessive familiarity. Assistant prosecutors should negate the appearance of impropriety and partiality by avoiding excessive camaraderie in their courthouse relations with defense attorneys, remaining at all times aware of their image as seen by the public and the police.

The prosecutor should establish regular communications with correctional agencies for the purpose determining the effect of his practices upon correctional programs. The need to maximize the effectiveness of such programs should be given significant weight in the formulation of practices for the conduct of the prosecution function.

The prosecutor should regularly inform the public about the

activities of his office and of other law enforcement agencies and should communicate his views to the public on important issues and problems affecting the criminal justice system. The prosecutor should encourage the expression of views by members of the public concerning his office and its practices, and such views should be taken into account in determining office policy.

Commentary:

This standard discusses the prosecutor's relationship with the public and other agencies in the criminal justice system, and recommends the maintenance of a regular liaison with the police department. The prosecutor should participate in police training programs and keep the police informed of new developments in the law. The standard closely resenbles NAC Standard 12.9. The need for good prosecutor-police relations is apparent since the police serve as the basic investigative arm of the prosecutor. Thus, the prosecutor is dependent upon the police for the development of evidence necessary for conviction. It is essential that the police understand the evidentiary problems encountered by the prosecution in court. Prosecutors can educate the police on their deficiencies in either handling evidence or in failing to unearth needed evidence. This is not to suggest that the prosecutor train the police in investigative techniques, but that the prosecutor help the police understand what kinds of evidence are needed and are admissible in court. Keeping the police informed about recent developments in the law is also important to avoid the suppression of evidence because of violations of constitutional rights. NAC Police Standard 11.2

recommends the establishment of a full-time legal advisor attached to the police department and independent of the prosecutor's office. Absent this type of support within the police department, some consistent relationship between the prosecutor and the police is essential.

Current local practice indicates that only the Hawaii County Prosecutor designates an attorney as liaison with the police department, and that attorney participates in police recruit training regularly. The practice on other islands indicates that there is a working relationship between the two agencies. In Maui county, the deputy prosecutors assist police recruit classes and conduct other training when requested to do so. The Kauai prosecutor's office is available to render legal advice and to provide legal training.

The police use a police report form not developed by the prosecutor's office. The prosecutors feel that the format is adequate but one office has indicated that the police need some help in writing these reports and perhaps more time to write them. If that is the case, action should be taken to identify the exact nature of the problem and remedial steps should ensue.

That portion of Standard 12.9 dealing with relations with the court and defense bar has its counterpart in ABA Prosecution Standard 2.8, which also recommends that such relations be characterized by professionalism, respect, dignity, honesty, and no appearance of impropriety. The ABA standard also concerns itself with the conduct of the prosecutor in relation to the court. Hawaii practice appears to conform to this standard.

The third segment of the criminal justice system to which Standard 12.9 addresses itself is corrections. The need to be aware of the impact of the prosecutorial function on corrections seems obvious. Of the Hawaii prosecutors, only the Hawaii County office keeps in contact with the correctional agencies.

The final paragraph of Standard 12.9 deals with public relations and public education, and recommends that prosecutors' offices engage in regular dialogue with the public. The prosecutor ought to "regularly inform the public about the activities of his office" as well as his opinions on various criminal justice issues. In addition, the prosecutor ought to weigh public opinion in determining office policies and procedures.

In Hawaii, only the prosecutor on the Big Island engages in a regular program to keep the public informed, and he does this through a regular radio program.

Standard 12.10:

Career Prosecutor Service

The chief prosecutor should actively strive to create conditions of employment which are conducive to the retention of staff attorneys on a career basis. Among other things, the prosecutor's office should establish a sabbatical leave program, recognizing the enormously demanding nature of full-time trial practice.

Commentary:

The task force believes that prosecutors should create

inducements for careers in prosecution, one of which would be a sabbatical leave program. Compare Standards 7.5 and 13.17, recommending similar programs for judges and public defenders, respectively.

CHAPTER 13

THE DEFENSE

Standard 13.1:

Availability of Publicly Financed Representation in Criminal Matters

Public representation should be made available to eligible defendants and eligible potential defendants (as defined in Standard 13.2) in all criminal cases at their request, or the request of someone authorized to act for them, beginning at the time the individual either is arrested or is requested to participate in an investigation. The representation should continue during trial court proceedings and through the exhaustion of all avenues of relief from conviction.

A defendant who asserts the right to dispense with legal representation and conduct his own defense should be permitted to do so upon a judicial determination that the defendant has knowingly and intelligently waived his right to counsel and is aware of the dangers and disadvantages of self-representation. The defendant's legal knowledge and experience are not proper factors for the court to consider in assessing the validity of the proposed waiver of counsel. In any case where the defendant represents himself, the court may appoint standby counsel to aid the defendant under guidelines established by the court, and to be available to represent the accused in the event of termination of self-representation. The trial judge should terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct during proceedings.

Commentary:

Standard 13.1 addresses four related issues regarding the availability of publicly provided counsel for the indigent defendant. These issues are: (1) the kinds of cases in which a defendant has the right to public representation; (2) the point in time at which such right attaches; (3) the duration of this right through subsequent proceedings against the defendant; (4) the appropriate judicial stance with respect to a defendant's desire to conduct his own defense.

Standard 13.1, like its counterpart, NAC Standard 13.1, proposes that public representation be available to indigent defendants in "all criminal cases." This provision should, of course, be read together with Standard 8.2, which proposes to limit the scope of the term "criminal case" by eliminating all but the most serious traffic violations from this classification. All traffic offenses thus decriminalized do not occasion the possibility of imprisonment upon conviction, and so the standard measures up in all respects to the constitutional requirement articulated by the U.S. Supreme Court in Argersinger v. Hamlin, 407 U.S. 25 (1972), which held, as a matter of sixth amendment, right-to-counsel interpretation, that no indigent person could be imprisoned as a result of criminal proceedings where he was not afforded the right to court-appointed counsel.

Article I, Section 2 of the Hawaii Constitution provides for public representation of indigent defendants who are "charged with an offense punishable by imprisonment for more than 60 days." This provision is out of date, in light of Argersinger,

and should be amended at the next Constitutional Convention. The Hawaii Legislature has expanded the protection afforded by the state constitutional provision in H.R.S. §802-1, which extends the right to court-appointed counsel to an indigent arrested for, charged with or convicted of a jailable offense or an offense within the jurisdiction of Family Court; and to indigents threatened with civil commitment. Thus Hawaii stautory law comports with Standard 13.1.

Although H.R.S. §802-1 would provide counsel for one charged with any jailable offense, current practice is for the court not to appoint counsel in certain less serious (but nevertheless jailable) traffic offenses such as speeding and crossing a solid line. This practice does not violate Argersinger, since incarceration is in fact not imposed in these cases; it may, however, frustrate legislative intent by nullifying the incarceration alternative. We recommend in Standard 8.2 that these less serious traffic offenses be decriminalized, and if that recommendation were to be implemented, then no modification of current practice would be required. Were that recommendation not to be implemented, it is conceivable that the staff of the public defender would need to be augmented to handle the additional traffic cases.

NAC Standard 13.1 recommends that public representation should be made available to an indigent at his request when a criminal investigation has begun to focus upon him as a likely suspect. ABA Defense Standard 5.1 is slightly more restrictive, and posits that counsel should be provided "as soon as feasible

after [the defendant] is taken into custody." H.R.S. §802-3 provides that an indigent defendant may request any judge to appoint counsel to represent him at any reasonable time. The task force believes that public representation should be provided upon request to any eligible defendant who is "arrested or is requested to participate in an investigation," since defendants with means would typically contact counsel in either of these situations.

H.R.S. §802-3 appears to speak only to the situation where a defendant has been arrested, charged with a crime and brought to court. It does not speak to the pre-arrest situation. Past experience indicates that in certain instances, legal advice, either over the telephone or in person, is given by the public defender to one being held in custody or requested to participate in a police investigation. Also, the police routinely telephone the public defender office to request that a public defender be present during the course of a lineup. Legal advice has been given to persons who have come to the public efender office because of anticipated criminal law problems. However, there are no formal mechanisms in operation to insure that all suspects who desire legal advice receive that advice. H.R.S. §802-3 should therefore be amended to conform to this standard, and to provide early representation to eligible defendants.

Standard 13.1 and NAC Standard 13.1 provide that public representation should continue for the benefit of the indigent "during trial court proceedings and through the exhaustion of all avenues of relief from conviction." ABA Defense Standards

4.2 and 5.2 are similar, except that Standard 5.2 adds the further provision that the lawyer initially assigned to represent the defendant in the trial court should continue as counsel through appeal and post-conviction review unless a new assignment is necessary due to "geographical considerations or other factors." H.R.S. §802-1 extends the right to public representation to appeals taken from conviction. The current practice on Oahu is to appoint the public defender as counsel on appeal for all indigents whether previously represented by court-appointed private counsel or public defender counsel. The public defender also pays for the costs of the transcript unless the defendant is able to do so. In addition, H.R.P.P. 40(i) provides the right to public defender representation in post-conviction proceedings unless the "claim is patently frivolous and without trace of support...."

Considerations of familiarity with the defendant's case and of insuring the preservation of bases of appeal are the basis for the ABA recommendation that the appointed trial attorney should continue as counsel throughout the entire appellate process. The Hawaii Public Defender has recognized the desirability of continuous, one-to-one representation of each defendant by one lawyer throughout the trial process, but assigns a different attorney to handle the appeal. We concur with this practice, because it is inefficient to give trial attorneys appellate responsibility. Not only are the skills involved different, but the demands of trial deadlines tend to assume priority over appellate work, thereby diminishing the quality of appellate work. The creation of a separate appellate division

is also a good place to train new attorneys, and it is often helpful to have a new perspective brought to bear upon the case.

The second paragraph of Standard 13.1 is based upon the decision in Faretta V. California, 422 U.S. 806 (1975), which held that an accused has a personal right to self representation based on the Sixth Amendment. The Court noted in Faretta that a trial court "may terminate self-representation by a defendant who engages in serious and obstructionist misconduct," but refused to limit the right to conduct one's own defense upon an assessment of the defendant's legal knowledge and experience.

Standard 13.2:

Payment for Public Representation

Public representation should be provided to any person (under the conditions specified in Standard 13.1) who is financially unable to obtain adequate representation without substantial hardship to himself or his family. Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel or because he has posted or is capable of posting bond. The defendant's own assessment of his financial ability or inability to obtain representation without substantial hardship to himself or his family should be considered.

If, at any time after counsel is appointed, the court is satisfied that the defendant is financially able to obtain adequate representation, or to make partial payment for legal representation, without substantial hardship to himself or his family, the court may terminate the appointment of counsel, unless the person so represented is willing to pay therefor.

If appointed counsel continues the representation, the court may direct payment for such representation as the interests of justice may dictate.

Commentary:

Standard 13.2 provides criteria for determining eligibility for public representation. The basic guideline is whether payment by a defendant for defense services will cause "substantial hardship" for the individual or his family, and this criterion comes frm NAC Standard 13.2. ABA Defense Standard 6.1 is to the same effect. NAC Standard 13.2 also suggests that the financial resources of the defendant's friends or relatives, his ability to post bond and his continued employment following arrest should not be determinative of defendant's ability to pay. The defendant's own assessment of his ability to pay should be considered.

H.R.S. §802-3 provides that the determination of indigency is to be made by the public defender, subject to approval by the court, based upon an "appropriate inquiry into the financial circumstances" of the defendant and upon an affidavit signed by the defendant "demonstrating financial inability to obtain counsel." The Hawaii Supreme Court, in construing the predecessor of the current statute (H.R.S. §705C-4), applied a substantial hardship test that included consideration of the defendant's income, fixed monthly expenditures, assets, fixed liabilities, borrowing capacity, and good faith efforts to secure his own counsel. <u>*State v. Mickle*</u>*, 56 Hawaii 23, 525 P.2d 1108 (1974).*

The Hawaii court further stated that possessions such as a family home or an "economy class" automobile would not be considered in determining the defendant's ability to pay for counsel, because such assets are not convertible without causing substantial hardship. The defendant's ability to hire private counsel is also evaluated by the public defender in determining the eligibility of borderline cases. Such an evaluation would necessarily include consideration of the type and complexity of the case, since private attorneys will charge more to defend a person charged with murder than they would charge to defend a person charged with assault. Thus, Hawaii law and practice appear to comport with Standard 13.2 in this respect.

The requirement of partial payment by the defendant for public representation comes from NAC Standard 13.2. H.R.S. §802-6 provides for partial payment if the defendant's financial condition improves after the appointment of a public defender, but does not address the situation where the defendant could afford a partial payment at the time of the court appointment but could not obtain private counsel.

Standard 13.3:

Initial Contact with Client

The defendant or potential defendant, or a relative, close friend, or other responsible person acting for him, may request public representation at the time of arrest, at the time the defendant is requested to participate in an investigation, or at any time the defendant believes an investigation has focused upon him as a likely suspect. Such a request should be conveyed

to the public defender as soon as possible.

When a person is taken into custody or otherwise deprived of his freedom he should immediately be advised of his right to counsel. This advice should be followed at the earliest opportunity by the formal offer of counsel, made in words easily understood, and in a language understood by the person, stating that one who is unable to pay for adequate representation is entitled to have it provided without cost to him. At the earliest opportunity a person in custody should be effectively placed in communication with a lawyer. For this purpose he should be provided access to a telephone, the telephone number of the public defender, and any other means necessary to place him in communication with a public defender. The public defender's office should establish procedures to facilitate initial client contact at the earliest opportunity.

If, at the initial court appearance, no request for public representation has been made, and it appears to the judicial officer that the defendant has not made an informed waiver of counsel and is eligible for public representation, an order should be entered by the judicial officer referring the case to the public defender. The public defender should contact the defendant as soon as possible following entry of such an order.

No waiver of counsel should be accepted unless it is in writing and of record. If a person who has not seen a lawyer indicates his intention to waive the assistance of counsel, a lawyer should be provided to consult with him. If a waiver is accepted, the offer of counsel should be reviewed at each subsequent stage of the proceedings at which the defendant appears without counsel.

Where, pursuant to court order or a request by or on behalf of defendant, a public defender attorney interviews a defendant and it appears that the defendant is financially ineligible for public defender services, the attorney should help the defendant obtain competent private counsel and should continue to render all necessary public defender services until private counsel assumes responsibility for full representation of the defendant.

Commentary:

This standard seeks to effectuate the right to counsel in placing eligible defendants in contact with counsel as early in the proceedings as possible. The standard draws heavily upon NAC Standard 13.3. ABA Defense Standard 5.1 is consistent with the above concept, except that it provides for notification of the public defender by the authorities rather than by the defendant himself. The ABA Defense Standard 7.1 suggests that the defendant be notified of his right to counsel immediately after he is taken into custody or deprived of his liberty, and that such notice be followed as soon as possible with an actual offer of counsel. NAC Standard 13.3 says merely that "procedures should exist whereby the accused is informed of this right [to counsel], and of the method for exercising it."

Hawaii law contains no provision for ensuring early contact between eligible defendants and counsel. H.R.S. §802-3 states that eligible defendants may request the judge to appoint counsel at any reasonable time. This presumes that the defendant is in court and is aware of his right to counsel. H.R.P.P. 10.1 calls

upon the court to notify the defendant of his right to counsel. Hawaii law thus provides only for notice once the defendant appears before a court. A statute should be enacted to facilitate early representation in Hawaii, so that valuable rights are not forfeited by unwitting accused. Miranda v. Arizona, 384 U.S.436 (1966), would require notification of such a right prior to interrogation of the defendant, but Standard 13.3 would require notification in all circumstances.

Standard 13.4:

Public Representation of Convicted Offenders

Counsel should be available at all correctional facilities to advise inmates desiring to appeal or collaterally attack their convictions. Counsel should also be provided to represent: any indigent inmate who is the subject of prison disciplinary proceedings; any indigent inmate at any proceeding affecting his parole or early release; any indigent parolee at any parole revocation hearing; and any indigent probationer at any probation revocation hearing.

Commentary:

Standard 13.4 closely resembles NAC Standard 13.4. ABA Defense Standards 4.2 and 5.2 are to the same effect. H.R.S. §802-1 provides for public representation of indigents in all judicial proceedings subject to court approval, and in all administrative hearings such as parole proceedings subject to the approval of the administrative agency. Public defender assistance has been provided for inmates requesting such

assistance when appearing before the parole board to set the minimum term of their imprisonment or to request parole. Counsel has also been afforded those facing either parole or probation revocation. H.R.P.P. 40 also provides for public defender representation for a petitioner in post-conviction proceedings when the petition alleges that the petitioner is unable to afford counsel and when the court finds that the petition is not patently frivolous.

The State Law Enforcement Planning Agency has funded a three-year project called the Hawaii Correctional Legal Services Program. This project offers post-conviction legal services to prisoners, including representation at disciplinary hearings at the prison, and will thereby lighten the burden on the public defender. The efforts of this project and the public defender appear to satisfy Standard 13.4.

Standard 13.5:

Method of Delivering Defense Services

Services of a full-time public defender organization, and a coordinated assigned counsel system that encourages significant participation by the private bar should be available to supply attorney services to eligible persons.

Commentary:

Standard 13.5 is based upon NAC Standard 13.5, which expresses a preference for a full-time public defender organization, and a coordinated assigned counsel system involving substantial participation of the private bar. ABA Defense Standard 1.2 does

not express a preference between the public defender or the appointed counsel system, and would approve of exclusive use of either system or a combination of the two.

Hawaii utilizes a full-time, statewide public defender system and a coordinated assigned counsel system. Assigned counsel are appointed when the caseload of the public defender will not permit acceptance of additional cases, when the public defender cannot accept the case because of a conflict of interest, or in some instances when the defendant expresses a strong desire to be represented by private counsel. In 1975, 546 indigent felony defendants were assigned to the public defender, while 157 indigents were assigned to private counsel. The totals in 1974 were 739 and 317 respectively. The list of assigned counsel includes the names of approximately 125 attorneys.

The factors which are generally cited in support of the public defender system are the belief that more effective representation of criminal defendants is afforded by attorneys who deal exclusively with criminal law and procedure, and the belief that a public defender will be more likely to advocate new laws and procedures of benefit to the criminal justice system. The primary consideration which militates against the exclusive use of the public defender is the strong belief that the defense of criminally accused indigents and the problems associated with the criminal justice system should be the concern of all members of the bar because of the impact of criminal justice developments upon the entire fabric of society. Thus Standard 13.5 advocates the best of both systems: the full-time public

defender and significant participation by the private bar. The statistics for 1974 and 1975 indicate that Hawaii practice also combines the best of both systems.

Standard 13.6:

Financing of Defense Services

Defender services should be organized and administered at the statewide level. Financing of defender services should be provided by the state.

Commentary:

Standard 13.6 is based on NAC Standard 13.6, which recommends that, however organized and administered, defender services should be financed by the State. The ABA standards take no position on this issue.

The Hawaii Office of the Public Defender is a statewide agency and is financed by the state. H.R.S. §802-9 creates a five-member Public Defender Council, appointed by the Governor, which council appoints the public defender. This system seems ideally suited for Hawaii.

Standard 13.7:

Chief Public Defender to be Full-Time and Adequately Compensated

The complexities and demands of the defense function require that the chief public defender be a full-time, skilled professional. The chief public defender for the state should be compensated at a rate determined with reference to the salaries paid trial judges, attorneys with comparable responsibilities in other areas of public service.

Commentary:

Standard 13.7 resembles Standard 12.1, which recommends that the Chief Prosecutor be a full-time, skilled professional who is paid an adequate salary. Standard 13.7 also resembles NAC Standard 13.7. The Hawaii Public Defender is a full-time position, and the salary is $37,500 per year.

ABA Defense Standard 3.1 recommends that the public defender's salary be comparable to that of the prosecutor. We have noted, in the commentary to Standard 12.1, that the four Hawaii prosecutors, because they are county employees, are paid varying amounts.

Standards 13.8:

Selection of Chief Public Defender

The chief public defender should be as independent as private counsel who undertakes the defense of a fee-paying criminally accused person. He should be selected on the basis of demonstrated ability and high personal integrity, and should be appointed for a term of not less than four years by the Hawaii Public Defender Council.

The Hawaii Public Defender Council should consist of five members, appointed by the governor, and serving staggered terms of five years. The Council should have one member from each of the counties of the state, and at least two members from Honolulu. The Council should exercise general supervisory authority over the office of the public defender.

The chief public defender should be subject to disciplinary or removal procedures for permanent physical or mental disability

seriously interfering with the performance of his duties, willful misconduct in office, willful and persistent failure to perform public defender duties, or conduct prejudicial to the administration of justice. Power to discipline the chief public defender should be placed in the Public Defender Council.

Commentary:

Standard 13.8 departs from NAC Standard 13.8, which recommends "nomination by a selection board and appointment by the Governor." The goal is to insure that the public defender is "as independent as any private counsel who undertakes the defense of a fee-paying criminally accused person." A similar goal informs ABA Defense Standard 4.1, which places the authority and responsibility for selecting the public defender in an independent board of trustees.

H.R.S. §802-9 establishes a five-member Public Defender Council with representation from all counties. The Governor appoints the defender council which in turn appoints the public defender for a term of four years and until his successor is appointed and qualified (H.R.S. §802-11). The statute contains no prohibition regarding reappointments. Created in 1972, the Public Defender Council has functioned well and has not sought to interfere with the administration and operation of the office.

It is arguable that, because the members of the Public Defender Council serve at the pleasure of the Governor, the goal of professional independence is threatened by the appearance and possibility of control by the executive. The standard thus recommends that council members serve "staggered terms of five years."

Standard 13.9:

Performance of Public Defender Function

Policy should be established for and supervision maintained over the public defender office by the chief public defender. It should be the responsibility of the chief public defender to insure that the duties of the office are discharged with diligence and competence.

The chief public defender should seek to maintain his office and the performance of its function free from political pressures that may interfere with his ability to provide effective defense services. He should assume a role of leadership in the general community, interpreting his function to the public and seeking to hold and maintain their support of and respect for this function.

The relationship between the law enforcement component of the criminal justice system and the public defender should be characterized by professionalism, mutual respect, and integrity. It should not be characterized by demonstrations of negative personal feelings on one hand or excessive familiarity on the other. Specifically, the following guidelines should be followed:

1. The relations between public defender attorneys and prosecution attorneys should be on the same high level of professionalism that is expected between responsible members of the bar in other situations.

2. Public defenders should negate the appearance of impropriety by avoiding excessive and unnecessary camaraderie in and around the courthouse and in their relations with law enforcement

officials, remaining at all times aware of their image as seen by their client community.

3. The chief public defender should be prepared to take positive action, when invited to do so, to assist the police and other law enforcement components in understanding and developing their proper roles in the criminal justice system, and to assist them in developing their own professionalism. In the course of this educational process he should assist in resolving possible areas of misunderstanding.

4. The chief public defender should maintain a close professional relationship with his fellow members of the legal community and organized bar, keeping in mind at all times that this group offers the most potential support for his office in the community and that, in the final analysis, he is one of them. Specifically:

a. He must be aware of their potential concern that he will preempt the field of criminal law, accepting as clients all accused persons without regard to their ability or willingness to retain private counsel. He must avoid both the appearance and fact of competing with the private bar.

b. He must, while in no way compromising his representation of his own clients, remain sensitive to the calendaring problems that beset civil cases as a result of criminal case overload, and cooperate in resolving these.

c. He must maintain the bar's faith in the defender

system by affording vigorous and effective representation to his own clients.

d. He must maintain dialogue between his office and the private bar, never forgetting that the bar more than any other group has the potential to assist in keeping his office free from the effects of political pressures and influences.

Commentary:

Standard 13.9 closely resembles NAC Standard 13.9, which outlines the public defender's appropriate relationships with the prosecution, police, public, and the private bar.

H.R.S. §802-9 designates the Public Defender Council as the governing body of the public defender. As such the defender council promulgates defender policy while the public defender is responsible for the implementation of such policy. Standard 13.9 recommends that public defender policy be established by the chief public defender.

Standard 13.10:

Selection and Retention of Attorney Staff Members

Hiring, retention, and promotion policies regarding public defender staff attorneys should be based upon merit and demonstrated legal ability. Care should be taken to recruit lawyers from all segments of the population. The chief public defender should undertake programs, such as legal internships for law students, designed to attract able young lawyers to careers in public defender work. The position of public defender staff

attorney should be a full-time occupation, and staff attorneys should be prohibited from engaging in outside law practice.

Commentary:

Standard 13.10 is based in part on NAC Standard 13.10. Compare Standard 12.2. The Hawaii public defender selects staff attorneys on the basis of merit subject to the approval of the Public Defender Council. Staff attorneys are full-time employees and serve at the pleasure of the public defender. The defender has established law student intern positions, and in all respects the practice measures up to this standard.

Standard 13.11:

Salaries for Defender Attorneys

The starting salaries for public defender staff attorneys should be comparable to starting salaries paid by private law firms and by other governmental agencies, and the chief public defender should have the authority to increase periodically the salaries for staff defenders to a level that will encourage the retention of able and experienced defenders. For the first five years of service, salaries of defender staff attorneys should be comparable to those of attorney associates in private law firms and other governmental agencies.

Commentary:

Standard 13.11 is similar to Standard 12.2. ABA Defense Standard 3.1 states that public defender staff attorneys should be compensated at a rate comparable to that of their counterparts in prosecutorial offices.

A law school graduate with no experience would probably start as a law clerk at the public defender office. His salary would be $1,100 a month or $13,200 a year. Upon the opening of a position in the trial division, he would move up to be a deputy defender and be paid $14,472 a year. There is a proposed pay scale that calls for a starting defender to be paid $15,924 a year. Though this is an improvement over past salary scales, it is still not at par with salaries in the prosecutors' offices or in private practice. The starting salary for a prosecutor just graduated from a law school is $16,400 a year. Starting salaries in private law firms are in the range of $16,500 to $17,000 plus a bonus.

Irrespective of years of experience, the salary range of defenders is up to $25,176 per year depending upon experience, merit, and the responsibility assigned to the attorney. The salary range for prosecutors is up to $32,000 per year in Honolulu. Generally speaking, then, public defender salaries should be substantially increased in Hawaii.

Standard 13.12:

Workload of Public Defenders

Keeping in mind the goal of consistently high quality defense representation, which includes the ability of each defender attorney to prepare properly every assigned case, the chief public defender should develop caseload guidelines of two sorts: (1) maximum number of cases per attorney per year; and (2) maximum number of cases per attorney at any given time. These figures may vary depending upon the level of experience of the

attorney, the amount of collateral or administrative duties assigned the attorney, and the kinds of cases which comprise the attorney's workload. These guidelines should be reconsidered and refined at least once a year. They should be used to project the number of staff attorneys required to discharge the work of the office, and to project and coordinate the workload of the assigned counsel panel.

The chief public defender should regularly monitor the workloads of individual attorneys and that of the entire office. If he determines that because of excessive workload the assumption of additional cases or continued representation in previously accepted cases by his office, or by an individual staff attorney, might reasonably be expected to lead to inadequate representation of clients, he should bring the matter to the attention of the court or courts involved and ensure that the overload cases are given to members of the assigned counsel panel.

Commentary:

NAC Standard 13.12 proposed maximum defender attorny caseload guidelines as follows: "felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25." The task force rejected these figures in favor or a standard which calls upon the chief public defender to develop caseload guidelines which will depend upon local

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conditions and which may be higher or lower than the NAC estimates. In addition, the defender should establish guidelines for "maximum number of cases per attorney at any given time." The former guidelines will enable the office to project the number of lawyers needed to discharge the work of the office; the latter will faciliate assignment of cases to individual attorneys and determination of excessive caseload situations. It should be noted that the NAC figures were developed to deal with the caseload problems experienced in large metropolitan areas such as New York where the caseload total induced assembly-line justice.

The factors which should be considered in devising workload standards consist of the speed of turnover of cases, the percentage of cases litigated, the extent of support services available to attorneys, court procedures, the amount of time required of the attorney with respect to other activities, and the skill and experience of the attorney. The primary reason for determining workload standards is the goal of consistently high quality defense representation. Such representation requires extensive fact investigation, thorough research of the legal issues presented, and careful preparation for trial.

The Hawaii public defender has used the NAC caseload figures as a guide with some modifications. The caseload standards for a year are: 150 for felonies, 400 for misdemeanors, and 300 for a mixture of felonies and misdemeanors. His caseload for 1975 for 25 attorneys was 2,907 felonies, 4,593 misdemeanors, and 1,247 others. The last category includes family court cases, civil commitments, and other miscellaneous

cases.

Regarding the overload situation, the public defender believes that 40 to 60 pending cases is enough for an individual defender. The actual number is dependent on the type of case. This is generally in line with the figures used by other jurisdictions in limiting the pending caseloads of attorneys to insure competent representation. New York Legal Aid Society lawyers are limited to 40 pending felony cases. The D.C. Public Defender Service limits its lawyers to 30 pending felony cases. The upshot of this discussion is that the Public Defender in Hawaii has established caseload and overload guidelines, that he has a means for refusing overload cases, and that he presently believes that his workload does not detract from the goal of quality representation. Standard 13.12 suggests that the guidelines "be reconsidered and refined at least once a year."

Standard 13.13:

Community Relations

The public defender should be sensitive to all the problems of his client community. He should be particularly sensitive to the difficulty often experienced by the members of that community in understanding his role. In response:

1. He should seek, by all possible and ethical means, to interpret the process of plea negotiation and the public defender's role in it to the client community.

2. He should, where possible, seek office locations that will not cause the public defender's office to be excessively identified with the judicial and law enforcement components of

the criminal justice system, and should make every effort to have an office or offices within the neighborhoods from which clients predominantly come.

3. He should be available to schools and organizations to educate members of the community as to their rights and duties related to criminal justice.

Commentary:

Standard 13.13, based on NAC Standard 13.13 reflects a realization that public understanding of the public defender's duty is necessary both to insure public support for defense services and to instill trust in the minds of his clients.

The Hawaii public defender has made himself available for and has participated in speaking engagements for various community organizations. Members of the staff have spoken at various high schools. As a means of implementing the objective of instilling confidence in the public defender in the minds of his clients, the standard recommends that the defender should seek to locate his office in an area which is readily available to his clients and which is not in immediate proximity to the courts and police stations. ABA Defense Standard 3.3 recognizes the desirability of locating the defender office "in a place convenient to the courts." The Hawaii public defender office is located in a building housing other community service organizations, and is not in close proximity to the courts, the prosecutor, or the police. The location does not present major problems with respect to access to the courts. The neighbor

island offices are located close to the courts but, with the exception of the Kauai office, these offices are not in the court building.

Current plans call for the Honolulu defender office to be located in the new court building upon its completion in 1981, but that scheduled move should be re-examined in light of this standard. Proximity to the courts is desirable but locating the defender office in the courthouse risks "excessive identification" with the judiciary and prosecutorial components of the criminal justice system.

Although the public defender has investigated the possibility of establishing satellite offices in outlying regions, he has determined that the additional costs would outweigh any potential benefit since a centralized office has not been a problem for the clients. On Hawaii, the public defender has a half-time office in Kona that shares space with the Legal Aid office in Kealakekua.

Standard 13.14:

Supporting Personnel and Facilities

The office of the public defender should have an adequate secretarial, investigative, paralegal, and social work support staff. The office should employ an office manager with the responsibility for program planning and budget management, procurement of equipment and supplies, and selection and supervision of non-legal personnel. Paraprofessionals should be utilized for law-related tasks to the extent possible. There should be adequate secretarial and investigative help for all staff attorneys.

Special efforts should be made to recruit members of the support staff from all segments of the community.

The budget of the public defender for operational expenses other than the costs of personnel should be substantially equivalent to, and certainly not less than, that provided for other components of the justice system with whom the public defender must interact, such as the courts, prosecution, private bar, and the police. The budget should include:

1. Sufficient funds to provide quarters, facilities, copying equipment, and communications comparable to those available to similar-size private law firms. Each defender-lawyer should have his own office to assure absolute privacy for consultation with clients.

2. Funds to provide tape recording, photographic and other investigative equipment of a sufficient quantity, quality, and versatility to permit preservation of evidence under all circumstances.

3. Funds for the employment of experts and specialists, such as psychiatrists, forensic pathologists, and other scientific experts in all cases in which they may be of assistance to the defense.

4. Sufficient funds or means of transportation to permit the office personnel to fulfill their travel needs in preparing cases for trial and in attending court or professional meetings.

The defender office should have immediate access to a library sufficiently extensive to fulfill the research needs of the office. Staff attorneys should be supplied with personal copies of books,

such as the Hawaii Penal Code and the Hawaii Rules of Penal Procedure, and with personal copies of Hawaii Supreme Court slip opinions.

Commentary:

Standard 13.14 is similar to NAC Standard 13.14. ABA Defense Standards 1.5 and 3.3 are to the same effect.

The Hawaii public defender is housed in a facility which is furnished in compliance with the above standards. The budgetary allowance of $15,000 for expert witness fees, transcripts, special contracts, witness and sheriff fees and other similar expenses is inadequate in comparison with the resources available to the prosecution. Although Hawaii law provides for expert witnesses to be appointed by the court and paid out of the court's budget, cases have and will continue to arise in which it is necessary for the defense to provide for its own expert witness. Transcripts currently cost $1.875 per page.

Except for reimbursement for mileage of official business, transportation funds are lacking in the public defender office. Funds for inter-island travel are present but not for travel to the mainland. A total of four investigators are currently assigned to the public defender office. While it would not be feasible to attempt to achieve parity with the prosecution in this area due to enormous amount of police investigative support available to the prosecution, it is nevertheless important to insure that defender attorneys are not saddled with investigative functions beyond that normally assumed by any defense attorney.

Standard 13.15:

Providing Assigned Counsel

The public defender office should have responsibility for compiling and maintaining a panel of attorneys from which a trial judge may appoint counsel to represent a particular defendant. The trial court should have the right to add to the panel attorneys not placed on it by the public defender. The public defender's office also should provide assistance to lawyers on the panel and support services for appointed lawyers, and it should monitor the performance of appointed attorneys. In appropriate cases, the court should be empowered to appoint more than one assigned counsel to represent a defendant.

Commentary:

Based on NAC Standard 13.15, Standard 13.15 recommends that the public defender be responsible for maintaining a list of private attorneys from which a trial judge can select appointed counsel for defendants who cannot be represented by the public defender. The standard also suggests that the public defender be responsible for monitoring the performance of panel attorneys and for providing them with support services.

ABA Defense Standards 2.1 and 2.2 provide for the systematic selection of assigned counsel, but do not assign responsibility for maintenance of a list of eligible attorneys. The standards recognize the competing goals of wide distribution of assignments and providing counsel of high competence, and therefore recommend that co-counsel with less experience be assigned to work with those attorneys whose familiarity with

the criminal courts and criminal procedure qualifies them for inclusion in a primary roster of assigned counsel.

Assigned counsel for felony cases in Hawaii currently come from a roster of attorneys maintained by the court. The roster is made up of approximately 125 attorneys of which 25% have less than five years' experience. Cases are assigned from the list on a semi-rotational basis which attempts to match the seriousness of the charge with the experience of the attorney.

The Hawaii public defender maintains a list of approximately 30 attorneys who provide representation to clients charged with misdemeanors. The public defender selects an attorney from the roster and sends the client to the assigned counsel. However, ultimate responsibility for the appointment of counsel and approval of fees rests with the court. Performance of assigned counsel is informally monitored by the public defender. The public defender takes into account the complexity of the case along with the experience and expertise of the private counsel in making the assignment.

The responsibilities placed on the defender by this standard, including monitoring and supporting the panel, will require increased administrative resources in the defender office. We recommend that the public defender develop a plan for implementing this proposal, in consultation with the judges of the circuit and district courts.

Standard 13.16:

Training and Education of Defenders

The training of public defenders and assigned counsel panel members should be systematic and comprehensive. The public defender office should have an in-house training staff, headed by an attorney whose principal function is staff and panel training. An intensive, entry-level orientation and training program should be established to assure that all attorneys, prior to representing eligible clients, have the basic trial skills necessary to provide effective representation. The defender office should also establish a comprehensive in-service training program for all defender staff attorneys, and should have sufficient funds to develop orientation materials and other materials relating to trial practice and trial evidence, and to employ videotape equipment.

The defender office should supplement its entry-level and in-service training program by sending staff attorneys to appropriate training seminars and conferences on the mainland.

Commentary:

Standard 13.16 envisions a defender training program which is "systematic and comprehensive," and which consists of an orientation and entry-level program plus comprehensive in-service training. NAC Standard 13.16 is to the same effect.

The Hawaii public defender places all new staff attorneys in the research division for their initial orientation to criminal defense practice. It is there that they gain greater familiarity with substantive criminal law and criminal procedure.

Four training sessions are held during the year, one of which is a live-in session lasting approximately three days and dealing with problem-solving techniques and recent developments in substantive criminal law. The other training sessions deal with specific topics such as cross-examination techniques and use of expert witnesses. The major deficiency is that the defender office does not have an "in-house training staff, headed by an attorney whose principal function is staff and panel training."

The Department of Personnel Services has acquired a video-tape machine and has taped several defender training seminars. There is hope that the use of video-tape equipment may ease the problem of training new attorneys.

The problem faced by the defender office is that it does not have sufficient resources to enable one staff attorney to devote full time to staff and panel training and the development of materials. This is a major deficiency, and should be addressed as soon as possible. The defender office recruits most of its staff attorneys from the ranks of recent law graduates, and these lawyers need more training than they are presently receiving. The defender should also provide training programs in criminal law for panel attorneys. One full-time senior staff attorney with law student asistance will be required to meet this need.

Standard 13.17:

Career Public Defender Service

The chief public defender should actively strive to create

conditions of employment which are conducive to the retention of staff attorneys on a career basis. Among other things, the public defender office should establish a sabbatical leave program, recognizing the enormously demanding nature of full-time criminal trial practice.

Commentary:

The task force believes that greater inducements for career public defender service should be created, and one such inducement would be a sabbatical leave program. Compare Standards 7.5 and 12.10, recommending similar programs for judges and prosecutors, respectively.