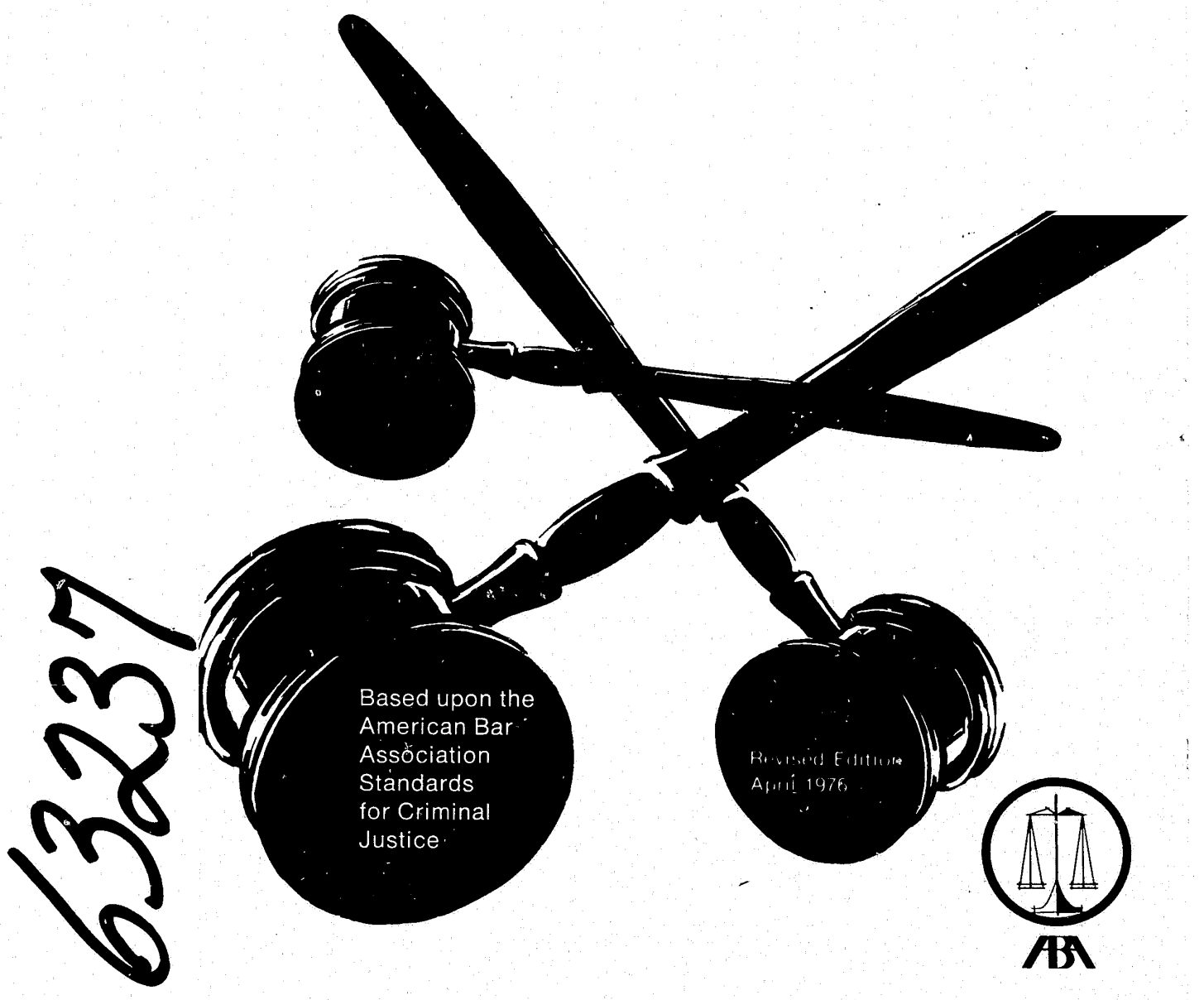
Prepared for the
Committee on
Implementation of
Standards for the
Administration
of Criminal Justice
of the Section of
Criminal Justice
of the American Bar
Association



PATTERN

RULES OF COURT

AND

CODE PROVISIONS

REVISED EDITION
MARCH 1976

BASED UPON THE

AMERICAN BAR ASSOCIATION

STANDARDS FOR CRIMINAL JUSTICE

PREPARED FOR THE

COMMITTEE ON IMPLEMENTATION OF STANDARDS

FOR THE

ADMINISTRATION OF CRIMINAL JUSTICE

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STANDARDS FOR CRIMINAL JUSTICE

PREPARED BY
PAUL E. WILSON
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FOR
THE COMMITTEE ON IMPLEMENTATION OF STANDARDS
FOR THE ADMINISTRATION OF CRIMINAL JUSTICE
OF THE
SECTION OF CRIMINAL JUSTICE
OF THE
AMERICAN BAR ASSOCIATION

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PREFACE

The American Bar Association Section of Criminal Justice is pleased to be able to provide you with a copy of this revised edition of Pattern Rules of Court and Code Provisions, a publication of our Committee on Implementation of Standards for the Administration of Criminal Justice, chaired by Justice Tom C. Clark. The fact that a second edition of this book was needed within a year of the first is a tribute both to the author, Paul E. Wilson, Kane Professor of Law, University of Kansas, and to the soundness of the material upon which it is based, the American Bar Association Standards for Criminal Justice.

The Section of Criminal Justice, primarily through its Implementation Committee, has been in the forefront of the organized bar's effort to bring about meaningful improvement of the criminal justice system, through the implementation of both the ABA Standards for Criminal Justice and the National Advisory Commission Standards and Goals for Criminal Justice. The Section has had the responsibility since 1968 for coordinating the nationwide implementation of all the ABA Standards for Criminal Justice, except those covering Fair Trial and Free Press. The implementation of the latter Standards, because of their special nature, is the responsibility of the Legal Advisory Committee on Fair Trial and Free Press, a subcommittee of the ABA Standing Committee on Association Communications.

The Standards themselves -- 17 volumes and a compendium covering every phase of the criminal trial -- were developed over a span of nine years by practicing lawyers, judges and scholars. The final product is a distillation of what was considered the best available practice in each stage of the proceeding -- from arrest through post-conviction appeal. And since the approval of the most recent volume in 1973, the Standards are truly becoming the "standard" by which to measure the performance of defense and prosecution lawyers, judges and law enforcement personnel. They have been cited in over 4,000 appellate decisions, codified in part in various codes of legal professional responsibility, and used as the basis of both substantive and procedural reform in many jurisdictions.

Guidelines not kept up to date, however, quickly become of little value, and to keep that from happening, the ABA has created a Special Committee for the Administration of Criminal Justice to review the Standards and suggest changes necessitated by U.S. Supreme Court decisions and evolving legal trends. New standards in such areas as the grand jury, the charging process and the mentally disabled are now being considered. Additionally, the ABA has approved new standards relating to Court Organization and Trial Courts, developed by the ABA Commission on Judicial Administration; and a multi-volume set of juvenile justice standards is expected to be presented to the House of Delegates for consideration in the near future.

The proliferation of standards and goals is a positive sign, because it shows that the organized bar not only is concerned about the many problems it sees around it but also is doing something to help solve those problems. Our Section itself has held numerous programs around the country to acquaint members of the bar, bench, media and public-at-large with the role of standards and goals in the amelioration process, and we have published a number of publications dealing with various aspects of the implementation process -- the latest, a series of "how to do it" brochures.

This book, Pattern Rules of Court and Code Provisions, is one of the most significant and successful of our publications, designed specifically as a tool for drafting agencies to use in developing or revising codes, rules and statutes governing procedure and relevant substantive matters in criminal cases. It is a highly useful work, and I commend it to you.

ROBERT M. ERVIN
Chairman
ABA Section of Criminal Justice

Introduction

The original edition of Pattern Rules of Court and Code Provisions was published in April, 1975, by the American Bar Association Section of Criminal Justice as part of the nationwide program to implement the Standards for Criminal Justice. It was intended as a tool for drafting agencies working to revise or develop rules and statutes governing procedure in criminal cases. The objective was to place in the hands of the drafter a restatement of the standards in language suitable for enactment as rules or codes of criminal procedure. The supply of the original edition is now exhausted and this revised edition is published with the same purpose and objective.

The entire original manuscript has been reviewed. Corrections and editorial changes have been made where needed. Some of the notes have been amplified to reflect relevant developments in the past year. The only significant changes from the earlier draft are to be found in portions of Title 5, The Function of the Trial Judge; and Title 10, Pleas of Guilty, which relate to plea discussions and agreements and guilty plea procedure. The standards dealing with those subjects disclose a considerable amount of overlap and some apparent inconsistency, which were reflected in the original draft of this publication. An effort has been made in this edition to eliminate duplication of content and to reconcile apparent inconsistencies.

Subsequent to final approval and publication of the last volume of Standards (Relating to the Urban Police Function, approved February, 1973), the American Bar Association created the Special Committee on Administration of Criminal Justice. Its responsibility includes continuous monitoring of the Standards for the purpose of keeping this monumental product current with decisions of the United States Supreme Court; to recomment changes and clarification deemed desirable in keeping with developments in criminal justice; and to recommend additional Standards in subject areas not now adequately covered. The ABA Section of Criminal Justice provides staff direction for this Special Committee, hence will serve as an information center for any revisions in the Standards resulting from this monitoring function.

The Standards for the Administration of Criminal Justice deal with a wide range of concerns. Their effective implementation requires action by all branches and at all levels of government. To the extent that the Standards relate to substantive law, their implementation will require action by the legislature. On the other hand, some of the Standards focus upon matters of administrative policy, and their implementation can best be accomplished by administrative regulation. But the greatest impact of the Standards is upon those areas of criminal procedure that are the special concern and responsibility of the judiciary. While the Standards are increasingly being recognized by appellate courts as supplying guidelines for judicial decision-making, the best vehicle for the expeditious and comprehensive implementation of the Standards probably is the judicial rule-making power.

Although rule-making is commonly regarded as a function of appellate courts, the power to adopt and enforce rules of procedure is an aspect of the judicial power and may be exercised by the trial courts as well. Indeed, the wide range of variations in local conditions affecting the administration of justice suggests that a more active rule-making role by trial courts would be appropriate. Local courts, more sensitive to local needs, should be able to respond more meaningfully to those needs than more remote appellate courts. The only limitations upon the rule-making power of trial courts lie in their not adopting rules which conflict with applicable constitutional limitation, statutory provisions and rules promulgated by appellate courts exercising supervisory powers.

Most of the Standards dealt with in this publication relate to the pretrial and trial stages of criminal justice. Prosecution, Defense, Providing Defense Services, The Trial Judge's Function, Pretrial Release, Discovery, Speedy Trial, Joinder and Severance, Pleas of Guilty, Trial, Sentencing, Probation and Post Conviction Procedures are all wholly or partly the concerns of the trial court. In the absence of statutes or appellate court rules to the contrary, there is no impediment to rule-making by trial courts in these areas.

Part I of this document consists of suggested drafts which translate most of the standards into rule or statute form. Those Standards which deal with matters which are clearly substantive have generally been omitted. Because of special problems arising from the unique and sensitive areas with which they deal, no effort has been made to draft rules relating to the Standards on Electronic Surveillance and Fair Trial - Free Press. Also, proposed rules to implement the newest of the Standards, those relating to the Urban Police Function, have not yet been prepared. Their formulation is to be a joint effort of the Joint American Bar Association/International Association of Chiefs of Police (ABA/IACP) Advisory Committee on Implementation of Urban Police Function Standards, and upon publication will be assigned to the space reserved as Title I of this publication. Except for these Standards, the proposals herein deal with the entire criminal justice spectrum covered by the Standards.

The proposals submitted in this publication are not suggested as uniform rules of criminal procedure. It is unlikely that any jurisdiction will find them suitable for adoption without modification. But if they are considered by drafting agencies along with other relevant materials, and followed wherever they are responsive to the needs of the criminal justice system, they will have served a useful purpose.

As noted above, these proposals mainly relate to Standards of a procedural nature. In a jurisdiction where the courts exercise broad rule-making power, most will probably be susceptible of implementation by court rule. In other states, where, as a

matter of law or tradition, rules of criminal procedure are prescribed by the legislature, implementation may be largely a legislative task. In either case the drafts will be useful.

Limitations upon space have required that comment on the proposed rules be minimal. In each instance, reference is made to the Standard on which the rule is based. Full comment on each Standards is to be found in the published volume of the Standards. Hence, these proposed rules should be read with the Standards on which they are based and the published comment relative to the Standard. Also, attention is called to Wilson, "Implementation by Court Rule of the Criminal Justice Standards," American Criminal Law Review, Vol. 12, 323 - 356 (Fall 1974). (These can be ordered from the ABA Criminal Justice Section, Second Floor, 1800 M Street, N.W., Washington, D.C. 20036.)

States concerned with revision or evaluation of their rule-making procedures will be particularly interested in Part II of this publication, a study of the procedural rule-making power in the United States prepared by the American Judicature Society in 1973. An examination of the nature and sources of the power to prescribe rules of procedure is followed by an analysis of the law and practice in each state, with quotations from and citations to relevant constitutional provisions, statutes and cases. These should be particularly heopful to those contemplating new constitutional or statutory formulations on this subject.

Inquiries concerning these pattern rules should be directed to the American Bar Association Section of Criminal Justice, Second Floor, 1800 M Street, N.W., Washington, D.C. 20036. Tel. 202/331-2260.

A recent publication of the American Bar Association of Criminal Justice that may be useful with this publication is a comparison of the Uniform Rules of Criminal Procedure with the ABA Standards for Criminal Justice, the NAC Standards and Goals, the Federal Rules of Criminal Procedure, and the Model ALI Code of Pre-Arraignment Procedure. This publication would be particularly valuable as an additional resource tool for states contemplating code revision and court rule-making. Order blanks for this publication, "Uniform Rules of Criminal Procedure: Comparison and Analysis," are included in the appendix.

Order blanks for other Section publications and for the eighteen volumes of the American Bar Association Standards for Criminal Justice are also included in the appendix.

LAWRENCE, KANSAS
MARCH, 1976

PAUL E. WILSON

PART I

PATTERN

RULES OF COURT

AND

CODE PROVISIONS

Title 1.

THE URBAN POLICE FUNCTION

[Rules to be Supplied]

In order that the several titles may ultimately appear in a sequence that parallels the chronological steps in the processing of a criminal case, Title 1 is presently reserved for rules relating to the police function. The Standards Relating to the Urban Police Function are the most recently drafted standards. The formulation of implementing rules is to be the effort of the American Bar Association /International Chiefs of Police (ABA/IACP) Advisory Committee on Implementation of Standards Relating to the Urban Police Function. When pattern rules have been prepared and approved by the responsible organizations, they will be published and assigned to this title.

Title 2

THE PROSECUTION FUNCTION

PRELIMINARY COMMENT

The Standards Relating to the Prosecution Function focus primarily upon the conduct of the prosecutor throughout the criminal proceeding, both in and out of court. Hence, the scope of the Standards is somewhat broader than the traditional range of judicial rule-making. Some of the Standards are drawn in general terms and express self-evident concepts of professional ethics which, in the absence of refinement, would hardly be enforceable by any external coercive process. On the other hand, many of the Standards are directly related to the Disciplinary Rules of the ABA Code of Professional Responsibility. Those Standards which deal with procedures in court are clearly appropriate subjects for court rule. To the extent that the Standards fix levels of professional conduct below which no prosecutor may fall without making himself liable to disciplinary action, they are suitable for implementation by court rule or legislative enactment. However, it should be noted that some of the Standards overlap or augment the recommendations found in other sets of Standards. The draftsman should engage in a process of evaluation, selection, adaptation and coordination to insure consistency and cohesiveness in the rules promulgated.

NOTE: The Conference of California Judges Criminal Justice Standards Review Committee has drafted "Model Rules of Court Based Upon the ABA Standards for Criminal Justice, the Prosecution and Defense Functions," with text derived from Pattern Rules of Court and Code Provisions. Formal adoption is expected in mid-1976.

Also, the Supreme Judicial Court for the Commonwealth of Massachusetts is expected to rule favorably in mid-1976 on a joint petition by the Boston and Massachusetts Bar Associations, to add to General Rule 3:22 certain additional disciplinary rules involving standards relative to the prosecution and defense functions.

PART I. GENERAL STANDARDS

2-1.1. The Function of the prosecutor.

(a) It is the duty of the prosecutor to see that the laws are faithfully executed and enforced in order to maintain the rule of law.

(b) The prosecutor is both an administrator of justice and advocate; he shall exercise sound discretion in the performance of his functions.

(c) It is the duty of the prosecutor to seek justice, not merely to convict.

(d) It is the duty of the prosecutor to know and be guided by the accepted standards of professional conduct in the discharge of his duties.

(e) In these rules the term "unprofessional conduct" denotes conduct which should be subject to disciplinary sanctions. Where other terms are used, the rule is intended as a guide to honorable professional conduct and performance. These rules are not intended as criteria for the judicial evaluation of alleged misconduct of the prosecutor in determining the validity of a conviction; they may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

Reference: ABA Standards Relating to the Prosecution Function (1971) (hereafter cited in this Title as Standard) 1.1.

Note: Standard 1.1, and several of the standards which follow it are statements of concepts or objectives and may not be deemed appropriate subjects for rules of court or statute. However, they are useful statements of principle, and are included here for their utility in the development of a proper perspective of the prosecution functions. For related standards, see The Defense Function 1.1, 1.4.

2-1.2. Conflicts of interest.

(a) A prosecutor shall avoid the appearance or reality of conflict of interest with respect to his official duties. When so provided in the Code of Professional Responsibility, his failure to do so will constitute unprofessional conduct.

Reference: Standard 1.2.

Note: The relevant provisions of the ABA Code of Professional Responsibility are found in the Code Disciplinary Rules 5-101, et seq. (The Disciplinary Rules are hereafter cited as D.R.). For a related standard, see The Defense Function 3.5.

2-1.3. Public statements.

(a) The prosecutor shall not exploit his office to gain personal publicity in connection with a case before trial, during trial and thereafter.

(b) The prosecutor shall make no public statement concerning a case which impinges upon the right of the accused to have a fair trial.

Reference: Standard 1.3.

Note: The Standard specifically enjoins the prosecutor to comply with the ABA Standards on Fair Trial and Free Press, Approved Draft, 1968, and provides that failure to do so may constitute unprofessional conduct. See also DR 7-107. For a related standard, see The Defense Function 1.3.

2-1.4. Duty to improve the law.

It is the duty of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to his attention, he shall stimulate efforts for remedial action.

Reference: Standard 1.4.

PART II. ORGANIZATION OF THE PROSECUTION FUNCTION

Preliminary note: The organization of the prosecution function is essentially a matter for the legislature. Persons concerned with drafting statutes on this subject should be aware of Standards 2.1 through 2.10. The rules suggested hereafter under this head relate mainly to matters which seem of particular concern to the courts and thus may be within the rule-making power.

2-2.1. The prosecutor.

The prosecution function shall be performed by a public officer who shall be a lawyer subject to the standards of professional conduct and discipline.

Reference: Standard 2.1.

2-2.2. Inter-relationship of prosecution officers.

(a) Local authority for prosecution shall be vested in the [district, county or city] attorney who shall be provided with such professional and non-professional staff and such other resources as may be needed.

(b) A state council of prosecutors is hereby established consisting of [the Attorney General or his designee and twelve prosecuting attorneys, four of whom shall be appointed by the Chief Justice, four of whom shall be appointed by the Attorney General and four of whom shall be elected by the State Association of Prosecuting Attorneys.] The state council of prosecutors shall have periodic meetings and shall coordinate the policies of local prosecution offices to improve the administration of justice and assure the maximum practical uniformity in the enforcement of the criminal law throughout the state.

(c) In cases which involve questions of law of statewide interest or concern which may create important precedents, the prosecutor shall consult and advise with the Attorney General of the state.

Reference: Standard 2.2.

Note: The Standards do not make specific suggestions as to the composition of the state council of prosecutors. This is left for determination within the jurisdiction.

2-2.3. Standards of professionalism.

(a) The prosecutor and members of his staff shall

devote full time to their prosecutorial duties.

(b) Prosecutors shall select their staff members on the basis of professional competence without regard to partisan political affiliation or influence.

Reference: Standard 2.2.

2-2.4. Special assistants, investigative resources, experts.

(a) The prosecutor may appoint special assistants from among the trial bar experienced in criminal cases, as needed for the prosecution of a particular case or to assist generally.

(b) The prosecutor shall employ a regular staff of professional investigative personnel and other necessary supporting personnel, to be under his direct control, to the extent warranted by the responsibilities and scope of his office; he shall also employ qualified experts as needed for particular cases.

Reference: Standard 2.4.

2-2.5. Prosecutor's handbook; policy guidelines and procedures.

(a) Each prosecutor's office shall develop a statement of

(i) general policies to guide the exercise of prosecutorial discretion, and

(ii) procedures of the office

The objectives of these policies as to discretion and procedures shall be to achieve a fair, efficient and effective enforcement of the criminal law.

(b) In the interest of continuity and clarity, such statement of policies and procedures shall be maintained in a handbook of internal policies of the office.

Reference: Standard 2.5.

2-2.6. Training programs.

Training programs shall be established within the prosecutor's office for new personnel and for the continuing education of his staff. Prosecutors shall participate in programs of continuing education.

Reference: Standard 2.6.

2-2.7. Relations with the police.

(a) The prosecutor shall provide legal advice to the police concerning police functions and duties in criminal matters.

(b) The prosecutor shall cooperate with police in providing the services of his staff to aid in training police in the performance of their function in accordance with the law.

Reference: Standard 2.7.

Note: For related standards, see The Urban Police Function 7.12, 7.13, 7.14.

2-2.8. Relations with the courts and the bar.

(a) It is unprofessional conduct for a prosecutor

intentionally to misrepresent matters of fact or law to the court.

(b) In his official contacts with the judge or judges the prosecutor shall carefully strive to preserve the apparent and actual relationship which professional traditions and canons require between judges and advocates.

(c) It is unprofessional conduct for the prosecutor to engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before him, except that evidentiary material may be submitted to the judge for his inspection in camera, upon notice to defense counsel, when such inspection is authorized by law.

(d) In his contacts with other members of the bar, the prosecutor shall strive to avoid the appearance as well as the reality of any relationship which would tend to cast doubt on the independence and integrity of his office.

Reference: Standard 2.8.

Note: See also DR 1-102. For a related standard, see The Defense Function 1.1.

2-2.9. Prompt disposition of criminal charges.

(a) A prosecutor shall not intentionally use procedural devices for delay for which there is no legitimate basis.

(b) The prosecutor shall undertake to dispose of all criminal charges promptly. The prosecutor shall be punctual in attendance in court and in the submission of all motions,

briefs, and other papers. He shall emphasize to all witnesses the importance of punctuality in attendance in court.

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

Reference: Standard 2.9.

Note: For related standards, see Speedy Trial 1.3; The Defense Function 1.2.

PART III. INVESTIGATION FOR PROSECUTION DECISION

2-3.1. Investigative function of prosecutor.

(a) The prosecutor is the chief law enforcement officer in his jurisdiction, and has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies.

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

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

(d) It is unprofessional conduct for a prosecutor to

secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless he is authorized by law to do so.

(e) It is unprofessional conduct for a prosecutor to promise not to prosecute for prospective criminal activity, except where such activity is part of an officially supervised investigative and enforcement program.

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

Reference: Standard 3.1.

Note: For related standards, see Discovery and Procedure Before Trial 2.1, 4.1; The Defense Function 4.1, 4.2.

2-3.2. Relations with prospective witnesses.

(a) It is unprofessional conduct to compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse an ordinary witness for the reasonable expenses of attendance upon court, including transportation and loss of income, provided there is no attempt to conceal the fact of reimbursement.

(b) In interviewing a prospective witness it is proper but not mandatory for the prosecutor or his investigator to caution the witness concerning possible self-incrimination and his possible need for counsel.

Reference: Standard 3.2.

Note: See also DR 7-109(C). For a related standard, see The Defense Function 4.3.

2-3.3. Relations with expert witnesses.

(a) A prosecutor who engages an expert for an opinion should respect the independence of the expert and shall not seek to dictate or influence the formation of the expert's opinion on the subject. To the extent necessary, the prosecutor shall explain to the expert his role in the trial as an impartial expert called to aid the fact-finders and the manner in which the examination of witnesses is conducted.

(b) It is unprofessional conduct for a prosecutor to pay an excessive fee for the purpose of influencing the expert's testimony or to fix the amount of the fee contingent upon the testimony he will give or the result in the case.

Reference: Standard 3.3.

Note: See DR 7-109(C)(3). For a related standard, see The Defense Function 4.4.

2-3.4. Decision to charge.

(a) The decision to institute criminal proceedings is initially and primarily the responsibility of the prosecutor.

(b) The prosecutor shall establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted.

(c) No citizen shall complain directly to a judicial officer or the grand jury, unless the citizen complainant shall first present his complaint for prior approval to the prosecutor, and the prosecutor's action or recommendation thereon shall be communicated to the judicial officer or grand jury.

Reference: Standard 3.4.

2-3.5. Relations with grand jury.

(a) The prosecutor is legal adviser to the grand jury. He may appropriately explain the law and express his opinion on the legal significance of the evidence but he shall give due deference to its status as an independent legal body.

(b) The prosecutor shall not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

(c) The prosecutor's communications and presentations to the grand jury shall be on the record.

Reference: Standard 3.3.

2-3.6. Quality and scope of evidence before grand jury.

(a) The prosecutor shall present to the grand jury only evidence which he believes would be admissible at trial. However, in appropriate cases the prosecutor may present witnesses to summarize admissible evidence available to him which he believes he will be able to present at trial.

(b) The prosecutor shall disclose to the grand jury any evidence which he knows will tend to negate guilt.

(c) The prosecutor shall recommend that the grand jury not indict if he believes the evidence presented does not warrant an indictment under governing law.

(d) If the prosecutor believes that a witness is a potential defendant he shall not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights.

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

Reference: Standard 3.6.

2-3.7. Quality and scope of evidence for informations.

When authorized by law to charge by information the prosecutor's decisions shall be governed by the principles embodied in Rule 2-3.6.

Reference: Standard 3.7.

2-3.8. Discretion as to non-criminal disposition.

(a) The prosecutor shall explore the availability of non-criminal disposition, including programs of rehabilitation, formal or informal, in deciding whether to press criminal charges; especially in the case of a first offender, the nature of the offense may warrant non-criminal disposition.

(b) Prosecutors shall be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

Reference: Standard 3.8.

2-3.9. Discretion in the charging decision.

(a) It is unprofessional conduct for a prosecutor to institute or cause to be instituted criminal charges when he knows that the charges are not supported by probable cause.

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with

the public interest decline to prosecute, notwithstanding that evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;

(ii) the extent of the harm caused by the offense;

(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;

(iv) possible improper motives of a complainant;

(v) reluctance of the victim to testify;

(vi) cooperation of the accused in the apprehension or conviction of others;

(vii) availability and likelihood of prosecution by another jurisdiction.

(c) In making the decision to prosecute, the prosecutor shall give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his record of convictions.

(d) In cases which involve a serious threat to the community, the prosecutor shall not be deterred from prosecution by the fact that in his jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(e) The prosecutor shall not bring or seek charges greater in number or degree than he can reasonably support with evidence at trial.

Reference: Standard 3.9.

Note: For related standards, see Pleas of Guilty 1.8(a)(iii) and 1.8(a)(v); also DR 7-103(A).

2-3.10. Role in first appearances and preliminary hearing.

(a) If the prosecutor is present at the first appearance of the accused before a judicial officer, he shall cooperate in obtaining counsel for the accused and in making arrangements for release under bond or other authorized pre-trial release.

(b) The prosecutor shall not encourage an uncounselled accused to waive preliminary hearing.

(c) The prosecutor shall not seek a continuance solely for the purpose of mooting the preliminary hearing by securing an indictment.

(d) Except for good cause, the prosecutor shall not seek delay in the preliminary hearing after an arrest has been made if the accused is in custody.

(e) The prosecutor shall be present at a preliminary hearing where such hearing is required by law.

Reference: Standard 3.10.

Note: For related standards, see Providing Defense Services 1.1, 5.1; Pre-trial Release 1.1, 1.2, 4.1-5 and 5.3.

2-3.11. Disclosure of evidence by the prosecutor.

(a) It is unprofessional conduct for a prosecutor to

fail to make timely disclosure to the defense of the existence of evidence, known to him, supporting the innocence of the defendant. He shall disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment at the earliest feasible opportunity.

(b) The prosecutor shall comply with discovery procedures under the applicable law.

(c) It is unprofessional conduct for a prosecutor intentionally to avoid pursuit of evidence because he believes it will damage the prosecution's case or aid the accused.

Reference: Standard 3.11.

Note: For related standards, see Discovery and Procedure Before Trial 1.4(b), 2.2(c) and 2.3; The Defense Function 4.5; Sentencing Alternatives and Procedures 5.3. Also see DR 7-103(B).

PART IV. PLEA DISCUSSION

2-4.1. Availability for plea discussions.

(a) The prosecutor shall make known a general policy of willingness to consult with defense counsel concerning disposition of charges by plea.

(b) It is unprofessional conduct for a prosecutor to engage in plea discussions directly with an accused who is represented by counsel, except with counsel's approval. If the accused refuses to be represented by counsel,

the prosecutor may properly discuss disposition of the charges directly with the accused in such cases; the prosecutor should, if feasible, request that a lawyer be designated by the court or some appropriate central agency, such as a legal aid or defender office or bar association, to be present at such discussions.

(c) It is unprofessional conduct for a prosecutor knowingly to make false statements or representations in the course of plea discussions with defense counsel or the accused.

Reference: Standard 4.1.

Note: For related standards, see Pleas of Guilty 2.1, 3.1(a); Providing Defense Services 7.2 and 7.3; Discovery and Procedure Before Trial 1.3, 1.4; The Defense Function 6.1, 6.2; The Function of the Trial Judge 4.1. See also DR 7-104(A)(2).

2-4.2. Plea disposition when accused maintains innocence.

A prosecutor may not properly participate in a disposition by plea of guilty if he is aware that the accused persists in denying guilt or the factual basis for the plea, without disclosure to the court.

Reference: Standard 4.2.

Note: For a related standard, see The Defense Function 5.3.

2-4.3. Fulfillment of plea discussions.

(a) It is unprofessional conduct for a prosecutor to

make any promise of commitment concerning the sentence which will be imposed or concerning a suspension of sentence: he may properly advise the defense what position he will take concerning disposition.

(b) A prosecutor shall not imply a greater power to influence the disposition of a case than he possesses.

(c) If the prosecutor finds he is unable to fulfill an understanding previously agreed upon in plea discussions, he shall give notice promptly to the defendant and cooperate in securing leave of the court for the defendant to withdraw any plea and take other steps appropriate to restore the defendant to the position he was in before the understanding was reached or plea made.

Reference: Standard 4.3.

Note: For related standards, see Pleas of Guilty 1.5, 2.1, 3.1; Discovery and Procedure Before Trial 1.3, 1.4; The Defense Function 6.1, 6.2; The Function of the Trial Judge 4.1. See also Santobello v. New York, 404 U.S. 257 (1971).

2-4.4. Record of reasons for nolle prosequi disposition.

Whenever felony criminal charges are dismissed by way of nolle prosequi the prosecutor shall make a record of the reasons for the action.

Reference: Standard 4.4.

PART V. THE TRIAL

2-5.1. The calendar.

The prosecutor shall file periodic reports, at such intervals as the court may prescribe by rule, setting forth the reasons for delay as to each case for which he has not requested trial within [time prescribed by statute or court rule] following charging. He shall also advise the court of facts relevant in determining the order of cases on the calendar.

Reference: Standard 5.1.

Note: For related standards, see Pretrial Release 5.9; Speedy Trial 1.2; The Function of the Trial Judge 3.2, 3.8.

2.5.2. Courtroom decorum.

(a) The prosecutor shall support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses, defendants, jurors and others in the courtroom.

(b) When court is in session the prosecutor shall address the court, not opposing counsel, on all matters relating to the case.

(c) It is unprofessional conduct for a prosecutor to engage in behavior or tactics purposefully calculated to irritate or annoy the court or opposing counsel.

(d) A prosecutor shall comply promptly with all orders and directives of the court, but he has a duty to have the record reflect adverse rulings or judicial conduct which he considers prejudicial. He has a right to make respectful requests for reconsideration of adverse rulings.

(e) A prosecutor shall be punctual in all court appearances.

Reference: Standard 5.2.

Note: The Standard also requires that prosecutors take leadership, with cooperation of the courts and the bar, in developing a code of decorum and professional etiquette for courtroom conduct. For related standards, see The Defense Function 7.1; The Function of the Trial Judge 5.7.

2-5.3. Selection of jurors.

(a) The prosecutor shall prepare prior to trial for the selection of the jury and the exercise of challenges for cause and peremptory challenges.

(b) Where it appears necessary to conduct a pre-trial investigation of the background of jurors the prosecutor shall restrict the investigation to methods which will not harass or unduly embarrass potential jurors or invade their privacy and, if possible, shall restrict the investigation to records and sources of information already in existence.

(c) If the prosecutor is permitted personally to question jurors on voir dire, the opportunity to examine jurors shall be used solely to obtain information for the intelligent exercise of challenges. A prosecutor shall not intentionally use the voir dire to present factual matter which he knows will

not be admissible at trial or to argue his case to the jury.

Reference: Standard 5.3.

Note: For related standards, see Discovery and Procedure Before Trial 5.4; Fair Trial and Free Press 3.2, 3.4; The Defense Function 7.2; The Function of the Trial Judge 5.1; Trial by Jury, Part II.

2-5.4. Relations with jury.

(a) It is unprofessional conduct for the prosecutor to communicate privately with persons summoned for jury duty or impaneled as jurors concerning the case prior to or during the trial. The prosecutor shall avoid the reality or appearance of any such improper communications.

(b) The prosecutor shall treat jurors with deference and respect, avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.

(c) After verdict, the prosecutor shall not make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which will tend to influence judgment in future jury service.

Reference: Standard 5.4.

Note: For a related standard, see The Defense Function 7.3. See also DR 7-108.

2-5.5. Opening statement.

In his opening statement the prosecutor shall confine his remarks to evidence he intends to offer which he believes in good faith will be available and admissible and a brief state-

ment of the issues in the case. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.

Reference: Standard 5.5.

Note: For a related standard, see The Defense Function 7.4.

2-5.6. Presentation of evidence.

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

(b) It is unprofessional conduct for a prosecutor knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

(c) It is unprofessional conduct for a prosecutor to permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration by the judge or jury until such time as a good faith tender of such evidence is made.

(d) It is unprofessional conduct to tender tangible evidence in the view of the judge or jury if it would tend to prejudice fair consideration by the judge or jury unless

there is a reasonable basis for its admission in evidence. When there is any doubt about the admissibility of such evidence it shall be by an offer of proof and a ruling obtained.

Reference: Standard 5.6.

Note: For a related standard, see The Defense Function 7.3. See also DR 7-106(C).

2-5.7. Examination of witnesses.

(a) The interrogation of all witnesses shall be conducted fairly, objectively and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily. Cross-examination shall be conducted without violating rules of decorum.

(b) The prosecutor's belief that the witness is telling the truth does not necessarily preclude appropriate cross-examination, but may affect the method and scope of cross-examination. He shall not misuse the power of cross-examination or impeachment to discredit or undermine a witness if he knows the witness is testifying truthfully.

(c) A prosecutor shall not call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege. When so declared by the Code of Professional Responsibility, such conduct will constitute unprofessional conduct.

(d) It is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner knows he cannot support by evidence.

Reference: Standard 5.7.

Note: For related standards, see The Defense Function 7.6; The Function of the Trial Judge 5.4, 5.5; see also DR 7-102(A)(8) and 7-106(C)(7).

2-5.8. Argument to the jury.

(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence of the guilt of the defendant.

(c) The prosecutor shall not use arguments calculated to inflame the passions or prejudices of the jury.

(d) The prosecutor shall refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

Reference: Standard 5.8.

Note: For related standards, see The Defense Function 7.8; The Function of the Trial Judge 5.10.

2-5.9. Facts outside the record.

It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside

the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial note.

Reference: Standard 5.9.

Note: For related standards, see The Defense Function 7.9, 8.4; The Function of the Trial Judge 5.10.

2-5.10. Comments by prosecutor after verdict.

The prosecutor shall not make public comments critical of a verdict, whether rendered by judge or jury.

Reference: Standard 5.10.

PART IV. SENTENCING

2-6.1. Role in sentencing.

(a) The prosecutor shall not make the severity of sentences the index of his effectiveness. To the extent that he becomes involved in the sentencing process, he shall seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.

(b) Where sentence is fixed by judge without jury participation, the prosecutor ordinarily shall not make any specific recommendation as to the appropriate sentence, unless his recommendation is requested by the court or he has agreed to make a recommendation as the result of plea discussions.

(c) Where sentence is fixed by the jury, the prosecutor shall present evidence on the issue within the limits permitted in the jurisdiction, but he shall avoid introducing evidence bearing on sentence which will prejudice the jury's determination of the issue of guilt.

Reference: Standard 6.1.

Note: ABA Standards, Sentencing Alternatives and Procedures 1.1 recommends that the sentencing power be vested in the judge rather than the jury. For related standards, see Sentencing Alternatives and Procedures 5.3; Trial by Jury 4.4.

2-6.2. Information relevant to sentencing.

(a) The prosecutor shall assist the court in basing its sentence on complete and accurate information for use in the presentence report. He shall disclose to the court any information in his files relevant to the sentence. If incompleteness or inaccurateness in the presentence report comes to his attention, he shall take steps to present the complete and correct information to the court and to the defense counsel.

(b) The prosecutor shall disclose to the defense and to the court at or prior to the sentencing proceeding all information in his files which is relevant to the sentencing issue.

Reference: Standard 6.2.

Note: For further consideration of the role of the prosecutor in the sentencing process, see ABA Standards, Sentencing Alternatives and Procedures 5.3(b), (c) and (d); also The Defense Function 8.1.

Title 3

THE DEFENSE FUNCTION

PRELIMINARY COMMENT

The ABA Standards Relating to the Defense Function (1971) like their counterparts in The Prosecution Function, are standards of professional conduct and responsibility rather than guidelines for procedure in criminal cases. Hence their usefulness as bases for court rules or legislative enactments may be limited. The drafts in this Title attempt to express the content of the standards in rule form in order to facilitate their utilization to the extent that state drafting agencies deem proper.*

Part I. GENERAL STANDARDS

3-1.1 The role of defense counsel.

(a) It is the duty of the lawyer for the accused to serve the accused as counselor and advocate, with courage, devotion, to the utmost of his learning and ability, and according to law.

(b) The defense lawyer is subject to the standards of conduct stated in statutes, rules, decisions of courts, and codes, canons or other standards of professional conduct. He has no duty to execute any directive of the accused which

*NOTE: The Conference of California Judges Criminal Justice Standards Review Committee has drafted "Model Rules of Court Based Upon the ABA Standards for Criminal Justice, the Prosecution and Defense Functions," with text derived from Pattern Rules of Court and Code Provisions. Formal adoption is expected in mid-1976.

Also, the Supreme Judicial Court for the Commonwealth of Massachusetts is expected to rule favorably in mid-1976 on a joint petition by the Boston and Massachusetts Bar Associations; to add to General Rule 3:22 certain additional disciplinary rules involving standards relative to the prosecution and defense functions.

does not comport with law or such standards; he is the professional representative of the accused and not his alter ego.

(c) It is unprofessional conduct for a defense lawyer intentionally to misrepresent matters of fact of law to the court.

(d) It is the duty of every lawyer to know the standards of professional conduct as defined in codes and canons of the legal profession and in these rules, to the end that his performance will at all times be guided by appropriate standards. The functions and duties of defense counsel are governed by such standards whether he is assigned or privately retained.

(e) In these rules the term "unprofessional conduct" denotes conduct which is or should be made subject to disciplinary sanctions. Where a rule uses other terms, it is intended as a guide to honorable professional conduct and performance. These rules are not intended to provide criteria for the judicial evaluation of the effectiveness of counsel to determine the validity of convictions; they may or may not be relevant in such judicial evaluation depending upon all the circumstances.

Reference: ABA Standards, The Defense Function, (1971) (hereafter cited in this Title as Standard) 1.1.

Note: For related standards, see Providing Defense Services 1.4; The Prosecution Function 1.1, 2.8. See also ABA Code of Professional Responsibility, 1969, Disciplinary Rules (hereafter cited as DR) 1-102.

3-1.2. Delays; Punctuality.

(a) Defense counsel shall avoid unnecessary delay in the disposition of cases. He shall be punctual in attendance upon court and in the submission of motions, briefs and other papers. He shall emphasize to his client and all witnesses the importance of punctuality in attendance in court.

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

(c) Defense counsel shall not intentionally use procedural devices for delay for which there is no legitimate basis.

(d) A lawyer shall not accept more employment than he can discharge within the spirit of the consitutional mandate for speedy trial and the limits of his capacity to give each client effective representation. It is unprofessional conduct to accept employment for the purpose of delaying trial.

Reference: Standard 1.2.

Note: For related standards, see Speedy Trial 1.3; The Prosecution Function 2.9.

3-1.3. Public statements

(a) The lawyer representing an accused shall avoid personal publicity connected with the case before trial, during trial and thereafter.

(b) The lawyer shall avoid public statements which impinge on the right of the accused to have a fair trial. When so provided by the Code of Professional Responsibility, violation of this rule shall constitute unprofessional conduct.

Reference: Standard 1.3.

Note: The Standard requires that defense counsel observe ABA Standards, Fair Trial and Free Press, Approved Draft, 1968. For a related standard, see The Prosecution Function 1.3.

3-1.4. Advisory council on professional conduct.

(a) There is hereby created an advisory council on professional conduct, which shall consist of [twelve members, six of whom shall be appointed by the Chief Justice of the State Supreme Court and six of whom shall be elected by the executive committee of the state bar association]. The council shall provide prompt and confidential guidance to lawyers seeking assistance in the application of standards of professional conduct in criminal cases.

(b) Communications between a lawyer and the advisory council on professional conduct shall have the same privilege for protection of the client's confidences as exist between lawyer and client. No council member shall reveal any disclosure of the client except (i) if the client challenges the effectiveness of the lawyer's conduct of the case and the lawyer relies on the guidance received from the council; and (ii) if the lawyer's conduct is called into question in an authoritative disciplinary inquiry or proceeding.

Reference: Standard 1.4.

Note: The Standard does not prescribe the structure or membership of the Advisory Council. The bracketed material is a suggestion of the draftsman. The details of organization are to be determined within the jurisdiction.

3-1.5. Trial lawyer's duty to administration of criminal justice.

(a) All qualified trial lawyers shall stand ready to undertake the defense of an accused regardless of public hostility toward the accused or personal distaste for the offense charged or the person of the defendant.

(b) Qualified trial lawyers shall not assert or announce a general unwillingness to appear to criminal cases; law firms shall encourage partners and associates to appear in criminal cases.

Reference: Standard 1.5.

3-1.6. Client interests paramount.

Whether privately engaged, judicially appointed or serving as part of a legal aid system, the duties of a lawyer to his client are to represent his legitimate interests, and considerations of personal and professional advantage should not influence his advice or performance.

Reference: Standard 1.6.

Note: For a related standard, see Providing Defense Services 1.4.

PART II. ACCESS TO COUNSEL

3-2.1. Communication.

Every accused person shall have the right to prompt and effective communication with counsel. Reasonable access to a telephone or other communication facilities shall be provided for that purpose to persons in custody.

Reference: Standard 2.1.

Note: For related standards, see Providing Defense Services 5.1, 7.1.

3-2.2. Referral service for criminal cases.

Lists of lawyers who are willing and qualified to undertake the defense of criminal cases, together with essential information as to how to contact such lawyers, shall be posted in jails and police stations in such places as are likely to come to the attention of accused persons.

Reference: Standard 2.2.

Note: See also Providing Defense Services 5.1, Commentary at 46.

3-2.3. Prohibited referrals.

(a) No law enforcement officer, bondsman, court employee or other such person subject to these rules shall refer an accused person to any particular lawyer, and, if asked to

suggest the name of an attorney, such officer or employee shall direct the accused person to the lawyer referral service or the local bar association.

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

Reference: Standard 2.3.

Note: See also DR 2-103(B), 5-107(B).

3-2.4. Recommendation of professional employment.

A lawyer shall comply with the requirements of the Code of Professional Responsibility regarding recommendation of professional employment.

Reference: Standard 2.4.

Note: See DR 2-103.

PART III. LAWYER-CLIENT RELATIONSHIP

3-3.1. Establishment of relationship.

(a) Defense counsel shall seek to establish a relationship of trust and confidence with the accused. The lawyer shall explain the necessity of full disclosure of all facts known to the client for an effective defense, and he shall explain the obligation of confidentiality which makes privileged the accused's disclosures relating to the case.

(b) As the conduct of the defense of a criminal case requires trained professional skill and judgment, the technical and professional decisions must rest with the lawyer without impinging on the right of the accused to make the ultimate decisions on certain specified matters, delineated in Rule 3-5.2.

(c) To insure the privacy essential for confidential communication between lawyer and client, adequate facilities shall be available for private discussions between counsel and accused in jails, prisons, court houses and other places where accused persons must confer with counsel.

(d) Personnel of jails, prisons and custodial institutions shall not examine or otherwise interfere with any communication or correspondence between a client and his lawyer relating to legal action arising out of charges or incarceration.

Reference: Standard 3.1.

3-3.2. Interviewing the client.

(a) As soon as practicable the lawyer shall seek to determine all relevant facts known to the accused. In so doing, the lawyer shall probe for all legally relevant information without seeking to influence the direction of the client's responses.

(b) It is unprofessional conduct for the lawyer to instruct the client or to intimate to him in any way that he

should not be candid in revealing facts so as to afford the lawyer free rein to take action which would be precluded by the lawyer's knowing of such facts.

Reference: Standard 3.2.

3-3.3. Fees.

(a) In determining the amount of the fee in a criminal case it is proper to consider the time and effort required, the responsibility assumed by counsel, the novelty and difficulty of the questions involved, the skill requisite to proper representation, the likelihood that other employment will be precluded, the fee customarily charged in the locality for similar services, the gravity of the charge, the experience, reputation and ability of the lawyer and the capacity of the client to pay the fee.

(b) It is unprofessional conduct for a lawyer to imply that compensation of the lawyer is for anything other than professional services rendered by him or by others for him.

(c) It is unprofessional conduct for a lawyer to enter into an agreement for, charge or collect an illegal or clearly excessive fee.

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

the Code of Professional Responsibility.

(e) It is unprofessional conduct for a lawyer to enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

Reference: Standard 3.3.

Note: See DR 2-106(A) and (C), 2-107, 3-102(A).

3-3.4. Obtaining publication rights from the accused.

It is unprofessional conduct for a lawyer, prior to conclusion of all aspects of the matter giving rise to his employment, to enter into any agreement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

Reference: Standard 3.4.

Note: See also DR 5-104(B).

3-3.5. Conflict of interest.

(a) At the earliest feasible opportunity defense counsel shall disclose to the defendant any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of a lawyer to represent him.

(b) Except for preliminary matters such as initial hearings or applications for bail, a lawyer, or lawyers who are associated in practice, shall not undertake to defend

more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. A lawyer shall decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation. When so provided in the Code of Professional Responsibility, accepting or continuing employment by more than one defendant in the same criminal case will constitute unprofessional conduct.

(c) In accepting payment of fees by one person for the defense of another, a lawyer shall be careful to determine that he will not be confronted with a conflict of loyalty since his entire loyalty is due the accused. It is unprofessional conduct for the lawyer to accept such compensation except with the consent of the accused after full disclosure. It is unprofessional conduct for a lawyer to permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

(d) It is unprofessional conduct for a lawyer to defend a criminal case in which the lawyer's partner or other professional associate is or has been the prosecutor.

Reference: Standard 3.5.

Note: For related standards, see Providing Defense Services 2.1; The Function of the Trial Judge 3.4; The Prosecution Function 1.2. See also DR 5-105, 5-107(A) and (B), 6-106.

3-3.6. Prompt action to protect the accused.

(a) The lawyer shall inform the accused of his rights forthwith and take all necessary action to protect such rights. He shall consider all procedural steps which in good faith may be taken, including, but not limited to, seeking pre-trial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for a change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, or seeking dismissal of the charges.

(b) A lawyer shall not act as surety on a bail bond either for the accused or others.

Reference: Standard 3.6.

Note: For related standards, see Pre-trial Release 1.1, 5.4.

3-3.7. Advice and service on anticipated unlawful conduct.

(a) It is a lawyer's duty to advise his client to comply with the law but he may advise concerning the meaning, scope and validity of a law.

(b) It is unprofessional conduct for a lawyer to counsel his client in or knowingly assist his client to engage in conduct which the lawyer knows to be illegal or fraudulent.

(c) It is unprofessional conduct for a lawyer to agree in advance of the commission of a crime that he will serve

as counsel for the defendant, except as part of a bona fide effort to determine the validity, scope, meaning or application of the law, or where the defense is incident to a general retainer for legal services to a person or enterprise engaged in legitimate activity.

(d) Except as provided in Rule 3-7.7, a lawyer may reveal the expressed intention of his client to commit a crime and information necessary to prevent the crime; and he must do so if the contemplated crime is one which would seriously endanger the life or safety of any person or corrupt the processes of the courts and the lawyer believes such action on his part is necessary to prevent it.

Reference: Standard 3.7.

Note: See DR 1-102, 2-110(C)(1)(b), 4-101(C)(3), 7-102.

3-3.8. Duty to keep client informed.

A lawyer shall keep his client informed of the developments in the case and the progress of preparing the defense.

Reference: Standard 3.8.

3-3.9. Obligations to client and duty to court.

Once a lawyer has undertaken the representation of an accused his duties and obligations are the same whether he is privately retained, appointed by the court, or serving in

a legal aid or defender system.

Reference: Standard 3.9.

Note: For a related standard, see Providing Defense Services 1.4.

PART IV. INVESTIGATION AND PREPARATION

3-4.1. Duty to investigate.

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation shall include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

Reference: Standard 4.1.

Note: For a related standard, see The Prosecution Function 3.1.

3-4.2. Illegal investigation.

It is unprofessional conduct for a lawyer knowingly to use illegal means to obtain evidence or information or to employ, instruct or encourage others to do so.

Reference: Standard 4.2.

Note: For a related standard, see The Prosecution Function 3.1.

3-4.3. Relations with prospective witnesses.

(a) It is unprofessional conduct to compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse a witness for the reasonable expenses of attendance upon court, including transportation and loss of income, provided there is no attempt to conceal the fact of reimbursement.

(b) In interviewing a prospective witness it is proper but not mandatory for the lawyer or his investigator to caution the witness concerning possible self-incrimination and his need for counsel.

(c) A lawyer shall not discourage or obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise any person, other than a client, or cause such person to be advised to decline to give information to the prosecutor or counsel for co-defendants information which he has a right to give.

(d) Unless the lawyer for the accused is prepared to forego either impeachment of a witness by the lawyer's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present his impeaching testimony, the lawyer should avoid interviewing a prospective witness except in the presence of a third person.

Reference: Standard 4.3.

Note: For related standards, see Discovery and Procedure Before Trial 3.3, 4.1; The Prosecution Function 3.1, 3.2. See also DR 7-109(C), 5-102.

3-4.4. Relations with expert witnesses.

(a) A lawyer who engages an expert for an opinion shall respect the independence of the expert and shall not seek to dictate or influence the formation of the expert's opinion on the subject. The lawyer shall inform the expert of his role in the trial as an impartial witness called to aid the factfinders and of the manner in which the examination of witnesses is conducted.

(b) It is unprofessional conduct for a lawyer to pay an excessive fee for the purpose of influencing the expert's testimony or to fix the amount of the fee contingent upon the testimony he will give or the result in the case.

Reference: Standard 4.4.

Note: For a related standard see The Prosecution Function 3.3. See also DR 7-109.

3-4.5. Compliance with discovery procedure.

The lawyer shall comply with the discovery procedures provided by law.

Reference: Standard 4.5.

Note: For related standards, see Discovery and Procedure Before Trial 1.4, Parts III, IV; The Prosecution Function 3.11.

PART V. CONTROL AND DIRECTION OF LITIGATION

3-5.1. Advising the defendant.

(a) After informing himself on the facts and the law, the lawyer shall advise the accused with complete candor concerning all aspects of the case, including his frank estimate of the probable outcome.

(b) It is unprofessional conduct for a lawyer intentionally to understate or overstate the risks, hazards or prospects of the case to exert undue influence on the accused's decision as to his plea.

(c) The lawyer shall caution his client to avoid communication about the case with witnesses, except with the approval of the lawyer, to avoid any contact with jurors or prospective jurors, and to avoid either the reality or the appearance of any other improper activity.

Reference: Standard 5.1.

Note: For related standards, see Pleas of Guilty 1.3, 3.2.

3-5.2. Control and direction of the case.

(a) The accused person shall make the following decisions after full consultation with counsel: (i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf.

(b) Decisions as to what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions shall be made by the lawyer after consultation with his client.

(c) If a disagreement on significant matters of tactics or strategy arises between the lawyer and his client, the lawyer shall make a record of the circumstances, his advice and reasons, and the conclusion reached. The record shall be made in a manner which protects the confidentiality of the lawyer-client relation.

Reference: Standard 5.2.

Note: For related standards, see Pleas of Guilty 1.3, 3.1, 3.2; Function of the Trial Judge 4.3; Trial by Jury 1.2, 1.3.

3-5.3. Guilty plea when accused denies guilt.

If the accused discloses to the lawyer facts which negate guilt and the lawyer's investigation does not reveal a conflict with the facts disclosed but the accused persists in entering a plea of guilty, the lawyer may not properly participate in presenting a guilty plea, without disclosure to the court.

Reference: Standard 5.3.

Note: For a related standard, see The Prosecution Function 4.2.

PART VI. DISPOSITION WITHOUT TRIAL

3-6.1. Duty to explore disposition without trial.

(a) Whenever the nature and circumstances of the case permit, the lawyer for the accused shall explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies.

(b) When the lawyer concludes, on the basis of full investigation and study, that under controlling law and the evidence a conviction is probable, he shall so advise the accused and seek his consent to engage in plea discussions with the prosecutor, if such appears desirable.

(c) Ordinarily the lawyer shall secure his client's consent before engaging in plea discussions with the prosecutor.

Reference: Standard 6.1.

Note: For related standards, see Discovery and Procedure Before Trial 1.3, 1.4; Pleas of Guilty 3.1; The Function of the Trial Judge 4.1; The Prosecution Function 4.1.

3-6.2. Conduct of discussions.

(a) In conducting discussions with the prosecutor the lawyer shall keep the accused advised of developments at all times and all proposals made by the prosecutor shall be communicated promptly to the accused.

(b) It is unprofessional conduct for a lawyer knowingly to make false statements concerning the evidence in the

course of plea discussions with the prosecutor.

(c) It is unprofessional conduct for a lawyer to seek or accept concessions favorable to one client by any agreement which is detrimental to the legitimate interests of any other client.

Reference: Standard 6.2.

Note: For related standards, see Discovery and Procedure Before Trial 1.3, 1.4; Pleas of Guilty 3.1; The Function of the Trial Judge 4.1; The Prosecution Function 4.1, 4.3. See also DR 5-106.

PART VII. TRIAL

3-7.1. Courtroom decorum.

(a) The lawyer is an officer of the court. He shall support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses and jurors.

(b) When court is in session defense counsel shall address the court and should not address the prosecutor directly on any matter relating to the case.

(c) It is unprofessional conduct for a lawyer to engage in behavior or tactics purposefully calculated to irritate or annoy the court or the prosecutor.

(d) The lawyer shall comply promptly with all orders and directives of the court, but he has a duty to have the

record reflect adverse rulings or judicial conduct which he considers prejudicial to his client's legitimate interests. He has a right to make respectful requests for reconsideration of adverse ruling.

Reference: Standard 7.1.

Note: The Standard enjoins all lawyers to cooperate with the courts and the organized bar in developing codes of decorum and professional etiquette. For related standards, see The Function of the Trial Judge 5.7; The Prosecution Function 5.3; Trial by Jury, Part III. See also DR 7-106(C)(2)(6).

3-7.2. Selection of jurors.

(a) The lawyer shall prepare himself prior to trial to discharge effectively his function in the selection of the jury, including the raising of any appropriate issues concerning the method by which the jury panel was selected and the exercise of both challenges for cause and peremptory challenges.

(b) In those cases where it appears necessary to conduct a pre-trial investigation of the background of jurors the lawyer shall restrict himself to investigatory methods which will not harass or unnecessarily embarrass potential jurors or invade their privacy and whenever possible, he shall restrict his investigation to records and sources of information already in existence.

(c) If counsel personally questions jurors on voir dire, the examinations of jurors shall be used solely to

obtain information for the intelligent exercise of challenges. A lawyer shall not purposely use the voir dire to present factual matter which he knows will not be admissible at trial or to argue his case to the jury.

Reference: Standard 7.2.

Note: For related standards, see Discovery and Procedure Before Trial 5.4; Fair Trial and Free Press 3.2, 3.4; The Function of the Trial Judge 5.1; The Prosecution Function 5.3; Trial by Jury, Part II.

3-7.3. Relations with jury.

(a) It is unprofessional conduct for the lawyer to communicate privately with persons summoned for jury duty or impaneled as jurors concerning the case prior to or during the trial. The lawyer shall avoid the reality or appearance of any such improper communications.

(b) The lawyer shall treat jurors with deference and respect, avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.

(c) After verdict, the lawyer shall not make comments concerning an adverse verdict or ask questions of a juror for the purpose of harassing or embarrassing the jury in any way which will tend to influence judgment in future jury service. If the lawyer has reasonable ground to believe that the verdict may be subject to legal challenge, he may properly, if no statute or rule prohibits such course,

communicate with jurors for that limited purpose, upon notice to opposing counsel and the court.

Reference: Standard 7.3.

Note: For related standards, see The Prosecution Function 5.4; Trial by Jury 5.7. See also DR 7-108(B).

3-7.4. Opening statement.

In his opening statement a lawyer shall confine his remarks to a brief statement of the issues in the case and evidence he intends to offer which he believes in good faith will be available and admissible. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence.

Reference: Standard 7.4.

Note: For a related standard, see The Prosecution Function 5.5. See also DR 7-106(C)(1).

3-7.5. Presentation of evidence.

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

(b) It is unprofessional conduct for a lawyer knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer inadmissible evidence,

ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

(c) It is unprofessional conduct to permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration of the case by the judge or jury until such time as a good faith tender of such evidence is made.

(d) It is unprofessional conduct to tender tangible evidence in the presence of the judge or jury if it would tend to prejudice fair consideration of the case unless there is a reasonable basis for its admission in evidence. When there is any doubt about the admissibility of such evidence it should be tendered by an offer of proof and a ruling obtained.

Reference: Standard 7.5.

Note: For a related standard, see The Prosecution Function 5.6. See also DR 7-102(A)(4).

3-7.6. Examination of witnesses.

(a) The interrogation of all witnesses shall be conducted fairly, objectively and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.

(b) A lawyer's belief that the witness is telling the truth does not preclude appropriate cross-examination or impeachment by employing it to discredit or undermine a witness if he knows the witness is testifying truthfully.

(c) A lawyer shall not call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege.

(d) It is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner cannot support by evidence.

Reference: Standard 7.6.

Note: For related standards, see The Function of the Trial Judge 5.4, 5.5; The Prosecution Function 5.7. See also DR 7-106.

3-7.7. Testimony by the defendant.

(a) If the defendant has admitted to his lawyer facts which establish guilt and the lawyer's independent investigation establishes that the admissions are true but the defendant insists on his right to trial, the lawyer shall advise his client against taking the witness stand to testify falsely.

(b) If, before trial, the defendant insists that he will take the stand to testify falsely, the lawyer shall withdraw from the case, if that is feasible, seeking leave of the court if necessary.

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during the trial and the defendant insists upon testifying falsely in his own behalf, it is unprofessional conduct for the

lawyer to lend his aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in an appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.

Reference: Standard 7.7.

Note: For a related standard, see Providing Defense Services 5.3. See also DR 7-102(A)(4) and (7).

3-7.8. Argument to the jury.

(a) In closing argument to the jury the lawyer may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for a lawyer intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for a lawyer to express his personal belief or opinion in his client's innocence or his personal belief or opinion in the truth or falsity of any testimony or evidence, or to attribute the

crime to another person unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court can take judicial notice.

Reference: Standard 7.9.

Note: For related standards, see The Function of the Trial Judge 5.10; The Prosecution Function 5.9.

3-7.10. Post-trial motions.

The trial lawyer's responsibility includes presenting appropriate motions, after verdict and before sentence, to protect the defendant's rights.

Reference: Standard 7.10.

Note: See also Criminal Appeals 2.2, Commentary at 47-48.

3-8.1. Sentencing.

(a) The lawyer for the accused shall be familiar with the sentencing alternatives available to the court and shall in so far as possible, be aware of its practices in exercising sentencing discretion. The consequences of the various dispositions available shall be explained fully by the lawyer to his client.

(b) Defense counsel shall present to the court any ground which will assist in reaching a proper disposition favorable to the accused. If a presentence report or summary is made available to the defense lawyer, he shall seek to verify the information contained in it and shall be

prepared to supplement or challenge it if necessary. If there is no presentence report or if it is not disclosed, he shall submit to the court and the prosecutor all favorable information relevant to sentencing and in an appropriate case be prepared to suggest a program of rehabilitation based on his exploration of employment, educational and other opportunities made available by community services.

(c) Counsel shall inform the accused of his rights of allocution, if any, and of the possible dangers of making a judicial confession in the course of allocution which might tend to prejudice his appeal.

Reference: Standard 8.1.

Note: For related standards, see Sentencing Alternatives and Procedures 4.5; The Prosecution Function 6.2.

3-8.2. Appeal.

(a) After conviction, the lawyer shall explain to the defendant the meaning and consequences of the court's judgment and his right of appeal. The lawyer shall give the defendant his professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. He shall also explain to the defendant the advantages and disadvantages of an appeal. The decision whether to appeal must be the defendant's own choice.

(b) The lawyer shall take whatever steps are necessary to protect the defendant's right of appeal.

Reference: Standard 8.2.

Note: For a related standard, see Criminal Appeals 2.2, 3.2.

3-8.3. Counsel on appeal.

(a) Trial counsel, whether retained or appointed by the court, shall conduct the appeal if the defendant elects to avail himself of that right unless new counsel is substituted by the defendant or the appropriate court.

(b) Appellate counsel shall not seek to withdraw from a case solely on the basis of his own determination that the appeal lacks merit.

Reference: Standard 8.3.

Note: For related standards, see Appellate Review of Sentencing 2.2; Criminal Appeals 2.2, 3.2; Providing Defense Services 5.2, 5.3.

3-8.4. Conduct of appeal.

(a) Appellate counsel shall be diligent in perfecting the appeal and expediting its prompt submission to the appellate court.

(b) Appellate counsel shall accurately refer to the record and the authorities upon which he relies in his presentation to the court in his brief and on his oral argument.

(c) It is unprofessional conduct for a lawyer intentionally to refer to or argue on the basis of facts

outside the record on appeal, unless such facts are matters of common public knowledge or matters of which the court may take judicial notice.

Reference: Standard 8.4.

3-8.5. Post conviction remedies.

After a conviction is affirmed on appeal, appellate counsel shall determine whether there is any ground for relief under other post conviction remedies. If there is a reasonable prospect of a favorable result he should explain to the defendant the advantages and disadvantages of taking such action. Appellate counsel is not obligated to represent the defendant in a post conviction proceeding unless he has agreed to do so.

Reference: Standard 8.5.

Note: See Post Conviction Remedies 4.4, Commentary at 67. For related standards, see Criminal Appeals 3.2; The Prosecution Function 5.9.

308.6. Challenges to the effectiveness of counsel.

(a) If a lawyer, after investigation, is satisfied that another lawyer who served in an earlier phase of the case did not provide effective assistance, he should not hesitate to seek relief for the defendant on that ground.

(b) If a lawyer, after investigation, is satisfied

that another lawyer who served in an earlier phase of the case provided effective assistance, he should so advise his client and he may decline to proceed further.

(c) A lawyer whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation, even though this involves revealing matters which were given in confidence.

Reference: Standard 8.6.

Title 4

PROVIDING DEFENSE SERVICES

PRELIMINARY COMMENT

Implementation of the ABA Standards Relating to Providing Defense Services (1968) requires a combination of legislative and administrative action as well as court rules. The structure and characteristics of the defender system should be provided by statute. Policies governing the operation of the agency can most feasibly be determined on the administrative level. The drafts which follow are suggested as appropriate to implement those standards which seem proper subjects for court rule. Draftsmen who are concerned with the preparation of legislation on this subject may find it helpful to examine the Model Defense of Needy Persons Act, prepared by the Conference of Commissioners on Uniform State Laws and reproduced at Appendix E, pp. 78-85, ABA Standards Relating to Providing Defense Services (1968).

PART I. SCOPE OF RIGHT TO COUNSEL

4-1.1. Criminal cases.

The right to counsel shall extend to all criminal proceedings for offenses punishable by loss of liberty,

regardless of their denomination as felonies, misdemeanors or otherwise.

Reference: ABA Standards Relating to Providing Defense Services (1968) (hereafter in this Title cited as Standard) 4.1.

Note: For related standards, see Discovery and Procedure Before Trial 5.3; Pleas of Guilty 1.3; Pre-trial Release 4.2; The Function of the Trial Judge 3.4. See also Argersinger v. Hamlin, 407 U.S. 25 (1972).

4-1.2. Collateral proceedings.

The right to counsel shall extend to all proceedings which are adversary in nature and arise from the initiation of a criminal action against the accused regardless of the court in which they occur or the classification of the proceeding as civil in nature.

Reference: Standard 4.2.

Note: For related standards, see Post Conviction Remedies 4.4, 5.2; Probation 5.4.

PART II. STAGE OF PROCEEDINGS

4-2.1. Initial provision of counsel; notice.

Counsel shall be provided to the accused as soon as feasible after he is taken into custody, when he appears before a committing magistrate, or when he is formally charged, whichever occurs earliest. Law enforcement officers shall notify the official responsible for assigning

counsel whenever a person is in custody and he requests counsel or is without counsel.

Reference: Standard 5.1.

Note: For related standards, see Pleas of Guilty 1.3; Post Conviction Remedies 3.1; Pre-trial Release 1.4, 4.1, 4.2, 4.3; The Defense Function 2.1.

4-2.2. Duration of representation.

Counsel shall be provided at every stage of the proceedings, including sentencing, appeal, and post conviction review. Counsel initially appointed shall continue to represent the defendant through all stages of the proceedings unless a new appointment is necessary because of geographical considerations or other factors.

Reference: Standard 5.2.

Note: For related standards, see Appellate Review of Sentences 2.2; Criminal Appeals 2.2, 2.3, 3.1, 3.2; Discovery and Procedure Before Trial 5.3; Pleas of Guilty 1.3; Post Conviction Remedies 4.4, 5.2; Probation 5.4; The Defense Function 8.3.

4-2.3. Withdrawal of counsel.

Once appointed, counsel shall not request leave to withdraw unless compelled to do so because of serious illness or other incapacity to render competent representation in the case, or unless contemporaneous or announced future conduct of the accused is such as to seriously compromise the

lawyer's professional integrity. If leave to withdraw is granted, or if the defendant for substantial reasons asks that counsel be replaced, successor counsel shall be appointed. Counsel shall not seek to withdraw because he believes that the contentions of his client lack merit, but shall present for consideration such points as the client desires to be raised provided he can do so without compromising professional standards.

Reference: Standard 5.3.

Note: For related standards, see Appellate Review of Sentences 2.2; Criminal Appeals 2.2, 3.2; Discovery and Procedure Before Trial 5.3; Post Conviction Remedies 4.4, 5.2; The Defense Function 7.7, 8.3.

PART III. ELIGIBILITY FOR ASSIGNMENT OF COUNSEL

4-3.1. Eligibility.

Counsel shall be provided to any person who is financially unable to obtain adequate representation without substantial hardship to himself or his family. Counsel shall 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.

Reference: Standard 6.1.

4-3.2. Partial eligibility.

The ability to pay part of the cost of adequate

representation shall not preclude eligibility to have counsel provided. The provision of counsel may be conditioned upon part payment pursuant to an established method of collection.

Reference: Standard 6.2.

4-3.3 Determination of eligibility.

A preliminary and tentative determination of eligibility shall be made as soon as feasible after a person is taken into custody. The formal determination of eligibility shall be made by the judge or an officer of the court selected by him. A questionnaire shall be used to determine the nature and extent of the financial resources available for obtaining representation. If at any subsequent stage of the proceedings new information concerning eligibility becomes available, eligibility shall be redetermined.

Reference: Standard 6.3; see published Standards, Appendix D, pp. 72-77, for Sample Eligibility Questionnaire.

Note: For a related standard, see Pre-trial Release 4.2.

4-3.4. Reimbursement.

Reimbursement of counsel or the governmental unit providing counsel shall not be required, except on the ground of fraud in obtaining the determination of eligibility.

Reference: Standard 6.4.

PART IV. OFFER AND WAIVER

4-4.1. Explaining the availability of a lawyer.

When a person is taken into custody he shall immediately be informed of his right to the assistance of a lawyer. At the earliest opportunity a formal offer of the assistance of a lawyer shall be made to the person in custody, either by the lawyer designated to provide such assistance, or by a judge or magistrate. The offer shall be clearly stated, and the person in custody shall be informed expressly that a person who is unable to pay a lawyer is entitled to have one provided without cost to him. At the earliest opportunity a person in custody shall be provided access to a telephone, the telephone number of the public defender or person responsible for assigning counsel, and any other means necessary to place him in communication with a lawyer.

Reference: Standard 7.1.

Note: For related standards, see Post Conviction Remedies 3.1; Pre-trial Release 4.2; The Defense Function 2.1.

4-4.2. Waiver.

The failure of an accused person to request counsel or his announced intention to plead guilty shall not be deemed a waiver of counsel. A waiver of counsel shall not be considered by the court until there has been an offer

of counsel made to the accused and the judge or magistrate has determined that the accused understands the offer of counsel and that he has the capacity to make an intelligent and understanding waiver. The mental condition of the accused, his age, education and experience, the nature or complexity of the case and other relevant factors shall be considered in determining whether the accused is able to make an intelligent and understanding choice.

Reference: Standard 7.2.

Note: For related standards, see Criminal Appeals 3.2; Discovery and Procedure Before Trial 5.3; Pleas of Guilty 1.3; Pre-Trial Release 4.2; The Function of the Trial Judge 3.5, 6.6.

4-4.3. Acceptance of waiver.

No waiver of counsel shall be accepted unless it is in writing and of record. If an accused who has not been advised by a lawyer indicates his intention to waive the assistance of counsel, a lawyer shall be provided to consult with him. No waiver shall be accepted unless the accused had at least once conferred with a lawyer. If a waiver is accepted, the offer of counsel shall be renewed at each subsequent stage of the proceedings at which the defendant appears without counsel.

Reference: Standard 7.3.

Note: For related standards, see Criminal Appeals 3.2; Discovery and Procedure Before Trial 5.3; Pleas of Guilty 1.3; Pre-trial Release 4.2; The Function of the Trial Judge 3.4, 6.6.

PART V. SUPPORTING SERVICES

4-5.1. Services other than counsel.

Counsel for an accused who is financially able to obtain investigative, expert, or other services necessary to an adequate defense in his case may request such services by motion. Upon finding that the services are necessary to an adequate defense and that the accused is financially unable to obtain them, the court shall authorize counsel to obtain the services on behalf of the accused. The court, in the interest of justice and on a finding that timely procurement of necessary services could not have waited prior authorization, shall ratify such services after they have been obtained.

The court shall determine reasonable compensation for the services and direct payment to the organization or person who rendered them upon the filing of a claim for compensation supported by an affidavit specifying the time expended and the services and expenses incurred on behalf of the accused, and the compensation received in the same case or for the same services from any other source.

Reference: Standard 1.5.

Note: For a related standard, see Pre-trial Release 4.5.

Title 5

The Function of the Trial Judge

PRELIMINARY COMMENT

The trial is the heart of the American Criminal Justice system. Not only is the trial the stage at which issues of guilt and liability to punishment are determined but, as the most visible component of the process, the trial is the feature upon which most citizens base their estimate of the fairness and effectiveness of the system. The interest of society in the impartial administration of criminal justice presupposes the dignified, orderly and effective conduct of the trial as a forum for the civil and just resolution of disputed issues. As the neutral figure in the adversary process, the trial judge's role in the trial is critical, both in producing just results and maintaining public confidence in the system.

The ABA Standards Relating to the Function of the Trial Judge (1972) deal with judical conduct at every stage of judicial participation in the criminal process from the issuance of warrants through post conviction procedures. The main emphasis, however, is on the judge's responsibility and conduct in the courtroom and at the trial and is trial related pretrial duties and obligations. The Standards not only provide for procedure in criminal trials, but they provide guidelines for aspects of judicial

conduct not ordinarily covered by rule or statute. Substantially all of the published Standards are here presented in rule form, although, in some instances the draftsman may find the subjects inappropriate for adoption in his jurisdiction. Some selectivity may be necessary.

Part IX of the published Standards relates to procedures for dealing with judicial misconduct and incompetence and retirement for disability. These subjects seem rather clearly beyond the scope of rules relating to the criminal trial and no effort has been made to formulate rules governing these subjects.

Two additional comments seem appropriate: First, the Standards relating to the trial judge and the criminal trial are peculiarly susceptible to implementation by trial court rule and in the absence of Supreme Court rule or statute, should be considered for implementation on the trial court level; second, the Standards are recommended as appropriate for all criminal trial courts whether of general, limited or special jurisdiction.

PART I. BASIC DUTIES

5-1.1. General responsibility.

(a) The trial judge is responsible for safeguarding the rights of the accused and the interests of the public in the criminal trial. He shall raise on his own initiative, at appropriate times and in an appropriate manner, matters which

may significantly promote a just determination of the issues in the trial. He shall not permit the criminal trial to be used for any purposes other than to determine whether the prosecution has established the guilt of the accused as required by law.

(b) The trial judge shall conduct proceedings before him in an atmosphere of dignity and fairness. His decisions in each case shall be based upon the particular facts of that case. He shall assure that the proceedings are clear and understandable to the participants, and shall use interpreters where necessary.

(c) The conduct of the trial judge toward the prosecutor and defense counsel shall be courteous and fair and shall manifest professional respect consistent with their important roles.

Reference: ABA Standards Relating to the Function of the Trial Judge (1972) (hereafter cited in this Title as Standard) 1.1.

Note: The language of Rule 5-1.1(b) is adapted from ABA Standards, Pretrial Release (1968) 4.3. For a related standard, see The Urban Police Function 8.1.

5-1.2. Adherence to standards.

The trial judge shall be familiar with and adhere to the canons and codes applicable to the judiciary, the code of professional responsibility applicable to the legal profession, and standards concerning the proper administration of criminal justice.

Reference: Standard 1.1.

5-1.3. Appearance and demeanor.

The appearance and demeanor of the trial judge shall be consistent with the dignity of his office and his obligation to maintain the public confidence in the administration of justice.

Reference: Standard 1.3.

5-1.4. Use of time.

The trial judge shall conserve the time of the court. He shall avoid delays, continuances and extended recesses, except for good cause. He shall practice punctuality and the observance of scheduled court hours and shall require such observance from others.

Reference: Standard 1.4.

5-1.5. Duty to maintain impartiality.

The trial judge shall avoid impropriety and the appearance of impropriety in all his activities, and shall conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. He shall not allow his family, social or other relationships to influence his judicial conduct or judgment.

Reference: Standard 1.5.

5-1.6. Ex parte discussions of pending case.

The trial judge shall not hear or participate in ex parte discussions of a pending case with the prosecutor, the defense counsel nor any other person, except after notice to all parties or when authorized by law or approved practice.

Reference: Standard 1.6.

5-1.7. Circumstances requiring recusation.

The trial judge shall recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can reasonably be questioned.

Reference: Standard 1.7.

PART II. FACILITIES AND STAFF

5-2.1. Duty to seek or compel support.

(a) The trial court shall seek the cooperation of the excutive and legislative departments of government in providing judicial manpower, supporting staff, physical facilities and budget adequate to assure the prompt and fair administration of justice.

(b) The trial court shall, where necessary, exercise the inherent power of the judiciary to compel other agencies of

government to provide staff, facilities and funds to assure the prompt and fair administration of justice.

Reference: Standards 2.1, 2.2 and 2.3.

5-2.2. Training and support of staff.

The trial judge shall assure that courtroom personnel are properly instructed in the performance of their duties, and shall support them in the exercise of their authority.

Reference: Standard 2.4.

5-2.3. Record of judicial proceedings.

It is the responsibility of the trial judge to assure that a true, complete and accurate record of all proceedings is made by the reporter. He may challenge the accuracy of the reporter's record of the proceedings, but shall not change the transcript without notice to the prosecution, the defense and the reporter, with opportunity to be heard. The trial judge shall take steps to insure that the reporter's obligation to furnish transcripts of court proceedings is promptly met.

Reference: Standard 2.5.

PART III. PRE-TRIAL DUTIES

5-3.1. Issuance or review of warrants.

In proceedings for the issuance of warrants for arrest or search and in the review of such proceedings, the judge shall carefully observe constitutional and statutory standards and shall make such findings as are necessary to support the action taken. Where the trial court has supervisory jurisdiction over other judicial officers who perform these functions, the trial judge shall insure that this standard is observed.

Reference: Standard 3.1.

Note: For a related standard, see The Urban Police Function 8.1.

5-3.2. Inquiries concerning jail population.

The trial judge shall periodically make inquiry concerning persons held in jail awaiting formal charge, trial or sentence. He shall take appropriate corrective action when required.

Reference: Standard 3.2.

Note: For related standards, see Speedy Trial 1.1, 1.2; The Prosecution Function 5.1.

5-3.3. Ruling on pre-trial release.

Whenever the trial judge is called upon to make a decision concerning release on bail, he shall first give consideration to

the law's preference for release of defendants pending determination of the accusation of guilt. When release of the accused is ordered, the trial judge shall set such conditions of release as may be just, having regard to the special circumstances of the accused.

Reference: Standard 3.3.

Note: See also ABA Standards, Pre-trial Release (1968) 1.1 and 5.1.

5-3.4. Protecting the accused's right to counsel.

(a) At the earliest time an accused person appears before him, the trial judge shall inquire whether such accused is represented by counsel. If an accused is unrepresented, the trial judge shall inquire into the eligibility of the accused for assigned counsel and, if eligibility is found, assign counsel to represent him unless counsel is waived by the accused in writing.

(b) Whenever two or more defendants who have been jointly charged, or whose cases have been consolidated, are represented by the same attorney, the trial judge shall inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel.

Reference: Standard 3.4.

Note: For related standards, see Providing Defense Services 6.1, 6.2 and 6.3; Discovery and Procedure Before Trial 5.3; Pleas of Guilty 1.3; Pre-trial Release 4.2; The Defense Function 3.5. The right of an accused person to waive counsel is recognized in Faretta v. California, 95 S. Ct. 2525 (1975).

5-3.5. Attorneys from other jurisdictions.

If an attorney who is not admitted to practice in the jurisdiction of the court petitions for permission to represent a defendant, the trial judge may

(a) deny such permission if the attorney has been held in contempt of court or otherwise formally disciplined for courtroom misconduct, or if it appears by reliable evidence that he has engaged in courtroom misconduct sufficient to warrant disciplinary action;

(b) grant such permission on condition that

(i) the petitioning attorney associate with him as co-counsel a local attorney admitted to practice in the jurisdiction,

(ii) the local attorney will assume full responsibility for the defense if the petitioning attorney becomes unable or unwilling to perform his duties, and

(iii) the defendant consents to the foregoing conditions.

Reference: Standard 3.5.

5-3.6. Pre-trial procedures.

The trial court shall require adherence to the provisions of Title 7 of these Rules, relating to Discovery and Procedure Before Trial.

Reference: Standard 3.6.

Note: For related standards, see Discovery and Procedure Before Trial.

5-3.7. Prejudicial publicity.

(a) The trial court shall adopt and enforce rules which prohibit court personnel from disclosing to any person, without authorization by the court, information relating to a pending criminal case that is not part of the public records of the court.

(b) The trial judge shall refrain from making public comment on a pending case or any comment that may tend to interfere with the right of any party to a fair trial.

Reference: Standard 3.7.

Note: The standard suggests that the trial judge should be familiar with ABA Standards, Fair Trial and Free Press (1968).

5-3.8. Responsibility for the criminal docket.

(a) The trial court has the ultimate responsibility for proper management of the criminal calendar and shall take measures to insure that cases are listed on the calendar and disposed of as promptly as circumstances permit.

(b) Whenever feasible, there shall be individual dockets for each trial judge, with the judge having continuing responsibility for cases on his docket from the filing of the indictment or information.

(c) Whenever feasible, the trial judge shall give preference to the trial of criminal cases over civil cases, and to the trial of defendants in custody and defendants whose pre-trial liberty is reasonably believed to present unusual risks over other criminal cases.

Reference: Standard 3.8.

Note: For related standards, see Discovery and Procedure Before Trial 1.1, 1.4, 5.1; Pre-trial Release 5.8; Speedy Trial, Part I; The Prosecution Function 2.9, 5.1.

5-3.9. Ordering severance on judge's own motion.

The trial judge shall order severance of offenses or defendants before trial on his own motion whenever it appears reasonably required to insure the fairness of the trial or its orderly progress, if a severance could be obtained on motion of a defendant or the prosecutor.

Reference: Standard 3.9.

Note: For a related standard, see Joinder and Severance 3.1.

PART IV. ACCEPTING PLEAS AND WAIVERS

5-4.1. Role of the judge in plea discussions and plea agreements.

(a) The trial judge shall not be involved with plea discussions before the parties have reached an agreement other than to facilitate fulfillment of the obligation of the prosecutor and defense counsel to explore with each other the possibility of disposition without trial.

(b) The trial judge shall not accept a plea of guilty or nolo contendere without first inquiring whether there is a plea agreement and, if there is one, requiring that it be disclosed on the record.

(c) If the plea agreement contemplates the granting of charge or sentence concessions by the trial judge, he shall:

(i) unless he then and there grants such concessions, inform the defendant as to the role of the judge with respect to such agreements.

(ii) give the agreement due consideration, but notwithstanding its existence reach an independent decision on whether to grant charge or sentence concessions; and

(iii) permit withdrawal of the plea (or, if it has not yet been accepted, withdrawal of the tender of the plea) in any case in which the judge determines not to grant the charge or sentence concessions contemplated by the agreement.

(d) The trial judge may decline to give consideration to a plea agreement until after completion of a pre-sentence investigation or may indicate his conditional concurrence prior thereto.

Reference: Standard 4.1.

Note: For related standards, see Sentencing Alternatives and Procedures 5.3, 5.4; The Defense Function 6.1, 6.2; The Prosecution Function 4.1; Pleas of Guilty 1.5, 3.3(b).

5-4.2. Acceptance of pleas of guilty or nolo contendere.

When a plea of guilty or nolo contendere is tendered by or on behalf of an accused, the proceedings before the trial judges shall be as provided in Rule 10-1-3 relating to pleas of guilty.

Reference: Standard 4.2.

Note: Standard 4.2 prescribes a procedure for the acceptance of pleas of guilty. To a considerable extent this standard duplicates Standards 1.4, 1.5, 1.6 and 1.7 of the Standards Relating to Pleas of Guilty. In order to avoid unnecessary duplication and the possibility of resulting confusion the content of Standard 4.2 has been incorporated into rules implementing the above mentioned standards relating to pleas of guilty and is to be found in Rules 10-1-3. For other related standards, see Sentencing alternatives and Procedures, Part V.

5-4.3. Waiver of right to trial by jury.

The trial judge shall not accept a waiver of right to trial by jury unless the defendant, after being advised by the court of this right, personally waives his right to trial by jury, either in writing or in open court for the record.

Reference: Standard 4.3.

Note: For related standards, see Fair Trial and Free Press 3.3; Pleas of Guilty 1.1, 3.2; The Defense Function 5.2; Trial by Jury 1.2.

PART V. PROCEDURES DURING TRIAL

5-5.1. Conduct of voir dire examination of jurors.

The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by referring to the charge against the accused, and by putting to the prospective jurors questions touching their qualifications, including impartiality, to serve as jurors in the case. The judge shall also permit such additional questions by the defendant or his attorney and the prosecutor as he

deems reasonable and proper.

Reference: Standard 4.4.

Note: For related standards, see Discovery and Procedure Before Trial 5.4; Fair Trial and Free Press 3.2, 3.4; The Defense Function 7.2; The Prosecution Function 5.3; Trial by Jury, Part II.

5-5.2. Control over and relations with the jury.

(a) The trial judge shall take steps to insure that the jurors will not be exposed to sources of information or opinion, or subject to influences, which might tend to affect their ability to render an impartial verdict on the evidence presented in court. Such steps may include admonition of jurors, sequestration during trial, or other appropriate actions.

(b) The trial judge shall require a record to be kept of all communications received by him from a juror or the jury after the jury has been sworn, and he shall not communicate with a juror or the jury on any aspect of the case itself (as distinguished from matters relating to physical comfort and the like), except after notice to all parties and reasonable opportunity for them to be present.

Reference: Standard 5.2.

Note: For a related standard, see Fair Trial and Free Press 3.5.

5-5.3. Custody and restraint of defendant and witness.

(a) The trial judge shall not permit a defendant or witness to appear at trial in the distinctive attire of a prisoner.

(b) The trial judge shall not permit a defendant or witness to be subjected to physical restraint in the courtroom unless the judge has found such restraint to be reasonably necessary to maintain order or provide for the safety of persons. If the judge orders such restraint,

(i) he shall enter into the record the reasons therefor, and

(ii) he shall instruct the jurors that such restraint is not to be considered in weighing evidence or determining the issue of guilt.

Reference: Standard 5.3.

Note: For related standards, see Pre-trial Release 5.11; Trial by Jury 4.1.

5-5.4. Duty to protect witnesses.

(a) The trial judge shall permit full and proper examination and cross-examination of witnesses, but shall require the interrogation to be conducted fairly and objectively and with due regard for the dignity and legitimate privacy of the witnesses and without seeking to intimidate or humiliate them unnecessarily.

(b) The trial judge shall not permit examination or cross-examination of witnesses at the witness stand, but should require counsel to examine from counsel table or the lectern or other designated location, except as permission is granted for

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counsel to present a document or an object to the witness for observation or inspection.

Reference: Standard 5.4.

Note: For related standards, see The Defense Function 7.6; The Prosecution Function 5.7.

5-5.5. Duty to control length and scope of examination.

The trial judge shall permit reasonable latitude to counsel in the examination and cross-examination of witnesses, but shall not permit unreasonable repetition or permit counsel to pursue clearly irrelevant lines of inquiry.

Reference: Standard 5.5.

Note: For related standards, see The Defense Function 7.6; The Prosecution Function 5.7.

5-5.6. Right of judge to give assistance to the jury during trial.

(a) The trial judge shall not express or otherwise indicate to the jury his personal opinion whether the defendant is guilty or express an opinion that certain testimony is worthy or unworthy of belief.

(b) When necessary to the jurors' proper understanding of the proceedings, the judge may intervene during the taking of evidence to instruct on a principle of law of the applicability of the evidence to the issues. This shall be done only when the jurors can not be effectively advised by postponing the explanation to the time of giving final instructions.

Reference: Standard 5.6.

Note: For related standards, see Trial by Jury 3.1, 4.1, 4.5, 4.6, 5.3, 5.4.

5-5.7. Duty of judge on counsel's objections and request for rulings.

The trial judge shall respect the obligation of counsel to present objections to procedures and to admissibility of evidence, to request rulings on motions, to make offers of proof, and to have the record show adverse rulings and reflect conduct of the judge which counsel considers prejudicial. Counsel shall be permitted to state succinctly the grounds of his objections or request; but the judge shall control the length and manner of argument.

Reference: Standard 5.7.

Note: For related standards, see The Defense Function 7.1; The Prosecution Function 5.2.

5-5.8. Duty of judge to respect attorney-client relationship.

The trial judge shall respect the obligation of counsel to refrain from speaking on privileged matters and shall avoid putting him in a position where his adherence to the obligation, such as by a refusal to answer, may tend to prejudice his client. Unless the privilege is waived, the trial judge shall not request counsel to comment on evidence or other matter where his knowledge is likely to be gained from privileged communications.

Reference: Standard 5.8.

Note: For a related standard, see The Defense Function 3.1.

5-5.9. Requests for conference outside hearing of the jury.

The trial judge shall, during the taking of evidence, permit bench conferences between counsel and the judge out of the hearing of the jury, only when an immediate conference appears necessary to avoid prejudice. Otherwise, requested conferences shall be postponed until the next recess.

Reference: Standard 5.9.

Note: For related standards, see Fair Trial and Free Press 3.5; Trial by Jury 4.5.

5-1.10. Final argument to the jury.

The trial judge shall not permit counsel during the closing argument to the jury to

(i) express his personal opinions as to the truth or falsity of any testimony or evidence or the guilt or innocence of the defendant.

(ii) make arguments on the basis of matters outside the records, unless they are matters of common public knowledge or of which the court may take judicial notice, or

(iii) make arguments calculated to inflame the passions or prejudices of the jury.

Reference: Standard 5.10.

Note: For related standards, see The Defense Function 7.8,

The Prosecution Function 5.8, 5.9.

5-5.11. Requests for jury instructions, and instructions.

(a) The trial judge shall afford counsel opportunity to object to any requests for jury instructions tendered by another party or prepared at the direction of the judge. He shall advise counsel before the arguments to the jury what requested instructions he proposes to give or not give. After the jury has been instructed and before it begins it deliberations, all objections to instructions given or refused shall be placed on the record.

(b) The court may recall the jury after they have retired and give them additional instructions in order:

(i) to correct or withdraw an erroneous instruction;

(ii) to clarify an ambiguous instruction; or

(iii) to inform the jury on a point of law which should have been covered in the original instructions.

Reference: Standard 5.11.

Note: For related standards, see Trial by Jury 3.1, 4.1, 4.2, 4.5, 4.6, 51., 5.2, 5.3, 5.4, 5.7.

5-5.12. Assistance during jury deliberations.

(a) The trial judge shall provide assistance to the jury during deliberation by permitting materials to be taken to the jury room and responding to requests to review evidence and for additional instructions, under appropriate safeguards.

(b) In dealing with what appears to be a deadlocked jury, the trial judge shall avoid instructions which imply that a majority view is the correct one.

Reference: Standard 5.12.

Note: For related standards, see Trial by Jury 5.1, 5.2, 5.3 and 5.4.

5-5.13. Judicial comment on verdict.

The trial judge may thank jurors at the conclusion of the trial for their public service, but such comments should not include praise or criticism for the verdict.

Reference: Standard 5.13.

Note: For a related standard, see Trial by Jury 5.6.

PART VI. MAINTAINING DECORUM OF COURTROOM

5-6.1. Special rules for order in the courtroom.

The trial judge, either before a criminal trial or at its beginning, shall prescribe and make known the ground rules relating to conduct which the parties, the prosecutor, the defense counsel, the witnesses, and others will be expected to follow in the courtroom, and which are not set forth in the code of criminal procedure or in the published rules of court.

Reference: Standard 6.1.

5-6.2. Colloquy between counsel.

The trial judge shall make known before trial that no colloquy, argument, or discussion directly between counsel in the presence of the judge or jury will be permitted, except that if a brief conference between counsel might tend to expedite the trial the judge will grant them leave to confer.

Reference: Standard 6.2.

Note: For related standards, see The Defense Function 7.1; The Prosecution Function 5.2.

5-6.3. Judge's use of his powers to maintain order.

The trial judge has the obligation to use his judicial power to prevent distractions from and disruptions of the trial. If the judge determines to impose sanctions for misconduct affecting the trial, he should ordinarily impose the least severe sanction appropriate to correct the abuse and to deter repetition. In weighing the severity of a possible sanction for disruptive courtroom conduct to be applied during the trial, the judge should consider the risk of further disruption, delay or prejudice that might result from the character of the sanction or the time of its imposition.

Reference: Standard 6.3.

5-6.4. Judge's responsibility for self-restraint.

The trial judge shall exercise restraint over his conduct and utterances. He shall suppress his personal predilections, and control his temper and emotions. He shall not permit any

person in the courtroom to embroil him in conflict, and he shall otherwise avoid conduct on his part which tends to demean the proceedings or to undermine his authority in the courtroom. When it becomes necessary during the trial for him to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, he shall do so in a firm, dignified and restrained manner, avoiding repartee, limiting his comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.

Reference: Standard 6.4.

5-6.5. Deterring and correcting misconduct of attorneys.

The trial judge shall require attorneys to respect their obligations as officers of the court to support the authority of the court and enable the trial to proceed with dignity. When an attorney causes a significant disruption in a criminal proceeding, the trial judge, having particular regard to the provisions of Rule 5-6.3, shall correct the abuse, and if necessary, discipline the attorney by use of one or more of the following sanctions:

(i) censure or reprimand;

(ii) citation or punishment for contempt;

(iii) removal from the courtroom;

(iv) suspension for a limited time of the right to practice in the court where the misconduct occurred if such

sanction is permitted by law;

(v) informing the appropriate disciplinary bodies in every jurisdition where the attorney is admitted to practice of the nature of the attorney's misconduct and of any sanction imposed.

Reference: Standard 6.5.

5-6.6. The defendant's election to represent himself at trial.

A defendant shall be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that such defendant

(i) has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when his is so entitled;

(ii) possesses the intelligence and capacity to appreciate the consequences of this decision; and

(iii) comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case.

Reference: Standard 6.6.

Note: For related standards, see Providing Defense Services 7.2, 7.3. See also, Faretta v. California, 95 S. Ct. 2525 (1975).

5-6.7. Standby counsel for defendant representing himself.

When a defendant has been permitted to proceed without the assistance of counsel, the trial judge shall consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his own motion. Standby counsel shall always be appointed in cases expected to be long or complicated or in which there are multiple defendants.

Reference: Standard 6.7.

5-6.8. The disruptive defendant.

A defendant may be removed from the courtroom during his trial when his conduct is so disruptive that the trial cannot proceed in an orderly manner. Removal is preferable to gagging or shackling the disruptive defendant. If removed, the defendant shall be required to be present in the court building while the trial is in progress, be given the opportunity of learning of the trial proceedings through his counsel at reasonable intervals, and be given a continuing opportunity to return to the courtroom during the trial upon his assurance of good behavior. The removed defendant shall be summoned to the courtroom at appropriate intervals, and the offer to permit him to remain repeated in open court each time.

Reference: Standard 6.8.

Note: See Illinois v. Allen, 397 U.S. 337 (1970).

5-6.10. Misconduct of spectators and others.

The right of the defendant to a public trial does not give particular members of the general public or of the news media a right to enter the courtroom or to remain there. Any person who engages in conduct which disturbs the orderly process of the trial may be admonished or excluded, and, if his conduct is intentional, may be punished for contempt. Any person whose conduct tends to menace a defendant, an attorney, a witness, a juror, a court officer, or the judge in a criminal proceeding may be removed from the courtroom.

Reference: Standard 6.10.

5-6.11. Arrangements for the news media.

Although representatives of the news media may observe the trial of a criminal case in order that information be obtained for circulation to the general public, the trial judge shall require that their conduct not jeopardize the order and decorum of the courtroom. He shall make suitable arrangements to accommodate them consistent with the opportunity of other members of the public to attend the trial.

Reference: Standard 6.11.

Note: For a related standard, see Fair Trial and Free Press 3.5.

PART VII. USE OF THE CONTEMPT POWER

5-7.1. Inherent power of the court.

The court has the inherent power to punish any contempt in order to protect the rights of the defendant and the interests of the public and to assure that the administration of criminal justice shall not be thwarted. The trial judge has the power to cite and, if necessary, punish summarily anyone who, in his presence in open court, willfully obstructs the course of criminal proceedings.

Reference: Standard 7.1.

5-7.2. Admonition and warning.

No sanction other than censure shall be imposed by a trial judge unless

(i) it is clear from the identity of the offender and the character of his acts that disruptive conduct was willfully contemptuous, or

(ii) the conduct warranting the sanction was preceded by a clear warning that such conduct is impermissible and that specified sanctions may be imposed for its repetition.

Reference: Standard 7.2.

5-7.3. Notice of intent to use contempt power; postponement of adjudication.

(a) The trial judge shall, as soon as practicable after he is satisfied that courtroom misconduct requires contempt proceedings, inform the alleged offender of his intention to institute such proceedings.

(b) The trial judge shall consider the advisability of deferring adjudication of contempt for courtroom misconduct of a defendant, an attorney or a witness until after the trial, and shall defer such a proceeding unless prompt punishment is imperative.

Reference: Standard 7.3.

5-7.4. Notice of charges and opportunity to be heard.

Before imposing any punishment for criminal contempt, the judge shall give the offender notice of the charges and a reasonable opportunity to adduce evidence or argument relevant to guilt or punishment.

Reference: Standard 7.4.

5-7.5. Referral to another judge.

The judge before whom courtroom misconduct occurs may impose appropriate sanctions, including punishment for contempt, but he shall refer the matter to another judge if his conduct

was so integrated with the contempt that he may have contributed to it or have been otherwise involved, or his objectivity can reasonably be questioned.

Reference: Standard 7.5.

5-8.1. Duties of judge in sentencing.

The sentence shall be determined by the trial judge, except where otherwise provided by law. Wherever feasible, sentence shall be imposed by the judge who presided at the trial or who accepted the plea of guilty or nolo contendere.

Reference: Standard 8.1.

Note: For related standards, see Sentencing Alternatives and Procedures and Probation.

5-8.2. Duties of judge administering post conviction remedies.

The trial judge having jurisdiction of applications for post conviction relief shall finally dispose of each application at the earliest stage consistent with the purpose of deciding claims on their underlying merits rather than on formal or technical grounds.

Reference: Standard 8.2.

Note: For related standards, see Post Conviction Remedies.

Note concerning Standards 9.1 and 9.2.

Standard 9.1 relates to procedures regarding judicial misfeasance, nonfeasance and disability. It contemplates the creation of a commission with powers to investigate complaints and make findings and recommendations for the censure, suspension or removal of judges for misconduct or incompetence.

Standard 9.2 relates to the retirement of judges for disability.

The implementation of these standards is to be accomplished only by constitutional provision or legislation. Hence, no rules are suggested.

Title 6

PRETRIAL RELEASE

PRELIMINARY COMMENT

The right to bail or other pretrial release is primarily substantive in nature. Once the right has been established, it seems clearly within the rule-making power for the courts to establish rules governing the operation of the bail system and prescribing the various factors which should be considered in the release decision. Hence, the Standards Relating to Pretrial Release (1968), which are primarily procedural in their focus, are generally amenable to implementation by court rule.

PART I. GENERAL PRINCIPLES

6-1.1. Policy.

(a) It is the intent and policy of these rules that persons accused of crimes shall be released from custody pending determination of guilty or innocence unless it shall be found that detention is necessary to assure the appearance of such persons in court.

(b) Release on the defendant's own recognizance shall be favored. Non-monetary conditions of release shall be preferred over release on bail. Release on bail shall be ordered only

when no other condition will reasonably ensure the defendant's appearance at court.

Reference: Standards Relating to Pretrial Release, (1968) (hereafter cited in this Title as Standard), 1.1 and 1.2.

Note: The draftsman may prefer to handle these broad policy statements in commentary accompanying the rules, rather than to make them the subject of rules. Standard 1.3 must be implemented by legislation. For a related standard, see The Function of the Trial Judge 3.3.

6-1.2. Definitions.

(a) Citation. A written order by a law enforcement officer requiring a person accused of violating the law to appear in a designated court or governmental office at a specified date and time.

(b) Summons. An order issued by a court requiring a person against whom a criminal charge has been filed to appear in a designated court at a specified date and time.

(c) Order to appear. An order issued by the court at or after the defendant's first appearance releasing him from custody or continuing him at large pending disposition of his case but requiring him to appear in court or in some other place at all appropriate times.

(d) Release on own recognizance. The release of a defendant without bail upon his promise to appear in court or in some other place at all appropriate times.

(e) Release on bail. The release of a defendant upon the execution of a bond, with or without sureties, which may or may not be secured by the pledge of money or property.

(f) First appearance. That proceeding at which a defendant initially is taken before a judicial officer after his arrest.

Reference: Standard 1.4.

PART II. RELEASE BY A LAW ENFORCEMENT OFFICER ACTING WITHOUT AN ARREST WARRANT.

6-2.1. Authority to Issue Citations.

A law enforcement officer acting without a warrant who has probable cause to believe that a person has committed any offense is authorized to issue a citation in lieu of arrest or continued custody.

Reference: Standard 2.1.

Note: In most jurisdictions it is uncommon to issue a citation for anything other than traffic offenses. Hence, it seems desirable to commence this section with a clear statement of the officer's authority to issue a citation.

6-2.2. Mandatory issuance of citation.

(a) A law enforcement officer who has grounds to charge a person with one of the offenses hereinafter enumerated, shall issue a citation in lieu of making an arrest or, if an arrest has been made, shall issue a citation in lieu of taking the accused to the police station or in court. Citations shall be issued for the following offenses:

[to be determined by the jurisdiction]

(b) When an arrested person has been taken to a police station and a decision has been made to charge him with an offense for which total imprisonment may not exceed six months the responsible officer shall issue a citation in lieu of continued custody.

(c) The requirement to issue a citation set forth in Rules 6-2.2(a) and 6-2.2(b) need not apply and the officer may arrest or issue a warrant:

(i) where an accused fails to identify himself satisfactorily;

(ii) where an accused refused to sign the citation;

(iii) where detention is necessary to prevent imminent bodily harm to the accused or to another;

(iv) where the accused has no ties to the jurisdiction reasonably sufficient to assure his appearance and there is a substantial likelihood that he will refuse to respond to a citation;

(v) where the accused previously has failed to appear in response to a citation concerning which he has given his written promise to appear.

(d) where an officer makes an arrest pursuant to Rule 6-2.2(c) he shall indicate his reasons in writing on forms to be supplied by the law enforcement agency with which he is affiliated.

Reference: Standard 2.2.

6-2.3. Discretionary issuance of citation.

(a) When an accused is arrested for [a serious crime] [an offense which carries a maximum penalty of over six months] [an offense which carries a maximum penalty of over ____] the ranking officer on duty at the station house may issue a citation in lieu of continued custody.

(b) In determining whether to continue custody or issue a citation the ranking officer shall inquire into and consider the following facts about the accused:

(i) place and length of residence;

(ii) family relationships;

(iii) references;

(iv) present and past employment;

(v) criminal record;

(vi) other facts relevant to appearance in response to a citation.

Reference: Standard 2.3.

Note: It is unclear whether "serious crime" as used in Standard 2.3 (as amended) is meant to refer to all crimes that carry a maximum penalty of over six months or some other category of crimes. Probably either interpretation would be in accord with the Standard--the alternative wording set out above will allow the jurisdiction to select the definition best suited for it.

6-2.4. Lawful searches.

The issuance of a citation in lieu of arrest or continued custody does not affect the police offier's authority to conduct an otherwise lawful search.

Reference: Standard 2.4.

6-2.5. Persons in need of care.

Even if a citation is issued, a law enforcement officer may take a cited person to an appropriate medical facility if he appears mentally or physically unable to care for himself.

Reference: Standard 2.5.

PART III. ISSUANCE OF SUMMONS IN LIEU OF ARREST WARRANT

6-3.1. Authority to issue summons.

Any judicial officer may issue a summons in lieu of an arrest warrant in all cases in which a complaint, information, or indictment is filed or returned against a person not already in custody.

Reference: Standard 3.1.

Note: Legislation may be necessary to implement Standard 3.1, as well as other standards relating judicial authority to issue process. Statutes of many states appear to require a court to issue an arrest warrant when probable cause has been shown.

6-3.2. Mandatory issuance of summons.

The issuance of summons rather than an arrest warrant is mandatory in all cases in which the maximum possible sentence for the offense charged is less than six months, unless the judicial officer finds that:

(a) The defendant previously failed to respond to a citation or summons for an offense other than a minor one;

(b) The defendant has no ascertainable ties to the community and there is a substantial likelihood that he will refuse to respond to a summons;

(c) The whereabouts of the defendant are unknown and an arrest warrant is necessary to subject him to the jurisdiction of the court; or

(d) An arrest is necessary to prevent imminent bodily harm to the accused or to another.

Reference: Standard 3.2.

6-3.3. Discretionary issuance of summons.

In cases where the maximum sentence for the offense charged exceeds six months the summons is to be used in lieu of the arrest warrant unless there is reasonable cause to believe that, unless taken into custody, the defendant will flee to avoid prosecution or will fail to respond to a summons.

Reference: Standard 3.3(a)

6-3.4. Application for an arrest warrant or summons.

(a) In determining whether to issue a summons or arrest warrant, the judicial officer shall require the applicant for the arrest warrant or summons to provide such information as may be reasonably obtained concerning the defendant's:

(i) residence;

(ii) employment;

(iii) family relationships;

(iv) past history or response to legal process, and

(v) past criminal record.

(b) In any case in which the judicial officer issues a warrant he shall record his reasons for not issuing a summons.

Reference: Standard 3.3(b)

6-3.5. Service of summons.

Summons issued in a criminal case may be served:

(a) In the manner perscribed for service of civil process; or

(b) by certified mail.

Reference: Standard 3.4.

Note: If service may be made by mail in civil cases under rules applicable in the jurisdiction, subsection (b) may be omitted.

PART IV. RELEASE BY JUDICIAL OFFICER AT FIRST APPEARANCE

6-4.1. Prompt first appearance.

An arrested person who is not released by citation or in some other lawful manner shall be taken before a judicial officer [without unnecessary delay] [within three hours] [other reasonable time to be set by jurisdiction].

Reference: Standard 4.1.

Note: For a related standard, see Providing Defense Services 5.1.

6-4.2. Appointment of counsel.

Where practicable, the defendant's desire for and ability to retain counsel, should be determined by the court before the first appearance. Counsel shall be appointed no later than the time of the first appearance.

Reference: Standard 4.2.

Note: Nothing in the section as written precludes appointment of temporary counsel as authorized by Standard 4.2. However, temporary appointment is not mentioned in the suggested rule as that concept might run contra to the law in some jurisdictions. If a jurisdiction wishes to make specific mention of this point, a statement in the commentary accompanying the court rules should suffice. For related standards see Discovery and Procedure Before Trial 5.3; Pleas of Guilty 1.3; Providing Defense Services 2.1, 4.1, 5.1, 6.3, 7.1, 7.2, 7.3; The Functions of the Trial Judge 3.4.

6-4.3. Nature of first appearance.

(a) Upon the defendant's first appearance the judicial officer shall inform him of the charge and provide him with a copy thereof. The judicial officer shall also inform the defendant of the following:

(i) that he is not required to say anything, and that anything he says may be used against him;

(ii) if he is as yet unrepresented, that he has a right to counsel, and, if he is unable to afford counsel, that counsel will be appointed forthwith;

(iii) That he has a right to communicate with his counsel, his family, or his friends, and that reasonable means will be provided for him to do so;

(iv) whether he has a right to a preliminary examination; and

(v) the nature and approximate schedule of all further proceedings to be taken in his case.

(b) No further steps in the proceedings may be taken until the defendant and his counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived his right to counsel.

(c) The judicial officer, if unable to dispose of the case at the first appearance, shall proceed to decide the question of the defendant's pretrial release in accordance with the provision set out below.

(d) First appearance proceedings shall be recorded.

Reference: Standard 4.3.

Note: This rule implements most of Standard 4.3. Standards 4.3(a) and 4.3(b) are not easily adapted to court rule form. The content of these standards might be included in the commentary accompanying the rule. Standard 4.3(e) is covered by Rule 6-4.4, infra. For related standards, see Probation 6.3; Providing Defense Services 5.1.

6-4.4. Pretrial release inquiry--in what cases.

(a) An inquiry into the relevant facts that might affect the pretrial release decision must be made in the following cases:

(i) In all cases where the maximum penalty for the crime charged exceeds one year and the prosecutor has not stipulated the defendant may be released on his own recognizance.

(b) In all other cases no pretrial release inquiry is necessary and the court shall release the defendant on his own recognizance at the first appearance.

Reference: Standards 4.3(e), 4.4 and 4.5(a).

Note: While the language of the rule differs from that of the Standards, all alternatives provided by the Standards are covered.

6-4.5. Pretrial release inquiry--time.

Where possible the pretrial release inquiry should be made by the [public defender's office] [prosecuting attorney's office] [other identified agency] prior to the defendant's first appearance. When a pretrial release inquiry has not been made prior to the defendant's first appearance, the inquiry may take place in open court by the judicial officer at the time of the defendant's first appearance.

Reference: Standard 4.5(b).

Note: While the Standards prefer that the inquiry be made by an independent agency, it is recognized that this approach is not always feasible.

6-4.6. Pretrial Release Inquiry--Scope.

(a) The inquiry shall be directed towards the discovery of factors relevant to the pretrial release decision. These may include such factors as:

(i) the defendant's employment status, history and financial condition;

(ii) the nature and extent of his family relationships;

(iii) his past and present residences;

(iv) his character and reputation;

(v) names of persons who agree to assist him in attending court at the proper times;

(vi) the nature of the current charge and any mitigating or aggravating factors that may bear on the likelihood of conviction and the possible penalty;

(vii) the defendant's prior criminal record, if any, and, if he previously has been released pending trial, whether he appeared as required;

(viii) any facts indicating the possibility of violations of law if the defendant is released without restrictions; and

(ix) any other facts tending to indicate that the defendant has strong ties to the community and is not likely to flee the jurisdiction.

(b) If the inquiry is made prior to the defendant's first appearance, the [public defender's office] [prosecuting attorney's office] [other identified agency] should make

recommendations to the judicial officer concerning the conditions, if any, which should be imposed on the defendant's release.

Reference: Standard 4.5(c).

Note: For a related standard, see Providing Defense Services 1.5.

PART V. THE RELEASE DECISION

6-5.1. Release on order to appear or on defendant's own recognizance.

(a) At the first appearance the judicial officer shall release the defendant on his personal recognizance or upon an order to appear, unless the judicial officer finds that such a release will create a substantial risk of non-appearance by the defendant.

(b) In determining whether there is a substantial risk of non-appearance the judicial officer shall take into account the following factors concerning the defendant;

(i) his length of residence in the community;

(ii) his employment status, history and financial condition;

(iii) his family ties and relationships;

(iv) his reputation, character and mental condition;

(v) his prior criminal record, including any record of prior release on recognizance or on bail;

(vi) the identity of responsible members of the community who would vouch for defendant's reliability;

(vii) the nature of the offense presently charged and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of non-appearance; and

(viii) any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.

(c) In evaluating these and any other factors, the judicial officer shall exercise care not to give inordinate weight to the nature of the present charge.

(d) In capital cases, the defendant may also be detained pending trial if the facts support a finding that the defendant is likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice if released.

(e) In the event the judicial officer determines that release of the defendant on order to appear or on his own recognizance is unwarranted, the judicial officer shall include in the record a statement of the reasons leading to this conclusion.

Reference: Standard 5.1.

Note: For a related standard, see The Function of the Trial Judge 3.3.

6-5.2. Conditions on release.

(a) Upon a finding that release on order to appear or on defendant's own recognizance is unwarranted, the judicial officer shall impose the least onerous condition reasonably likely to assure the defendant's appearance in court.

(b) Where conditions on release are found necessary, the judicial officer should impose one or more of the following conditions:

(i) place the defendant under the care of a qualified person or organization agreeing to supervise the defendant and assist him in appearing in court;

(ii) place the defendant under the supervision of a probation officer or other appropriate public official;

(iii) impose reasonable restrictions on the activities, movements, associations, and residences of the defendant;

(iv) release the defendant during working hours but require him to return to custody at specified times; or

(v) impose any other reasonable restriction designed to assure the defendant's appearance.

Reference: Standard 5.2.

6-5.3. Release on money bail.

(a) The judicial officer shall set money bail only after he determines that no other conditions will reasonably assure the defendant's appearance in court.

(b) If it is determined that money bail should be set, the judicial officer shall require one of the following:

(i) the execution of an unsecured bond in an amount specified by the judicial officer, either signed by persons other than the accused or not;

(ii) the execution of an unsecured bond in an amount specified by the judicial officer, accompanied by a deposit of cash or securities equal to ten percent of the face amount of the bond. [Ninety Percent] [other amount specified by jurisdiction] of the deposit shall be returned at the conclusion of the proceedings, provided the defendant has not defaulted in the performance of the conditions of the bond; or

(iii) the execution of a bond secured by the deposit of the full amount of cash or other property or by the obligation of qualified, uncompensated sureties.

(c) In setting the amount of bail the judicial officer should take into account all facts relevent to the risk of willful non-appearance including:

(i) the length and character of the defendant's residence in the community;

(ii) his employment status, history and financial condition;

(iii) his family ties and relationships;

(iv) his reputation, character and mental condition;

(v) his past history of response to legal process;

(iv) his prior criminal record;

(vii) the identity of responsible members of the community who would vouch for the defendant's reliability;

(viii) the nature of the current charge, the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of non-appearance; and

(ix) any other factors indicating the defendant's roots in the community.

(d) Nothing in this section shall be construed to prohibit a defendant charged with a traffic or other minor offense from posting a specified sum of money to be forfeited in lieu of any court appearance.

Reference: Standard 5.3.

Note: Standards 5.3(b) and 5.3(e) are not spelled out in the suggested rule but are covered by implication. Standard 5.4, which prohibits compensated sureties, is not deemed an appropriate subject for rule.

6-5.4. Prohibition of wrongful acts pending trial.

Upon a showing that there exists a danger that the defendant will commit a serious crime or will seek to

intimidate witnesses, or will otherwise unlawfully interfere with the orderly administration of justice, the judicial officer, upon the defendant's release, may enter an order:

(a) prohibiting the defendant from approaching or communicating with particular persons or classes of persons, except that no such order shall be deemed to prohibit any lawful and ethical activity of defendant's counsel;

(b) prohibiting the defendant from going to certain described geographical areas or premises;

(c) prohibiting the defendant from possessing any dangerous weapon, or engaging in certain described activities or indulging in intoxicating liquors or in certain drugs;

(d) requiring the defendant to report regularly to and remain under the supervision of an officer of the court.

Reference: Standard 5.5.

6-5.5. Violations of conditions of release.

(a) Upon a verified application by the prosecuting attorney alleging that a defendant has willfully violated the conditions of his release, a judicial officer shall issue a warrant directing that the defendant be arrested and taken forthwith before a court of general criminal jurisdiction for a hearing. A law enforcement officer having reasonable grounds to believe that a released defendant charged with a felony has violated the conditions of his release is authorized to arrest the defendant and take him forthwith before a court

of general criminal jurisdiction when it would be impracticable to secure a warrant.

(b) After a hearing, and upon finding that the defendant has willfully violated reasonable conditions imposed on his release, the court may impose different or additional conditions upon defendant's release or revoke his release.

Reference: Standards 5.6 and 5.7.

6-5.6. Commission of serious crime while awaiting trial.

If it is shown that a competent court or grand jury has found probable cause to believe that a defendant has committed a serious crime while on release pending adjudication of a prior charge, the court which initially released him may revoke his release.

Reference: Standard 5.8.

Note: For related standards, see Speedy Trial 4.2, The Function of the Trial Judge 3.8.

6-5.7. Continuing review of defendant's release status.

(a) When the defendant has been unable to secure his pretrial release at the time of his initial appearance, the judicial officer shall reexamine the release decision within [a reasonable time] [fourteen days] [other specified period of time].

(b) When the defendant has been unable to secure his pretrial release the prosecuting attorney shall advise the court at [two week] [reasonable] intervals of the status of defendant's case.

(c) A defendant whether or not in custody, is entitled to obtain upon application, a review of the release decision.

Reference: Standard 5.9.

Note: For related standards, see Speedy Trial 1.2; The Prosecution Function 5.1.

6-5.8. Trial.

When the defendant has been detained pending trial, the trial judge shall establish such rules as may be necessary in the particular case to insure that the trial jury is unaware of the defendant's detention.

Reference: Standard 5.11.

Note: Standard 5.10 relates to the acceleration of trials for detained defendants. Since the subject is covered in the Rules Relating to Speedy Trials, an implementing rule is not deemed necessary here. For related standards, see The Function of the Trial Judge 5.3; Trial by Jury 4.1.

6-5.9. Credit for pretrial detention.

Credit shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed, or as a result of the underlying conduct on which such a charge is based.

Reference: Standard 5.12.

Note: Legislation may be required to implement Standard 5.12. For related standards, see Post-Conviction Remedies 6.3; Sentencing Alternatives and Procedures 3.5, 3.6.

Title 7

DISCOVERY AND PROCEDURE BEFORE TRIAL

PRELIMINARY COMMENT

In order to provide for an expeditious as well as fair determination of any charges brought, the Standards Relating to Discovery and Procedure Before Trial (1970) propose the implementation of a new three-stage procedure prior to trial, which is designed not only to accommodate such discovery but also to determine the validity of any prior proceedings and generally to facilitate disposition of the case. The recommendations regarding procedure prior to trial are framed in general terms which can be incorporated into, or appropriately adapted to, existing systems. The innovative feature of these recommendations is the creation of the Omnibus Hearing, an all-purpose pretrial hearing designed to deal with a multiplicity of issues in a simplified, systematic manner. The recommendations are all basically procedural in nature, and it would seem that they can be implemented primarily through the rule-making power of the courts.

The primary concern of the Standards, however, is the nature and scope of pretrial discovery which should exist in all serious criminal cases. The Standards, therefore, focus their attention upon the scope of discovery, the extent of

disclosure which should be made both to the accused and to the prosecution, and the regulation of discovery by the court. Since pretrial discovery in the United States has traditionally been regarded as an appropriate subject for rule-making by the courts, these Standards would appear to be appropriate for implementation by court rule.

PART I. DISCLOSURE TO ACCUSED

7-1.1. Prosecutor's obligations.

(a) Subject to the provisions of 7-1.6 and 7-3.4, the prosecuting attorney shall disclose to defense counsel the following material and information which is within the possession or control of the prosecuting attorney.

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with their relevant written or recorded statements;

(ii) any written or recorded statements and the substance of any oral statements made by the accused, or made by a codefendant, if the trial is to be a joint one;

(iii) those portions of grant jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial;

(iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons;

(v) any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused; and

(vi) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

(b) The prosecuting attorney shall inform defense counsel:

(i) whether there is any relevant recorded grand jury testimony which has not been transcribed; and

(ii) whether there has been any electronic surveillance (including wiretapping) of conversations to which the accused was a party or of his premises.

(c) Subject to the provision of 7-3.4 the prosecuting attorney shall disclose to defense counsel any material or information within his possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefor.

(d) The prosecuting attorney's obligations under this section extend to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case

and who either regularly report, or with reference to the particular case have reported, to his office.

Reference: Standards Relating to Discovery and Procedure Before Trial, (1970) (hereafter in this Title called Standard, 2.1.

Note: Part I of the Standards Relating to Discovery and Procedure Before Trial consists of declarations of general principle and policies to be applied in proceedings prior to trial. While these concepts are hardly appropriate subjects for court rules, their content might appropriately be set out in an official commentary accompanying the rules.

7-1.2. Prosecutor's performance of obligations.

(a) The prosecuting attorney shall perform his obligations under Section 7-1.1 as soon as practicable following the filing of charges against the accused.

(b) The prosecuting attorney may perform these obligations in any manner mutually agreeable to himself and defense counsel or by:

(i) notifying defense counsel that material and information described in general terms, may be inspected, obtained, tested, copied or photographed, during specified, reasonable times; and

(ii) making available to defense counsel at the time specified such material and information, and suitable facilities or other arrangements for inspection, testing, copying and photographing of such material and information.

(c) The prosecuting attorney shall ensure that a flow of information maintained between the various investigative personnel and his office sufficient to place within his possession or control all material and information relevant to the accused and the offense charged.

Reference: Standard 2.2.

7-1.3. Additional disclosures upon request and specification.

Subject to the provisions of 7-1.6 and 7-3.4, the prosecuting attorney shall upon request of the defense counsel, disclose and permit inspection, testing, copying, and photographing of any relevant material and information regarding:

(a) specified searches and seizures;

(b) the acquisition of specified statements from the accused; and

(c) the relationship, if any, of specified persons to the prosecuting authority.

Reference: Standard 2.3.

Note: For a related standard, see Electronic Surveillance 2.3.

7-1.4. Material held by other governmental personnel.

(a) Upon defense counsel's request and designation of material or information which would be discoverable if in the

possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel, the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to defense counsel, if the prosecuting attorney's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court.

Reference: Standard 2.4.

7-1.5. Discretionary disclosures.

(a) The court in its discretion may require disclosure to defense counsel of relevant material and information not covered by sections 7-1.1, 7-1.2 and 7-1.4 upon a showing of materiality to the preparation of the defense, and if the request is reasonable.

(b) The court may deny disclosure authorized by this section if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.

Reference: Standard 2.5.

7-1.6. Matters not subject to disclosure.

(a) Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of his legal staff.

(b) Informants. Disclosure shall not be required of an informant's identity where his identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not be denied hereunder of the identity of witnesses to be produced at a hearing or trial.

(c) National Security. Disclosure shall not be required where it involves a substantial risk of grave prejudice to national security and a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not be denied hereunder regarding witnesses or material to be produced at a hearing or trial.

Reference: Standard 2.6.

PART II. DISCLOSURE TO PROSECUTION

7-2.1. The person of the accused.

(a) Notwithstanding the initiation of judicial

proceedings, and subject to constitutional limitations, a judicial officer may require the accused to:

(i) appear in a line-up;

(ii) speak for identification by witnesses to an offense;

(iii) be fingerprinted;

(iv) pose for photographs not involving reenactment of the scene;

(v) try on articles of clothing;

(vi) permit the taking of specimens of material under his fingernails;

(vii) permit the taking of samples of his blood, hair and other materials of his body;

(viii) provide specimens of his handwriting; and

(ix) submit to a reasonable physical or medical inspection of his body.

(b) Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the prosecuting attorney to the accused and his counsel. Provision may be made for appearance for such purposes in an order admitting the accused to bail or providing for his release.

Reference: Standard 3.1.

7-2.2. Medical and scientific reports.

Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of and

permitted to inspect and copy or photograph any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

Reference: Standard 3.2.

7-2.3. Nature of defense.

Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of the nature of any defense which defense counsel intends to use at trial and the names and addresses of persons whom defense counsel intends to call as witnesses in support thereof.

Reference: Standard 3.3.

Note: For a related standard, see The Defense Function 4.3. See also Wardius v. Oregon, 412 U.S. 470 (1973).

PART III. REGULATION OF DISCOVERY

7-3.1. Investigation not to be impeded.

Subject to the provisions of 7-1.6 and 7-3.4, neither the prosecuting attorney, the defense counsel nor other prosecution or defense personnel shall advise persons having relevant material or information (except the accused) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede

counsel's investigation of the case. The court shall determine that the parties are aware of this provision.

Reference: Standard 4.1.

Note: For related standards, see The Defense Function 4.3; The Prosecution Function 3.1.

7-3.2. Continuing duty to disclose.

If before trial, but subsequent to compliance with, or an order entered pursuant to this Rule, a party discovers additional material or information which is subject to disclosure, he shall promptly notify the other party of the existence of such material or information. If additional material or information is discovered during trial, the party shall notify the court and the adverse party of the existence of the material or information.

Reference: Standard 4.2.

7-3.3. Custody of materials.

Any materials furnished to an attorney pursuant to these rules shall remain in his exclusive custody and be used only for the purposes of conducting his side of the case. The court may provide that the material be subject to other reasonable terms and conditions.

Reference: Standard 4.3.

Note: For a related standard, see Fair Trial and Free Press 1.1.

7-3.4. Protective orders.

Upon a showing of cause, the court may order that specified disclosures be restricted or deferred, or make such other order as is appropriate. Provided that all material and information to which a party is entitled under 7-1.1, 7-1.3 and 7-1.4, must be disclosed in time to permit counsel to make beneficial use therof at the trial.

Reference: Standard 4.4.

7-3.5. Excision.

(a) When some parts of certain material are discoverable under the provisions of these court rules, and other parts are not discoverable, the non-discoverable material may be excised and the remainder made available in accordance with applicable provisions of these rules.

(b) Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

Reference: Standard 4.5.

7-3.6. In camera proceedings.

Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

Reference: Standard 4.6.

7-3.7. Failure to comply; sanctions.

(a) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, [prohibit the party from introducing in evidence the material not disclosed] or enter such other order as it deems just under the circumstances.

(b) Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

Reference: Standard 4.7.

Note: A jurisdiction may omit the bracketed provision and remain in complete accord with the Standards. The commentary to the Standards makes clear that this particular sanction is neither advocated nor opposed, although the Standards encourage use of the alternative sanctions specifically enumerated.

PART IV. PROCEDURE

7-4.1. General procedural requirements.

(a) In all criminal cases, procedures prior to trial shall recognize the possible need for the following three stages:

(i) an exploratory stage, initiated by counsel and conducted without court supervision to implement discovery required or authorized under this rule;

(ii) an omnibus stage, supervised by the trial court and requiring court appearance when necessary;

(iii) a trial planning stage, requiring pretrial conference when necessary.

(b) These stages shall be adapted to the needs of the particular case and may be modified or eliminated as appropriate.

Reference: Standard 5.1.

Note: This rule implements part of Standard 5.1. Standard 5.1.(b) is dealt with in the Standards Relating to Speedy Trial, and therefore no implementing rule is provided here. For related standards, see Speedy Trial 1.2, 2.1; The Function of the Trial Judge 3.6, 3.8; The Prosecution Function 5.1.

7-4.2. Setting of omnibus hearing.

(a) If a plea of guilty is not entered at the time the accused is first called upon to plead by a court having jurisdiction to try the accused, the court shall set a time for an Omnibus Hearing.

(b) In determining the date for the Omnibus Hearing the Court shall allow counsel sufficient time:

(i) to initiate and complete discovery required or authorized under this rule;

(ii) to conduct further investigation necessary to the defendant's case; and

(iii) to continue plea discussion.

Reference: Standard 5.2(b) and (c).

Note: For a related standard, see The Function of the Trial Judge 3.6.

7-4.3. Omnibus hearing.

(a) At the Omnibus Hearing, the trial court on its own initiative, utilizing an appropriate check-list form, should:

(i) ensure that standards regarding provisions of counsel have been complied with;

(ii) ascertain whether the parties have completed the discovery required in sections 7-1.1 and 7-1.3, and if not, make orders appropriate to expedite completion;

(iii) ascertain whether there are requests for additional disclosures under sections 7-1.4, 7-1.5, and 7-2.2 and 7-2.3;

(iv) make rulings on any motions, demurrers or other requests then pending, and ascertain whether any additional motions, demurrers or requests will be made at the hearing or continued portions thereof;

(v) ascertain whether there are any procedural or constitutional issues which should be considered;

(vi) upon agreement of counsel, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, set a time for a Pretrial Conference; and

(vii) upon the accused's request, permit him to change his plea.

(b) Unless the court otherwise directs, all motions, demurrers and other requests prior to trial should be reserved for and presented orally at the Omnibus Hearing. All issues presented at the Omnibus Hearing may be raised without prior notice either by counsel or by the court. If discovery, investigation, preparation, and evidentiary hearing, or a formal presentation is necessary for a fair determination of any issue, the Omnibus Hearing should be continued until all matters are properly disposed of.

(c) Any pretrial motion, request or issue which is not raised at the Omnibus Hearing shall be deemed waived, unless

the party concerned did not have the information necessary to make the motion or request or raise the issue.

(d) Stipulations by any party or his counsel should be binding upon the parties at trial unless set aside or modified by the court in the interests of justice.

(e) A verbatim record of the Omnibus Hearing shall be made and preserved. This record shall include the disclosures made, all rulings and orders of the court, stipulations of the parties, and an identification of other matters determined or pending.

Reference: Standard 5.3.

Note: The Standard does not require a verbatim record but allows for either a verbatim record or a summary memorandum. For related standards, see Criminal Appeals 3.2; Electronic Surveillance 2.3; Pleas of Guilty 1.3; Pretrial Release 4.2; Providing Defense Services 4.1, 5.2, 5.3, 7.2, 7.3; The Function of the Trial Judge 3.4, 3.6.

7-4.4. Omnibus hearing-forms.

(a) Appropriate forms and checklists shall be utilized by the court in conducting the Omnibus Hearing. These forms shall be made available to the parties at the time of the defendant's First Appearance.

(b) Nothing in the forms shall be construed to make substantive changes in these rules on discovery.

Reference: Standards Relating to Discovery and Procedure Before Trial, Appendix C p. 138.

7-4.5. Pretrial conference.

(a) Whenever a trial is likely to be protracted or otherwise unusually complicated, or upon request by agreement of counsel, the trial court may (in addition to the Omnibus Hearing) hold one or more Pretrial Conferences, with trial counsel present, to consider such matters as will promote a fair and expeditious trial. Matters which might usefully be considered include:

(i) making stipulations as to facts about which there can be no dispute;

(ii) marking for identification various documents and other exhibits of the parties;

(iii) waivers of foundation as to such documents;

(iv) excision from admissible statements of material prejudicial to a codefendant;

(v) severance of defendants or offenses;

(vi) seating arrangements for defendants and counsel;

(vii) use of jurors and questionnaires;

(viii) conduct of voir dire;

(ix) number and use of peremptory challenges;

(x) procedure on objections where there are multiple counsel;

(xi) order of presentation of evidence and arguments where there are multiple defendants;

(xii) order of cross-examination where there are multiple defendants; and

(xiii) temporary absence of defense counsel during trial.

(b) Pretrial Conferences shall be recorded. At the conclusion of the conference a memorandum of the matters agreed upon should be signed by counsel, approved by the court, and filed. Such memorandum shall be binding upon the parties at trial, on appeal and in post-conviction proceedings unless set aside or modified by the court in the interests of justice. However, admissions of fact by an accused if present should bind the accused only if included in the pretrial order and signed by the accused as well as his attorney.

Reference: Standard 5.4.

Note: For related standards, see Fair Trial and Free Press 3.2, 3.4; Joinder and Severance 2.3; The Defense Function 7.2; The Function of the Trial Judge 5.1; The Prosecution Function 5.3; Trial by Jury, Part II.

APPENDIX A

Checklist for Action Taken at Omnibus Hearing

In the District Court of _____, County,_____

State of _____)
)
Plaintiff)
)
v.) No._____
)
_____,)
)
Defendant)
)

ACTION TAKEN AT OMNIBUS HEARING

A. DISCOVERY BY DEFENDANT

(Number circled
shows action taken)

1. The defense states it has obtained full discovery and (or) has inspected the prosecution file, (except)

(If prosecution has refused discovery of certain materials, defense counsel shall state nature of material._____
_____).

2. The prosecution states it has disclosed all evidence in its possession, favorable to defendant on the issue of guilt.

3. The defendant requests and moves for---

3(a) Discovery of all oral, written or recorded statements made by defendant to investigating officers or to third parties and in the possession of the prosecution (Granted) (Denied)

3(b) Discovery of the names of prosecution witnesses and their statements. (Granted) (Denied)

3(c) Inspection of all physical or documentary evidence in plaintiff's possession. (Granted) (Denied)

4. Defendant, having had discovery of Items #2 and #3, requests and moves for discovery and inspection of all further or additional information coming into the plaintiff's possession as to Items #2 and #3. (Granted) (Denied)

5. The defense requests the following information and the plaintiff states---

5(a) The prosecution (will) (will not) rely on prior acts or convictions of a similar nature for proof of knowledge or intent.

5(b) Expert witness (will) (will not) be called:

1. Name of witness, qualification and subject of testimony , and reports (have been) (will be) supplied to the defense.

5(c) Reports or tests of physical or mental examinations in the control of the prosecution (have been) (will be) supplied.

5(d) Reports of scientific tests, experiments or comparisons and other reports of experts in the control of the prosecution, pertaining to this case (have been) (will be) supplied.

5(e) Inspection and/or copying of any books, papers, documents photographs or tangible objects which the prosecution---

(1) obtained from or belonging to the defendant, or

(2) which will be used at the hearing or trial, (have been) (will be) supplied to defendant.

5(f) Information concerning a prior conviction of persons whom the prosecution intends to call as witnesses at the hearing or trial (has been) (will be) supplied to defendant.

5(g) Prosecution to use prior felony conviction for impeachment of defendant if he testifies,

Date of conviction_____Offense_____

(1) Court rules it (may) (may not) be used.

(2) Defendant stipulates to prior conviction without production of witnesses or certified copy. (Yes) (No)

5(h) Any information government has, indicating entrapment of the defendant (has been) (will be) supplied.

B. MOTIONS REQUIRING SEPARATE HEARING

The defense moves---

6(a) To suppress physical evidence in plaintiff's possession on the grounds of

(1) Illegal search
(2) Illegal arrest

6(b) Hearing of motions to suppress physical evidence set for_____.

_____
_____

6(c) To suppress admissions or confessions made by defendant on the grounds of

(1) Delay in arraignment
(2) Coercion or unlawful inducement
(3) Violation of the Miranda Rule
(4) Unlawful arrest
(5) Improper use of Line-up (Wade & Gilbert)

6(d) Hearing to suppress admissions or confessions set for

(1) Date of trial. (or) (2)_____

_____
_____

Prosecution to state:--

6(e) Proceedings before the grand jury (were) (were not) recorded;

6(f) Transcriptions of the grand jury testimony of the accused, and all persons whom the prosecution intends to call as witnesses at a hearing or trial (have been) (will be) supplied:

6(g) Hearing re supplying transcripts set for_____

_____
_____

6(h) The prosecution to state:

(1) There (was) (was not) an informer (or lookout) involved;
(2) The informer (will) (will not) be called as a witness at the trial;
(3) It has supplied the identity of the informer; (or)
(4) It will claim privilege of non-disclosure;

6(i) Hearing on privilege set for _____

_____
_____

6(j) The prosecution to state:--

There (has) (has not) been any--
(1) Electronic surveillance of the defendant or his premises;
(2) Leads obtained by electronic surveillance of defendant's person or premises;
(3) All material will be supplied, or

6(k) Hearing on disclosure set for _____

C. MISCELLANEOUS MOTIONS

The defense moves---

7(a) To dismiss for failure of the indictment (or information) to state an offense. (Granted) (Denied)

7(b) To dismiss the indictment or information (or count___ thereof) on the ground of duplicity. (Granted) (Denied)

7(c) To sever case of defendant_____and for a separate trial. (Granted) (Denied)

7(d) To sever count_____of the indictment or information and for a separate trial thereon. (Granted) (Denied)

7(e) For a Bill of Particulars. (Granted) (Denied)

7(f) To take a deposition of witness for testimonial purposes and not for discovery. (Granted) (Denied)

7(g) To require the prosecution to secure the appearance of witness_____who is subject to state direction at the trial or hearing. (Granted) (Denied)

7(h) To inquire into the reasonableness of bail. Amount fixed_____. (Affirmed) (Modified to_____).

D. DISCOVERY BY THE PROSECUTION

D.1. Statements by the defense in response to prosecution requests.

8. Competency, Insanity and Diminished Mental Responsibility

8(a) There (is) (is not) any claim of incompetency of defendant to stand trial.

8(b) Defendant (will) (will not) rely on a defense of insanity at the time of offense;

8(c) Defendant (will) (will not) supply the name of his witnesses, both lay and professional, on the above issue;

8(d) Defendant (will) (will not) permit the prosecution to inspect and copy all medical reports under his control or the control of his attorney;

8(e) Defendant (will) (will not) submit to a psychiatric examination by a court appointed doctor on the issue of his sanity at the time of the alleged offense;

9. Alibi

9(a) Defendant (will) (will not) rely on an alibi;
9(b) Defendant (will) (will not) furnish a list of his alibi witnesses;

10. Scientific Testing

Defendant (will) (will not) furnish results of scientific tests, experiments or comparisons and the names of persons who conducted the tests;

11(a) Nature of the Defense
Defense counsel states the general nature of the defense is---
(1) lack of knowledge of contraband
(2) lack of special intent
(3) diminished mental responsibility
(4) entrapment
(5) general denial. Put prosecution to proof.

11(b) Defense counsel states there (is) (is not) (may be) a probability of a disposition without trial;

11(c) Defendant (will) (will not) waive a jury and ask for a court trial;

11(d) Defendant (may) (will) (will not) testify;

11(e) Defendant (may) (will) (will not) call additional witnesses.

11(f) Character witnesses (may) (will) (will not) be called.

11(g) Defense counsel will supply the prosecution names of additional witnesses for defendant_____days before trial.

D.2. RULINGS ON PROSECUTION REQUEST AND MOTIONS

The defendant is directed by the court, upon timely notice to defense counsel,

12(a) to appear in a lineup

12(b) to speak for voice identification by witnesses

12(c) to be finger printed

12(d) to pose for photographs (not involving a reinactment of the crime)

12(e) to try on articles of clothing

12(f) to permit taking of specimens of material under fingernails.

12(g) to permit taking samples of blood, hair and other materials of his body which involve no unreasonable intrusion;

12(h) to provide samples of his handwriting

12(i) to submit to a physical external inspection of his body.

E. STIPULATIONS

It is stipulated between the parties:

13(a) That if_____was called as a witness and sworn he would testify he was the owner of the motor vehicle on the date referred to in the indictment (or information) and that on or about that date the motor vehicle disappeared or was stolen; that he never gave the defendant or any other person permission to take the motor vehicle.

13(b) That the official report of the chemist may be received in evidence as proof of the weight and nature of the substance referred to in the indictment (or information).

13(c) That if_____the official state chemist were called, qualified as an expert and sworn as a witness he would testify that the substance referred to in the indictment (or the information) has been chemically tested and is_____contains_____

and the weight is _____.

13(d) That there has been a continuous chain of custody in state agents from the time of the seizure of the contraband to the time of the trial.

13(e) Miscellaneous stipulations:

_____

_____

_____

F. CONCLUSION---DEFENSE COUNSEL STATES

14(a) That defense counsel knows of no problems involving delay in arraignment, the Miranda Rule or illegal search or arrest, or any other constitutional problem, except as set forth above.

14(b) That defense counsel has inspected the check list on this Action Taken form, and knows of no other motion, proceeding or request which he decides to press, other than those checked thereon.

Approved: Dated: _____

_____ SO ORDERED:

Attorney for the State of _____

_____
JUDGE

_____

Attorney for Defendant

Title 8

SPEEDY TRIAL

PRELIMINARY COMMENT

The Standards Relating to Speedy Trial, (1968) are, in part, hortatory and declare matters of general policy. These suggested drafts have been prepared within the limitations of the Standards and may, in some cases, seem overbroad and general. The draftsman who seeks to use these proposals as bases for workable rules of procedure will probably wish to employ greater particularity and refinement in order to achieve implementation of the Standards within a framework of local practice.

One of the most serious problems in the administration of criminal justice is the increasing congestion in the trial courts and the consequent delay in bringing cases to trial. The Standards recognize the interests of both the accused and the public in securing a prompt adjuciation of any charge, and are primarily concerned with the definition and protection of those interests. Thus, they deal with the trial calender and the problems of scheduling a prompt trial, the problem of determining what constitutes a speedy trial and what periods of time should be included in, or excluded from, the court's consideration in deciding upon a speedy trial motion, special procedures for the trial

of persons on other charges, and the consequences of the denial of a speedy trial. While the right to a speedy trial is a substantive right of constitutional origin, supplemented in most states by specific statutes setting forth the time within which a defendant must be tried following the date he was arrested, held to answer, committed or indicted, the content of the Standards is largely procedural and would, therefore, seem to be almost wholly subject to implementation by court rule.

Of particular significance is the speedy trial legislation recently enacted by congress. (18 U.S.C., §§ 3161-3162; Pub. L. 93-619, Jan. 3, 1975; 88 Stat. 2076). Until the current enactment was passed, Federal courts were subject only to the rather indefinite Sixth Amendment standard. The new legislation provides a framework of specific limitations controlling each stage of the processing of the criminal case, a clear statement of the bases upon which periods of delay shall be excluded from the limitations, and a system of sanctions for violation. The draftsman who is concerned with speedy trial rules or legislation should become familiar with these statutes.

PART I. THE TRIAL CALENDER

8-1.1. Priorities in scheduling criminal cases.

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 is practicable:

(a) the trial of criminal cases shall be given preference over civil cases; and

(b) the trial of defendants in custody and defendants whose pretrial liberty is reasonably believed to present unusual risks shall be given preference over other criminal cases.

Reference: Standards Relating to Speedy Trial, (1968) (hereafter cited in this Title as Standard), 1.1.

Note: For a related standard, see The Function of the Trial Judge 3.8.

8-1.2. Assignment of cases; prosecutor's duty to report.

(a) The court shall provide for the assignment of cases upon the calendar for trial in accordance with these rules. The prosecuting attorney shall advise the court of any facts within his knowledge which may be relevant in determining the order of cases on the calendar.

(b) On the first court day of each month the prosecuting attorney shall file a written report listing all cases that have been pending more than [time fixed by jurisdiction] since the filing of the charge and for which trial has not been requested by the prosecution. In each case the reasons why trial has not been requested shall be stated. The report so filed shall be retained in the office of the clerk of the court and shall constitute a public record.

Reference: Standard 1.2.

Note: For related standards, see Discovery and Procedure Before Trial 5.1; Pretrial Release 5.9; The Function of the Trial Judge 3.8; The Prosecution Function 5.1.

8-1.3. Continuances.

Continuances shall be granted by the court only upon a showing of good cause and for a period no longer than the circumstances of the case require. In ruling upon motions for continuance, the court shall take into account not only the request or consent of the prosecution or defense, but the public interest in the prompt disposition of the case.

Reference: Standard 1.3.

Note: For related standards, see The Defense Function 1.2; The Prosecution Function 2.9.

PART II. DETERMINATION OF TIME FOR TRIAL

8-2.1. Limitation.

A defendant charged with an offense, either felony or misdemeanor, shall be tried within [period fixed by jurisdiction] from the time provided in Rule 8-2.2, excluding only such periods of necessary delay as are authorized in Rule 8-2.3.

Reference: Standard 2.1.

Note: For a related standard, see Discovery and Procedure Before Trial 5.1.

8-2.2. When time commences to run.

The time for trial shall commence running, without demand by the defendant, from the following dates:

(a) From the date the charge is filed, except that if the defendant has been continuously held in custody or on bail or recognizance until that date to answer for the same offense or an offense based on the same conduct or arising from the same criminal episode, then the time for trial shall commence running from the date he was held to answer.

(b) When the charge is dismissed upon motion of the defendant and subsequently the defendant is held to answer or charged with the same offense or an offense based upon the same conduct or arising from the same criminal episode, the time for trial shall commence running from the date the defendant is subsequently held to answer or charged, as provided in subdivision (a) of this rule.

(c) If the defendant is to be retried following a mistrial, an order granting a new trial, or an appeal or collateral attack, the time for trial shall commence running from the date of mistrial, order granting a new trial or remand.

Reference: Standard 2.2.

Note: As used in this rule, charge means a written statement filed with a court which accuses a person of an offense and which is sufficient to support a prosecution; it may be an indictment, information, complaint, or affidavit, depending upon the circumstances and the law of the particular jurisdiction. For discussion, see commentary of the Section 2.2, pp. 17-25, Standards Relating to Speedy Trial, (1968).

For a somewhat more complex and particular set of limitations, see 18 U.S.C. § 3161.

8-2.3. Excluded periods.

The following periods shall be excluded in computing the time for trial:

(a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on the competency of the defendant and the period during which he is incompetent to stand trial, hearings on pre-trial motion, interlocutory appeals, and trials of other charges against the defendant. No pre-trial motion shall be held under advisement for more than [30 days or other fixed period] and any time longer than [30 days or other fixed period] shall not be considered as an excluded period.

(b) The period of delay resulting from congestion of the trial docket when the delay is attributable to exceptional circumstances. When delay results from congestion of the trial docket attributable to exceptional circumstances, the court shall state and a record shall be made of the exceptional circumstances to which the congestion is attributable in its order continuing the case.

(c) The period of delay resulting from a continuance granted at the timely request or with the consent of the defendant or his counsel. A defendant without counsel shall not be deemed to have consented to a continuance unless he has been advised by the court of his right to a speedy trial under this rule and the effect of his consent.

(d) The period of delay resulting from a continuance

granted at the timely request of the prosecuting attorney, if:

(i) the continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at a later date; or

(ii) the continuance is granted in a felony case to allow the prosecuting attorney additional time to prepare the state's case and additional time is justified because of the exceptional complexity of the particular case.

(e) The period of delay resulting from the absence or unavailability of the defendant. A defendant shall be considered absent whenever his whereabouts are unknown and in addition he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. A defendant shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained or he resists being returned to the state for trial.

(f) If the charge was dismissed upon motion of the prosecuting attorney and thereafter a charge is filed against the defendant for the same offense or an offense based upon the same conduct or arising from the same criminal episode, the period of delay from the date the charge was dismissed to the date the time limitations would commence running as to the subsequent charge had there been no previous charge.

(g) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant shall be granted a severance so that he may be tried within the time limits applicable to him.

(h) Other periods of delay for good cause.

Reference: Standard 2.3.

Note: For a related standard, see Joinder and Severance 2.3. See also, 18 U.S.C. § 3161(h) and (i).

PART III. SPECIAL PROCEDURES: PERSONS SERVING TERM OF IMPRISONMENT

8-3.1. Prosecutor's obligations.

(a) If the prosecuting attorney is informed or otherwise knows that a person charged with a crime is imprisoned in a penal institution of the state of _____, he shall promptly undertake to obtain the presence of the prisoner for trial.

(b) If the prosecuting attorney is informed or otherwise knows that a person charged with a crime is imprisoned in a penal institution of a jurisdiction other than the state of _____, he shall promptly cause a detainer to be filed with the official having custody of the prisoner and request such officer to advise the prisoner of the filing of the detainer and of the prisoner's right to demand trial.

(c) Upon receipt from a prisoner of a demand for trial

upon a pending charge, the prosecuting attorney shall promptly seek to obtain the presence of the prisoner for trial.

Reference: Standard 3.1.

Note: Standards 3.1(b) and (d) deal with the responsibility of the Warden or other officials having custody of the prisoner. As these are officers of the executive department, a court rule prescribing their duties seems inappropriate. However, standards for legislation to this effect may be derived from the Uniform Mandatory Disposition of Detainers Act, prepared by the National Conference of Commissioners on Uniform State Laws, and the Suggested Legislation and Agreement on Detainers, prepared by the Council of State Governments, which appear as Appendix A and Appendix B, respectively, pp. 43-56, Standards Relating to Speedy Trial, (1968).

See also 18 U.S.C. § 3161(j).

8-3.2. Time for trial.

The time for trial of a prisoner whose presence for trial is obtained while he is serving a term of imprisonment shall commence running from the time his presence for trial has been obtained, subject to such excluded periods as are provided by Rule 8-2.3. If the prosecuting attorney has unreasonably delayed in causing a detainer to be filed with the official having custody of the prisoner or seeking to obtain the prisoner's presence for trial in lieu of filing a detainer or upon receipt of a demand, such periods of unreasonable delay shall be counted in ascertaining whether the time for trial has run.

Reference: Standard 3.3.

PART IV. CONSEQUENCES OF DENIAL OF SPEEDY TRIAL

8-4.1. Absolute discharge.

If the defendant is not brought to trial within the time provided by Rules 8-2.1 and 8-2.2, as extended by periods excluded under Rule 8-2.3, the court, upon motion of the defendant, shall dismiss the charge with prejudice. A dismissal with prejudice discharges the defendant and bars prosecution for the offense charged and for any other offense based on the same conduct or arising from the same criminal episode.

Reference: Standard 4.1.

Note: Rule 8-2.1 suggests a single limitation on trials, regardless of whether the defendant is held in jail prior to trial or is at liberty on bail or recognizance. In some states the statutes impose a shorter limitation on the trials of persons detained prior to trial than in the case of those who have been released. For example, Sec. 22-3402, Kan. Code of Crim. Proc. provides that a defendant who is held in jail must be tried within 90 days, while a defendant on pretrial release must be tried within 180 days. Failure to comply with either limitation results in absolute discharge. On the other hand, 18 U.S.C. § 3162 empowers the court to determine whether the dismissal will be with or without prejudice. Among the factors the court must consider are: the seriousness of the offense; the facts and circumstances which led to dismissal; and the impact of reprosecution on the administration of justice and the speedy trial act.

Standard 4.2 is relevant to those jurisdictions where a shorter limitation is imposed for trials of persons in custody. It provides that the running of the shorter period shall only terminate custody and require the release of the defendant on his own recognizance. He will not be entitled to discharge until the elapse of the time for trial of persons on pretrial release. With respect to the appropriate remedy, see Barker v. Wingo, 407 U.S. 514 (1972).

8-4.2. Waiver.

Failure of a defendant represented by counsel to move for dismissal of the charges under these rules prior to a plea of guilty or nolo contendere or trial shall constitute a waiver of his rights under these rules.

Reference: Standard 4.1.

Title 9

JOINDER AND SEVERANCE

PRELIMINARY COMMENT

The Standards Relating to Joinder and Severance (1968) deal with the problems of the joinder and severance of both offenses and defendants in criminal cases. They set forth criteria to aid the trial judge in the responsible exercise of his discretion in deciding whether or not to grant a motion for joinder or severance. Such criteria would, of course, also be of value in facilitating the effective review of the trial judge's exercise of discretion. The Standards also recognize the power of the court to consolidate or sever pending actions on its own motion whenever such action would have been appropriate upon a motion by either of the parties.

Most states control joinder and severance by statute. However, federal practice has long relied upon court rules in this area. These Standards would, therefore, appear to be susceptible to implementation by court rule.

PART I. JOINDER OF OFFENSES AND DEFENDANTS

9-1.1. Joinder of offenses.

Two or more offenses may be joined in one charge, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

(a) are of the same or similar character, even if not part of a single scheme or plan; or

(b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Reference: Standards Relating to Joinder and Severance (1968), (hereafter cited in this Title as Standard) 1.1.

9-1.2. Joinder of defendants.

Two or more defendants may be joined in the same charge:

(a) when each of the defendants is charged with accountability for each offense alleged;

(b) when each of the defendants is charged with conspiracy and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy; or

(c) when, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:

(i) were part of a common scheme or plan; or

(ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of others.

Reference: Standard 1.2.

9-1.3. Failure to join related offenses.

(a) Two or more offenses are related offenses for purposes of this rule, if they are within the jurisdiction and venue of the same court and are based on the same conduct or arise from the same criminal episode.

(b) When a defendant has been charged with two or more related offenses, his timely motion to join them for trial should be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion is granted. A defendant's failure to so move constitutes a waiver of any right of joinder as to related offenses with which the defendant knew he was charged.

(c) A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for joinder of these offenses was previously denied or the right of joinder was waived as provided in subsection (b). The motion to dismiss must be made prior to the second trial, and should be granted unless the court determines that because the prosecuting attorney did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

(d) Entry of a plea of guilty or nolo contendere to one offense does not bar the subsequent prosecution of a related

offense. A defendant may enter a plea of guilty or nolo contendere on the basis of a plea agreement in which the prosecuting attorney agrees to seek or not to oppose dismissal of other related charges or not to prosecute other potential related charges.

Reference: Standard 1.3.

Note: For a related standard, see Pleas of Guilty 3.1. Also, Ashe v. Swenson, 397 U.S. 436 (1970) is relevant to the problem of failure to join related offenses.

PART II. SEVERANCE OF OFFENSES AND DEFENDANTS

9-2.1. Timeliness of motion; waiver; double jeopardy.

(a) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if based upon a ground not previously known. Severance is waived if the motion is not made at the appropriate time.

(b) If a defendant's pretrial motion for severance was overruled, he may renew the motion on the same grounds before or at the close of all the evidence. Severance is waived by failure to renew the motion.

(c) Unless consented to by the defendant, a motion by the prosecuting attorney for severance of counts or defendants may be granted only prior to trial.

(d) If a motion for severance is granted during the trial and the motion was made or consented to by the defendant, the

granting of the motion shall not bar a subsequent trial of that defendant on the offenses severed.

Reference: Standard 2.1.

9-2.2. Severance of offenses.

(a) Whenever two or more offenses have been joined for trial solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of of the offenses.

(b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), shall grant a severance of offense whenever:

(i) if before trial, it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense; or

(ii) if during trial upon consent of the defendant, it is deemed necessary to achieve a fair determination of the defendant's guilt or innocence of each offense.

Reference: Standard 2.2.

9-2.3. Severance of defendants.

(a) When a defendant moves for a severance because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court shall determine whether the prosecution intends to offer the statement in

evidence at the trial. If so, the court shall require the prosecuting attorney to elect one of the following courses:

(i) a joint trial at which the statement is not admitted into evidence;

(ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been deleted, provided that, as deleted, the confession will not prejudice the moving defendant; or

(iii) severance of the moving defendant.

(b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), shall grant a severance of defendants whenever:

(i) if before trial, it is deemed necessary to protect a defendant's right to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of one or more defendants; or

(ii) if during trial upon consent of the defendant to be severed, it is deemed necessary to achieve a fair determination of the guilt or innocence of one or more defendants.

(c) When such information would assist the court in ruling on a motion for severance of defendants, the court may order the prosecuting attorney to disclose any statements made by the defendants which he intends to introduce in evidence at the trial.

Reference: Standard 2.3.

9-2.4. Failure to prove grounds for joinder of defendants.

If a defendant moves for severance at the conclusion of the prosecution's case or of all the evidence, and there is not sufficient evidence to support the allegation upon which the moving defendant was joined for trial with the other defendant or defendants, the court shall grant a severance if, in view of this lack of evidence, severance is deemed necessary to achieve a fair determination of that defendant's guilt or innocence.

Reference: Standard 2.4.

Note: For related standards, see Discovery and Procedure Before Trial 2.1, 5.4; Speedy Trial 2.3.

PART III. CONSOLIDATION FOR SEVERANCE ON MOTION OF COURT

9-3.1. Authority of court to act on own motion.

(a) The court may order consolidation of two or more charges for trial if the offenses, and the defendants if there is more than one, could have been joined in a single charge.

(b) The court may order a severance of offenses or defendants before trial if a severance could be obtained on motion of a defendant or the prosecution.

Reference: Standard 3.1.

Note: For a related standard, see The Function of the Trial Judge 3.9.

Title 10

PLEAS OF GUILTY

PRELIMINARY COMMENT

Title 10 is proposed to implement the ABA Standards Relating to Pleas of Guilty, (1968), as modified by Standards Relating to the Function of the Trial Judge (1972), 4.1 and 4.2. Both the Advisory Committee on the Criminal Trial and the Advisory Committee on the Judge's Function considered and proposed standards to govern guilty plea procedure. The results of their respective studies are found in the published Standards referred to above. There is significant overlapping of portions of the two sets of standards and a close examination reveals some inconsistency. With the objectives of simplification and the elimination of confusion, an effort is here made to reconcile the two sets of standards to the extent that they relate to pleas of guilty.

In cases of apparent conflict or inconsistency, the Standards Relating to the Function of the Trial Judge, as the later expression, have been relied upon. To avoid duplication, the more general rules relating to guilty plea procedure have been withdrawn from Title 5, The Function of the Trial Judge, and are included in this title. On the other hand, those rules which seem particularly to be relevant to the rule of the judge in the guilty plea process remain in Title 5. The draftsman

who is concerned with rules relating to pleas of guilty should review both titles. Additional guidelines for those performing particular roles in the process are found in Standards Relating to the Prosecution Function (1971) 4.1 to 4.3 and Standards Relating to the Defense Function (1971) 6.1 and 6.2. While the rules in this title govern guilty pleas generally, the participants in the process should also examine the rules based on the Standards referred to above.

The appropriateness of rules governing guilty pleas and plea negotiations is illustrated by Rule 11 of the recently amended Federal Rules of Criminal Procedure (Pub. L. 94-64 § 3(5)-(10), 89 Stat. 371, 372, July 31, 1975). Although drawn in somewhat different language, Rule 11 incorporates most of the features of the standards.

Like Rule 11, the standards recognize the legitimacy of plea discussions and plea agreements. Hence, these proposed rules not only establish procedures to be followed by courts in taking pleas of guilty and nolo contendere, but they also provide guidelines for those who participate in the negotiations that preceed the plea.

The plea of guilty involves a waiver of important constitutional rights. Recent experience indicates that often the plea is not finally dispositive of the case, but is the subject of post conviction litigation. The draftsman of rules governing this stage must be aware of the sensitive considerations involved.

PART I. RECEIVING AND ACTING UPON THE PLEA

10-1.1. Pleading by defendant; alternatives.

(a) A defendant may plead not guilty, guilty or nolo contendere. A plea of guilty or nolo contendere shall be received only from the defendant himself in open court, except when the defendant is a corporation, in which case the plea may be entered by counsel or a corporate officer.

(b) A defendant may plead nolo contendere only with the consent of the court. The court may accept a plea of nolo contendere only when, upon due consideration of the views of the parties and the interest of the public in the effective administration of justice, it is convinced that the interest of justice will be served by such acceptance.

Reference: Standards Relating to Pleas of Guilty (1968) (hereafter cited in this Title as Standard) 1.1.

Note: For a related standard, see The Function of the Trial Judge 4.3.

10-1.2. Aid of counsel; time for deliberation.

(a) A defendant shall not be called upon to plead until he has had an opportunity to retain counsel or, if he is eligible for appointment of counsel, until counsel has been appointed or waived. A defendant with counsel should not be required to enter a plea if his counsel makes a reasonable request for additional time to represent the defendant's interests.

(b) A defendant without counsel should not be called upon

to plead to a charge of felony or other offense punishable by imprisonment for more than one year within less than seven days following the date he was held to answer or was otherwise informed of the charge.

Reference: Standard 1.3.

Note: For related standards, see Discovery and Procedure Before Trial 5.3; Providing Defense Services 4.1, 5.1, 5.2, 5.3, 7.2, 7.3; The Defense Function 5.1, 5.2; The Function of the Trial Judge 3.4.

10-1.3. Acceptance of pleas of guilty or nolo contendere.

(a) The court shall not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally and determining that

(i) the defendant understands the nature of the charge;

(ii) the defendant understands that, by pleading guilty or nolo contendere, he waives his constitutional right to persist in a plea of not guilty and remain silent, his right to a trial by jury and his right to be confronted with the witnesses against him;

(iii) the plea is voluntary; and

(iv) unless the court's concurrence in a plea agreement prior to acceptance of the plea renders it unnecessary, the defendant understands the maximum possible sentence on the charge (including that possible from consecutive sentences), the mandatory minimum sentence, if any, on the charge, and, when

applicable, that a different or additional punishment is authorized by reason of a previous conviction or other factors which may be established, after his plea, in the present action.

(b) Notwithstanding the acceptance of a plea of guilty or nolo contendere, the court shall not enter a judgment upon such plea without making such inquiry as will satisfy the court that there is a factual basis for the plea.

(c) If the plea of guilty or nolo contendere is not accepted, the judge shall state the reasons and shall require a verbatim record of the proceedings to be made and preserved.

Reference: Standards Relating to the Function of the Trial Judge 4.2.

Note: Standard 1.4, Standards Relating to Pleas of Guilty 1.4 was substantially expounded and effectively superseded by the Standard referred to above. See also Baykin v. Alabama, 395 U.S. 238 (1969). For another related Standard, see Sentencing Alternatives and Procedures 5.5.

10-1.4. Unrepresented defendant; reaffirmation of plea.

If a defendant who has waived counsel tenders a plea of guilty or nolo contendere to a charge of felony or other offense punishable by imprisonment for more than one year, the court shall not accept the plea unless it is reaffirmed by the defendant after a reasonable time for deliberation, not less than three days, following the date the defendant received the advice from the court required by Rule 10-1.3.

Note: This new section is based upon the second sentence of Standard 1.3(b). The words "who has waived counsel" are substituted for "without counsel." The words "charge of felony or other offense punishable by imprisonment for more than one year" are substituted for "serious offense." The words "not less than three days" are substituted for "set by rule or statute" to provide a definite minimum limit on the time the court must allow an unrepresented defendant to deliberate whether he will reaffirm his plea after receiving the advice and warnings from the court as required by Rule 10-1.3.

10-1.5. Plea agreements.

(a) The trial judge shall not accept a plea of guilty or nolo contendere without first inquiring whether there is a plea agreement and, if there is one, requiring that it be disclosed on the record.

(b) If the plea agreement contemplates the granting of charge or sentence concessions by the trial judge, he shall:

(i) unless he then and there grants such concessions, advise the defendant as to the role of the judge with respect to such agreements, as provided in the following subparagraphs;

(ii) give the agreement due consideration, but notwithstanding its existence reach an independent decision on whether to grant charge or sentence concessions; and

(iii) permit withdrawal of the plea (or, if it has not yet been accepted, withdrawal of the tender of the plea) in any case in which the judge determines not to grant the charge or sentence concessions contemplated by the agreement.

(c) The trial judge may decline to give consideration to a plea of guilty until after completion of a presentence investigation or may indicate his conditional concurrent prior thereto.

Reference: Standards Relating to the Function of the Trial Judge 4.1, 4.2. Also see, Standards Relating to Pleas of Guilty 1.5, 3.3b.

Note: For related standards, see Sentencing Alternatives and Procedures 5.3, 5.4; The Defense Function 6.1, 6.2; The Prosecution Function 4.1.

10-1.6. Record of proceedings.

A verbatim record of the proceedings at which the defendant enters a plea of guilty or nolo contendere shall be made and preserved. The record shall include (a) the court's advice to the defendant (as required by Rule 10-1.3 and, when applicable, Rule 10-2.3), (b) the inquiry into the voluntariness of the plea (as required by Rule 10-1.5), and (c) the inquiry into the accuracy of the plea (as required by Rule 10-1.6).

Reference: Standard 1.7.

Note: For related standards, see The Function of the Trial Judge 4.1, 4.2.

10-1.7. Pleading to other offenses.

Upon entry of a plea of guilty or nolo contendere or after conviction on a plea of not guilty, the defendant through counsel may make a written request for permission to plead

guilty or nolo contendere as to any other crime or crimes he has committed which are within the jurisdiction or coordinate courts of the state. Upon receipt of written approval of the prosecuting attorney of the governmental unit in which such a crime was committed, together with a certified copy of the charge filed in that unit, the defendant shall be allowed to enter the plea, subject to the court's discretion under Rule 10-1.2(b) to refuse to accept a plea of nolo contendere. In making a request for transfer of a charge under the provisions of this section, the defendant shall be deemed to have waived (a) venue as to a crime committed in another governmental unit of the state, and (b) as to an offense not yet formally charged, return of an indictment or filing of an information in the coordinate court of that unit.

Reference: Standard 1.2.

Note: The principal deviations from the language of Standard 1.2 are (1) in requiring that the defendant's request for the transfer of a charge pending in another unit be made in writing so that there may be records in the files of the clerks of court and the prosecuting attorneys of the two units involved showing the basis of the transfer (compare Rule 20, Federal Rules of Criminal Procedure); (2) in requiring that a certified copy of the transferred charge, in addition to the written approval of the prosecuting attorney of the unit in which the other crime was committed, be sent to the court to which the charge is transferred as the basis for further action in that court; (3) in predicating the waivers of venue and formal charge upon the defendant's written request for transfer rather than the after-the-fact entry of his plea; and (4) in substituting "return of an indictment or filing of an information" for "formal charge." This latter provision, and the section as a whole, must of necessity presuppose that a charge of at least the degree of a formal complaint is pending in the unit in which the other crime was committed, since a prosecution can hardly proceed on anything less (except for a petty offense such as a traffic violation, which is commonly based upon a citation or violation notice). For the same reason, the ambiguous words "or could be charged" in the second sentence of Standard 1.2 are deleted.

For a related standard, see Sentencing Alternatives and Procedures 5.2.

10-1.8. Consideration of plea in final disposition.

(a) It is proper for the court to grant charge and sentence concessions to a defendant who enters a plea of guilty or nolo contendere when the interest of the public in the effective administration of justice would thereby be served. Among the considerations which are appropriate in determining whether such concessions should be granted are:

(1) that the defendant by his plea has aided in ensuring the prompt and certain application of correctional measures to him;

(2) that the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct;

(3) that the concessions will make possible the application of alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes or correctional treatment, or will prevent undue harm to the defendant from the form or description of the conviction;

(4) that the defendant has made public trial unnecessary when there are goodreasons for not having the case dealt with in a public trial;

(5) that the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more criminal conduct;

(6) that the defendant by his plea has aided in avoiding delay in the disposition of other cases and thereby has contributed to the efficient administration of criminal justice in the prompt and certain application of correctional measures to other convicted offenders.

(b) The court shall not impose upon a defendant any sentence in excess of that which would be justified by any of the rehabilitative, protective, deterrent or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove his guilt at trial rather than to enter a plea of guilty or nolo contendere.

Reference: Standard 1.8.

PART II. PLEA DISCUSSIONS AND PLEA AGREEMENTS; SPECIAL PROVISIONS

10-2.1. Propriety of plea discussions and plea agreements.

(a) In cases in which it appears that it would serve the interest of the public in the effective administration of criminal justice under the principles set forth in Rule 10-1.8 (a), the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He shall engage

in plea discussions and reach a plea agreement with the defendant only through defense counsel, except when the defendant has waived his right to be represented by appointed or retained counsel.

(b) The prosecuting attorney may agree to one or more of the following, as appropriate in the circumstances of the individual case:

(1) to make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere;

(2) to seek or not to oppose dismissal of the charge if the defendant enters a plea of guilty or nolo contendere to a charge of another offense reasonably related to the offense charged;

(3) to seek or not to oppose dismissal of other charges or not to press potential charges against the defendant if he enters a plea of guilty or nolo contendere to one or more of the charges against him.

(c) Similarly situated defendants shall be afforded equal opportunities for plea discussion and plea agreements.

Reference: Standard 3.1.

Note: For related standards, see Discovery and Procedure Before Trial 1.3, 1.4; Joinder and Severance 1.3; The Defense Function 5.2, 6.1, 6.2; The Prosecution Function 4.1, 4.3.

10-2.3. Discussions and agreement not admissible.

Unless the defendant enters a plea of guilty or nolo contendere as agreed upon in a plea agreement and the plea is not withdrawn, neither the plea discussions nor the plea agreement shall be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceeding.

Reference: Standard 3.4.

PART III. WITHDRAWAL OF PLEA

10-3.1. Plea withdrawal.

(a) The court shall allow a defendant to withdraw his plea of guilty or nolo contendere upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice.

(1) A motion to withdraw a plea of guilty or nolo contendere to correct a manifest injustice is timely if, upon consideration of the nature of the allegations of the motion, the court determines that it is made with due diligence. Such a motion is not barred because it is made after the entry of judgment upon the plea. If a defendant is allowed to withdraw his plea after judgment has been entered, the court shall set aside the judgment and the plea.

(2) Withdrawal of a plea of guilty or nolo contendere shall be deemed to be necessary to correct a manifest injustice if the defendant proves to the satisfaction of the court that:

(i) he was denied the effective assistance of counsel;

(ii) the plea was not entered or ratified by the defendant or a person authorized to do so in his behalf;

(iii) the plea was involuntary, or was entered without knowledge of the nature of the charge or that the sentence imposed could be imposed;

(iv) he did not receive the charge or sentence concessions contemplated by a plea agreement and the prosecuting attorney failed to seek or not oppose the concessions as promised in the plea agreement; or

(v) he did not receive the charge or sentence concessions contemplated by a plea agreement in which the trial judge had indicated his concurrence and he did not affirm his plea after receiving advice that the judge had withdrawn his indicated concurrence and an opportunity to either affirm or withdraw the plea, as provided in Rule 10-1.5(b)(iii).

(b) In the absence of proof that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right after it has been accepted by the court. At any time before

sentence, the court in its discretion may allow the defendant to withdraw his plea if it is fair and just to do so, giving due consideration to the reasons advanced by the defendant in support of his motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea.

(c) The defendant may move to withdraw his plea of guilty or nolo contendere without alleging that he is innocent of the charge to which the plea was entered.

Reference: Standard 2.1.

Note: The following are the principal changes in Standard 2.1: (1) the addition of a sentence in subsection (a) (1) (Standard 2.1(a)(i)) prescribing the procedure to be followed when the defendant is allowed to withdraw his plea after judgment has been entered; (2) the transposition of Standard 2.1(a) (iii) as subsection (c), because the subject matter of the provision (defendant not required to allege that he is innocent) is independent under the general topic of the section and the provision applies to motions under both subsection (a) (Standard 2.1(a)--withdrawal at any time to correct manifest injustice) and subsection (b) (Standard 2.1(b)--withdrawal for lesser reasons before sentence); it is therefore not properly a subdivision of subsection (a) as in Standard 2.1(a); and (3) the revision of the second sentence of Standard 2.1(b) (subsection (b), supra) to provide that in considering a motion to withdraw a plea before sentence, the court should weigh the grounds advanced by the defendant against any prejudice the granting of the motion would cause to the prosecution because of actions it has taken in reliance upon the plea in order to reach a decision that is fair and just to both sides. As it reads, the "unless the prosecution" clause of Standard 2.1(b) would require denial of the motion no matter how unjust to the defendant such action would be if the prosecution would be "substantially prejudiced by reliance upon the defendant's plea." The court's discretion should not be so limited. Even "substantial" prejudice to the prosecution resulting from, e.g., dismissal of witnesses in reliance upon the fact that the defendant has plead guilty or nolo contendere (see Pleas of Guilty, Commentary, pp. 58-59), should not require denial of a motion to withdraw a plea supported by grounds which appeal to the court as just. For related standards, see Discovery and Procedure Before Trial

1.3, 1.4; Sentencing Alternatives and Procedures 5.5; The Prosecution Function 4.1, 4.3. See also Santobello v. New York, 404 U.S. 257 (1971).

10-3.2. Withdrawn or rejected plea not admissible.

A plea of guilty or nolo contendere which is not accepted or has been withdrawn shall not be received in evidence against the defendant in any criminal proceeding.

Reference: Standard 2.2.

Title 11

TRIAL BY JURY

PRELIMINARY COMMENT

The ABA Standards Relating to Trial by Jury (1968) deal with the right of an accused to trial by jury and with the accused's waiver of that right, the selection of the jury, jury orientation and compensation, special procedures which should be adopted during criminal jury trials in order to avoid prejudice to the defendant and to assure a proper allocation of responsibility between the trial judge and the jury, and procedures necessary to ensure that the jury receives all the assistance which it may need during the course of its deliberations and in reaching a verdict. The right of an accused to trial by jury is, of course, clearly a matter of substantive law. The parameters of that right must, therefore, be determined through constitutional interpretation. Furthermore, the manner of the selection, qualification, and compensation of jurors are primarily matters for the legislature to determine. The balance of these Standards, relating to special procedures during jury trials and during the course of the jury's deliberations, are primarily procedural in nature, and are, therefore, proper subjects for judicial rule-making. In those areas where the Standards are silent, or where the language of the Standards is too

general to provide helpful guidelines, the Federal Rules of Criminal Procedure, Rules 23 to 31, have been used as models.

PART I. GENERAL PRINCIPLES

11-1.1. Right to Trial by Jury.

In all criminal cases the defendant shall have the right to be tried by a jury of twelve whose verdict shall be unanimous, except where otherwise provided by law.

Reference: Standards Relating to Trial by Jury (1968) (hereafter in this Title cited as Standard), 1.1.

Note: The right to trial by jury is assured by substantive law. A rule relating to this subject can only declare the law as reflected in the constitution and statutes of the jurisdiction. Where not barred by applicable constitutional provisions, the standards permit limitation of the right to jury trial in one or more of the following ways: (a) by denial of jury trial to those charged with "petty offenses"; (b) by requiring trial without jury for lesser offenses, provided there is a right to appeal without unreasonable restrictions to a court in which a trial de novo by a jury may be had; (c) by the use of juries of less than twelve, without regard to the consent of the parties; or (d) by permitting less than unanimous verdicts, without regard to the consent of the parties.

Attention is invited to ABA Standards Relating to Trial Courts, developed by the ABA Commission on Standards of Judicial Administration, approved by the ABA House of Delegates in February, 1976, that places the ABA on record that jury trial is a matter of right and provides in Standard 2.10 Right of Jury Trial, (a) Criminal Cases. "Jury trial should be available upon request of a party, including the state, in criminal prosecutions in which confinement in jail or prison or other severe penalty may be imposed. The jury should consist of twelve persons, except that a jury of less than 12 (but not less than six) may be provided when the penalty that may be imposed is not more than six months' confinement. The verdict of the jury should be unanimous." This action of the ABA House of Delegates will be considered by the ABA Special Committee on the Administration of Criminal Justice in a re-evaluation of this standard.

Before drafting rules to limit the right to jury trial in any of the suggested ways, the draftsman should acquaint himself with Duncan v. Louisiana, 391 U.S. 145 (1968), Baldwin v. New York, 399 U.S. 66 (1970), Williams v. Florida, 399 U.S. 78 (1970), Johnson v. Louisiana, 406 U.S. 356 (1972) and Apodaca v. Oregon, 406 U.S. 404 (1972).

11-1.2. Waiver of trial by jury.

(a) Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial [with the approval of

the court and the consent of the prosecution] in accordance with this rule.

(b) The judge in open court shall advise the defendant of his right to trial by jury. After being so advised, the defendant may waive his right to jury trial, either in writing or in open court for the record.

(c) Upon finding that this rule has been complied with and that the defendant has knowingly and voluntarily waived his right to trial by jury, the court shall [may] accept such waiver.

(d) The defendant may not withdraw a knowing and voluntary waiver of jury trial as a matter of right, but the court, in its discretion may permit withdrawal prior to the commencement of trial.

Reference: Standard 1.2; Fed. Rules Crim. Proc., Rule 23(a).

Note: The Standards take no position with respect to whether the acceptance of a waiver should be conditioned on approval by the court and the prosecuting attorney. The language in brackets will be used if the decision is to require such approval. (For discussion, see Commentary Standards Relating to Trial by Jury, (1968), pp. 29-37). For related standards, see Fair Trial and Free Press 3.3; The Defense Function 5.2; The Function of the Trial Judge 4.3.

11-1.3. Waiver of full jury.

(a) The defendant may elect trial by a number of jurors less than the number to which he is entitled.

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(b) At any time before verdict, the parties with the approval of the court may stipulate that the jury shall consist of any number less than that required for a full jury.

(c) The court shall not permit the election or approve the stipulation provided for by this rule, unless the defendant, after being advised by the court of his right to a trial by full jury, personally waives such right either in writing or in open court for the record.

Reference: Standard 1.3; Fed. Rules Crim. Proc., Rule 23(b).

Note: For a related standard, see The Defense Function 5.2.

PART II. SELECTION OF THE JURY

11-2.1. Selection of prospective jurors.

The selection of prospective jurors shall be governed by the following general principles:

(a) The names of persons who may be called for jury service shall be selected at random from sources which will furnish a representative cross-section of the community.

(b) Jury officials shall determine the qualifications of prospective jurors by questionnaire or interview, and disqualify those who fail to meet specified minimum requirements. The grounds for disqualification shall be clearly stated objective criteria, and shall include:

(i) inability to read, write, speak, and understand the English language;

(ii) incapacity, by reason of mental or physical informity, to render efficient jury service;

(iii) failure to meet reasonable requirements concerning citizenship, residence, or age; and

(iv) pending charge of conviction of a felony or a crime involving moral turpitude.

(c) Prospective jurors may be excused from jury service upon request on the basis of clearly stated grounds for exemption, including:

(i) that the person has previously served as a juror within a specified period of time; or

(ii) that the person is actively engaged in one of a limited number of specifically identified critical occupations.

(d) The court may excuse other persons upon a showing of undue hardship or extreme inconvenience.

Reference: Standard 2.1.

Note: The details and mechanics of the process by which prospective jurors are selected will vary from jurisdiction to jurisdiction in accordance with local conditions and local substantive law. This proposed rule, which follows the Standard, suggests only the general principles which are believed to be basic to a fair and effective selection process. A rule relating to this subject designed for a particular jurisdiction will necessarily be amplified and adapted in the manner required by local law. For related standards, see Discovery and Procedure Before Trial 5.4; Fair Trial and Free Press 3.2, 3.4; The Defense Function 7.2; The Function of the Trial Judge 5.1; The Prosecution Function 5.3.

11-2.2. Juror orientation; use of handbooks.

Prospective jurors shall receive an orientation which informs them of the nature of their duties and introduces them to trial procedure and legal terminology, but which does not include anything to be regarded by the jurors as instructions of law to be applied in any case or anything that may prejudice a party or mislead the jurors. This orientation may be accomplished by the use of juror handbooks, which may, but need not, be implemented by oral instructions.

Reference: Standard 3.1.

Note: For related standards, see The Function of the Trial Judge 5.6, 5.11, 5.12.

11-2.3. List of prospective jurors.

Upon request, lists of prospective jurors and their addresses shall be furnished to the defendant or his counsel and the prosecuting attorney.

Reference: Standard 2.2.

Note: For related standards, see Discovery and Procedure Before Trial 5.4; Fair Trial and Free Press 3.2, 3.4; The Defense Function 7.2; The Function of the Trial Judge 5.1; The Prosecution Function 5.3.

11-2.4. Challenge to the array.

The prosecuting attorney and the defendant or his attorney may challenge the array on the ground that there has been a

material departure from the requirements of the law governing selection of jurors.

Reference: Standard 2.3.

Note: For related standards, see Discovery and Procedure Before Trial 5.4; Fair Trial and Free Press 3.2, 3.4; The Defense Function 7.2; The Function of the Trial Judge 5.1; The Prosecution Function 5.3.

11-2.5. Voir dire examination.

A voir dire examination shall be conducted for the purpose of discovering bases for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge shall then ask the prospective jurors any questions which he thinks necessary, touching their qualifications to serve as jurors in the cause on trial. The judge shall also permit such additional questions by the defendant or his attorney and the prosecuting attorney as he deems reasonable and proper.

Reference: Standard 2.4. See also, Fed. Rules Crim. Proc., Rule 24(a).

Note: For related standards, see Discovery and Procedure Before Trial 5.4; Fair Trial and Free Press, 3.2, 3.4; The Defense Function 7.2; The Function of the Trial Judge 5.1; The Prosecution Function 5.3.

Attention is invited to the resolution of the ABA House of Delegates in February, 1975, that places the ABA on record as supporting the "concept of voir dire by counsel as a matter of right in federal civil and criminal cases." This action will be considered by the ABA Special Committee on the Administration of Criminal Justice in a re-evaluation of this Standard.

11-2.6. Challenges for cause.

If the judge after examination of any juror is of the opinion that grounds for challenge for cause are present, the judge should excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for cause. A challenge to an individual should be made before he is sworn to try the case, but the judge may permit it to be made after he is sworn but before jeopardy has attached.

Reference: Standard 2.5.

Note: Grounds for challenge for cause will be found in the statutes of the jurisdiction and elsewhere in the rules.

11-2.7. Exceptions to challenge.

(a) The challenge for cause may be excepted to by the adverse party for insufficiency and, if so, the court shall determine the sufficiency thereof, assuming the facts alleged in the challenge to be true. The challenge may be denied by the adverse party and, if so, the court shall try and determine the issue, both as to law and fact.

(b) Upon trial of a challenge, the rules of evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other competent person may be examined as a witness by either party. If a challenge for cause is determined to be sufficient, or if found to be true, as the case may be, it shall be allowed, and

the juror to whom it was directed shall be excluded; otherwise the challenge shall be disallowed.

Reference: Washington Superior Court Criminal Rules (hereafter cited as Washington Rule), Rule 6.4(d).

11-2.8. Peremptory challenges.

(a) A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude the challenged juror. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the prosecution is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(b) After prospective jurors have been passed for cause, peremptory challenges shall be exercised alternately, first by the prosectuion and then by each defendant until the peremptory challenges allowed are exhausted or the jury is accepted by all parties. Acceptance of the jury as presently constituted shall

not waive remaining peremptory challenges to jurors subsequently called.

Reference: Standard 2.6; Fed. Rules Crim. Proc., Rule 24(b); Washington Rule 6.4(e).

Note: The Standard provides only that the number and mechanics of peremptory challenges shall be governed by rule or statute. The rule suggested above has been constructed by combining features of the federal rule with the Washington Rule. The suggested numbers of peremptory challenges are taken from Fed. Rules Crim. Proc., Rule 24(b). For related standards, see Discovery and Procedure Before Trial 5.4; Fair Trial and Free Press 3.2, 3.4; The Defense Function 7.2; The Function of the Trial Judge 5.1; The Prosecution Function 5.3.

11-2.9. Alternate jurors.

The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory

challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

Reference: Standard 2.7; Fed. Rules Crim. Proc., Rule 24(c).

Note: The language of the federal rule is employed here. For related standards, see Discovery and Procedure Before Trial 5.4; Fair Trial and Free Press 3.2, 3.4; The Defense Function 7.2; The Function of the Trial Judge 5.1; The Prosecution Function 5.3.

PART III. PROCEDURES DURING TRIAL

11-3.1. Custody and restraint of defendants and witnesses.

(a) During trial the defendant shall be seated where he can effectively consult with his counsel and can see and hear the proceedings.

(b) An incarcerated defendant or witness shall not be required to appear in court in the distinctive attire of a prisoner or convict.

(c) Defendants and witnesses shall not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to maintain order. If the trial judge orders such restraint, he shall enter into the record of the case the reasons therefor. Whenever physical

restraint of a defendant or witness occurs in the presence of jurors trying the case, the judge shall instruct the jurors that such restraint is not to be considered in assessing the proof and determining guilty.

Reference: Standard 4.1.

Note: The special problem of dealing with the disruptive defendant is also dealt with in the Standards Relating to The Function of the Trial Judge, 5.3, and 6.1 through 6.3.

11-3.2. Note taking by jurors.

Jurors may take notes regarding the evidence presented to them and keep such notes with them when they retire for their deliberations. Such notes shall be treated as confidential between the juror making them and his fellow jurors.

Reference: Standard 4.2.

Note: For related standards, see The Function of the Trial Judge 5.11, 5.12.

11-3.3. Substitution of judge.

(a) If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

(b) If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

Reference: Standard 4.3; Fed. Rules Crim. Proc., Rule 25.

Note: The language of the federal rule is suggested here as it provides more specific guides than the general language of the Standard.

11-3.4. Evidence.

In all trials under these rules the testimony of witnesses shall be taken orally in open court. The rules of evidence applicable in civil cases shall apply unless otherwise provided by statute or these rules or limited by the constitution of the United States or the state of _____.

Reference: Fed. Rules Crim. Proc., Rule 26.

Note: The standards do not deal with rules of evidence. The examination of witnesses and proof of facts will be governed by the general law of evidence applicable in the jurisdiction. Hence, the specific rules of evidence are not touched upon here.

11-3.5. Evidence of prior convictions.

When prior convictions of the defendant are admissible solely for the purpose of determining the sentence to be imposed, such convictions shall not be alleged in the complaint, information or indictment, nor shall evidence of such convictions be introduced or the jury be otherwise informed of them until it has found the defendant guilty.

Reference: Standard 4.4.

Note: For a related standard, see The Prosecution Function 6.1.

11-3.6. Motion for judgment of acquittal.

(a) After the evidence on either side is closed, the court on motion of a defendant or on its own motion shall order the entry of a judgment of acquittal of one or more offenses charged if the evidence is insufficient to sustain a conviction of such offense or offenses. Such a motion by the defendant, if not granted, shall not be deemed to withdraw the case from the jury or to bar the defendant from offering evidence.

(b) If the defendant's motion for judgment of acquittal is made at the close of the evidence offered by the prosecution, the court may not reserve decision on the motion. If the defendant's motion is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the

jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) If the jury returns a verdict of guilty or is discharged without having returned a verdict, the defendant's motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period.

Reference: Standard 4.5; Fed. Rules Crim. Proc., Rule 29

Note: For related standards, see The Function of the Trial Judge 5.6, 5.11, 5.12.

11-3.7. Jury instructions.

(a) A book of pattern jury instructions approved by the Supreme Court shall be available in each trial court for use in criminal cases. Any trial court may adopt special rules permitting instructions to be requested by number from such published book of instructions. Such pattern instructions shall be modified and supplemented whenever necessary to ensure that the jury is adequately instructed with respect to the case being tried.

(b) At the close of the evidence or at such earlier time as the court reasonably directs, the court shall allow any party to tender written instructions and may direct counsel to prepare designated instructions in writing. Copies of tendered instructions and instructions prepared at the direction of the court shall be furnished to the other parties.

(c) A conference on instructions shall be held out of the hearing of the jury, and, on request of any party, out of the presence of the jury, counsel shall be afforded an opportunity to object to any instruction tendered by another party or prepared at the direction of the court. The court shall advise counsel what instructions will be given prior to their delivery and, in any event, before the arguments to the jury. No party shall be permitted to object on appeal to the failure to give an instruction unless he shall have tendered it, and no party shall be permitted to claim as error on appeal the giving of an instruction unless he objected thereto, stating distinctly the matter to which he objects and the grounds of his objection. However, if the interests of justice so require, substantial defects or omissions should not be deemed waived by failure to object to or tender an instruction.

(d) After the jury is sworn the court may give preliminary instructions deemed appropriate for its guidance in hearing the case. After the arguments are completed, the court should give the jury all necessary instructions.

(e) All instructions, whether given or refused, shall become a part of the record. All objections made to instructions and the rulings thereon shall be included in the record.

Reference: Standard 4.6; see also Fed. Rules Crim. Proc., Rule 30.

Note: The tentative draft of the standards (4.7) provided that at the time the court instructs the jury it may summarize and comment on evidence. Guidelines and limitations governing such comments are set out. Standard 4.7 was approved by the Special Committee on Standards for Criminal Justice by a vote of 7 to 4. However, the Council of the ABA Section of Criminal Law rejected the proposed standard by a vote of 10 to 2. Finally, a motion to delete Standard 4.7 carried in the ABA House of Delegates by a vote of 126 to 91. (Reports of Am. Bar Assn. (1968), Vol. 93, p. 351). Hence, no rule relating to comment on the evidence has been prepared.

The arguments in favor of Standard 4.7 are set out at length of pages 121 to 129 of the published report on Standards Relating to Trial by Jury. It is there pointed out that the substance of the standard has been previously approved by the American Bar Association, the ABA Section of Judicial Administration, the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Also, attention is called to Griffin v. California, 380 U.S. 609 (1965), in which the Supreme Court held that the trial court's (and the prosecutor's) comment on the defendant's failure to testify violated the defendant's privilege against self-incrimination. For related standards, see Fair Trial and Free Press 3.5; The Function of the Trial Judge 5.6, 5.11, 5.12.

PART IV. JURY DELIBERATIONS AND VERDICT

11-4.1. Materials to jury room.

(a) The court in its discretion may permit the jury, upon retiring for deliberation, to take to the jury room a copy of the charges against the defendant and the exhibits and writings which have been received in evidence, except depositions.

(b) Among the considerations which are appropriate in the exercise of this discretion are:

(i) whether the material will aid the jury in a proper consideration of the case;

(ii) whether any party will be unduly prejudiced by submission of the material; and

(iii) whether the material may be subjected to improper use by the jury.

Reference: Standard 5.1.

11-4.2. Jury request to review.

(a) If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, it shall be conducted to the courtroom. Whenever the jury's request is reasonable, the court, after notice to the prosecutor and counsel for the defense, shall have the requested parts of the testimony read to the jury and shall permit the jury to re-examine the requested materials admitted into evidence.

(b) The court need not submit evidence to the jury for review beyond that specifically requested by the jury, but in its discretion the court may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

Reference: Standard 5.2.

Note: For related standards, see The Function of the Trial Judge 5.11, 5.12.

11-4.3. Additional instructions.

(a) If the jury, after retiring for deliberations, desires to be informed on any point of law, it shall be

conducted to the courtroom. The court shall give appropriate additional instructions in response to the jury's request unless:

(i) the jurors may be adequately informed by directing their attention to some portion of the original instructions;

(ii) the request concerns matters not in evidence or questions which do not pertain to the law of the case; or

(iii) the request would call upon the judge to express an opinion upon factual matters that the jury should determine.

(b) The court need not give additional instructions beyond those specifically requested by the jury, but in its discretion the court may also give or repeat other instructions to avoid giving undue prominence to the requested instructions.

(c) The court may recall the jury after it has retired and give it additional instructions in order:

(i) to correct or withdraw an erroneous instruction;

(ii) to clarify an ambiguous instruction; or

(iii) to inform the jury on a point of law which should have been covered in the original instructions.

(d) The provisions of Rule 11-3.7(c) and (e) also apply to the giving of all additional instructions, except that the court in its discretion shall decide whether additional argument will be permitted.

Reference: Standard 5.3.

Note: For related standards, see The Function of the Trial Judge 5.6, 5.11, 5.12.

11-4.4. Length of deliberations; deadlocked jury.

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(i) that in order to return a verdict, each juror must agree thereto;

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(iv) that in the course of deliberations, a juror should not hesitate to re-examine his own views and change his opinion if convinced it is erroneous; and

(v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue its deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or

threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

Reference: Standard 5.4.

Note: The rule proposed to implement Standard 5.4. is suggested as an alternative to the Allen charge, which was approved in Allen v. United States, 164 U.S. 492 (1896), and has been the subject of frequent litigation since that time. For related standards, see The Function of the Trial Judge 5.6, 5.11, 5.12.

11-4.5. Verdict.

(a) The verdict shall be returned by the jury to the judge in open court.

(b) If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdict with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) The defendant may be found guilty of an offense necessarily included in the offense charged or an offense necessarily included therein if the attempt is an offense.

(d) When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. The poll shall be conducted by the

court or the clerk of the court asking each juror individually whether the verdict announced is his verdict. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

Reference: Fed. Rules Crim. Proc., Rules 23(a) and 31; Standard 5.5.

Note: Subsections a, b and c are based on the federal rules and have no counterpart in the standards. However, they reflect the usually approved practice. For a related standard, see The Function of the Trial Judge 5.12.

11-4.6. Impeachment of the verdict.

(a) Upon an inquiry into the validity of a verdict, no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.

(b) The limitations in subsection (a) shall not bar evidence concerning whether the verdict was reached by lot.

(c) Subject to the limitations in subsection (a), a juror's testimony or affidavit shall be received when it concerns:

(i) whether matters not in evidence came to the attention of one or more jurors, under circumstances which would violate the defendant's constitutional right to be confronted with the witnesses against him; or

(ii) any other misconduct for which the jurisdiction permits jurors to impeach their verdict.

Reference: Standard 5.7.

Note: For related standards, see Fair Trial and Free Press 3.6; The Defense Function 7.3; The Function of the Trial Judge 5.11, 5.12.

Title 12

SENTENCING ALTERNATIVES AND PROCEDURES

PRELIMINARY COMMENT

The implementation of the ABA Standards Relating to Sentencing Alternatives and Procedures, (1968), will require action on the legislative, administrative and judicial levels. While the draft rules here suggested may go beyond the appropriate limits of the judicial rule making power, they hardly provide a framework for the complete implementation of the Standards. The nature of the sentencing authority, the range of sentencing alternatives and the state policies with respect to confinement and other punishment are initially matters for legislative concern. The supplying of facilities and adjunctive services requires both legislative and administrative action. Development of sentencing criteria involves matters of internal court policy and judicial administration. Hence, court rules can not provide an adequate instrumentality for the full implementation of these Standards. Other governmental powers must be employed. However, to the extent that they may be useful, the following rules relating to Sentencing Alternatives and Procedures are suggested.

PART I. THE EXERCISE OF JUDICIAL DISCRETION-- RANGE OF SENTENCING ALTERNATIVES

12-1.1. General Principles.

(a) For the purpose of sentencing, crimes are classified in categories which reflect substantial differences in gravity. Each category specifies the sentencing alternatives available for offenses included in the category.

(b) It is the intent of these rules that the sentencing court shall be permitted to select among a wide range of alternative sentences in each case, with gradations of supervisory, supportive and custodial facilities at its disposal, so as to permit sentences appropriate to each individual case.

Reference: Standards Relating to Sentencing Alternatives and Procedures, (1968) (hereafter in this Title cited as Standard) 2.1.

Note: The sentencing structure must be provided by statute. The legislative draftsman who seeks to prepare legislation to implement the standards may be helped by an examination of the model Penal Code Sentencing Provisions and the Model Sentencing Act, which may be found respectively at Appendix B and Appendix C, pp. 306-335, of the published report of the ABA Project on Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures. Proposed Rules 1.1 to 1.6 presupposes a statutory framework within which they may operate. While they are largely precatory and declarative of policy, rules of this nature may provide helpful guidelines for courts concerned with problems of interpretation. For a related standard, see The Function of the Trial Judge 8.1.

12-1.2. General guides to judicial discretion.

The sentence imposed in each case shall require the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.

Reference: Standard 2.2.

Note: For a related standard, see Probation 1.3.

12-1.3. Sentences not involving confinement.

(a) In every case the sentencing court may impose a sentence of probation or other appropriate sentence not involving confinement.

(b) The following general principles shall apply to sentences without confinement:

(i) The court shall specify at the time of sentence the length of the term during which the defendant shall be under supervision and during which the court shall have power to revoke the sentence for violation of specified conditions;

(ii) Neither supervision nor the power to revoke shall extend beyond two years for a misdemeanor or five years for a felony, or such lesser time as may be fixed by law;

(iii) The court shall not fix the sentence to be imposed upon violation of a condition until there has been a finding that a violation has occurred.

(c) In the absence of affirmative reasons to the contrary, a sentence not involving confinement shall be preferred to a sentence involving partial or total confinement.

Reference: Standard 2.3.

Note: It may be appropriate to provide for limited exceptions to subsection (a), but only for the most serious offenses such as murder or treason. See Rule 12-5.4 for procedures concerning revocation or modification of the sentence and available alternatives upon violation of the condition. For related Standards, see Probation 1.1, 1.2, 1.3, 3.3, 5.1.

12-1.4. Partial confinement.

(a) The range of sentencing alternatives to be considered by the court shall include an intermediate sanction between probation and total confinement, which will permit the development of an individualized treatment program for the defendant.

(b) The following general principles shall apply to sentences to partial confinement:

(i) The court shall specify at the time of sentence the length of the term during which the defendant shall be under supervision and during which the court shall have power to revoke the sentence for violation of specified conditions;

(ii) Neither supervision, the power to revoke, nor the maximum period during which the defendant shall be subject to a sentence to partial confinement shall extend beyond two years for a misdemeanor or five years for a felony, or such lesser time as may be fixed by law;

(iii) The court shall not fix the sentence to be imposed upon violation of a condition until there has been a finding that a violation has occurred.

(c) In the absence of affirmative reasons to the contrary a sentence involving partial confinement shall be preferred to a sentence involving total confinement.

Reference: Standard 2.4.

Note: Alternatives contemplated by subsection (a) include (1) confinement for selected periods to a local facility designed to provide educational or other rehabilitative services; (2) commitment to a local facility which permits the defendant to hold a regular job while subject to supervision or confinement on nights and weekends; and (3) commitment to an institution for a short, fixed term, followed by automatic release under supervision.

12-1.5. Total confinement.

A sentence not involving total confinement shall be preferred in the absence of affirmative reasons to the contrary. Total confinement in a particular case may be appropriate where:

(i) Confinement appears necessary in order to protect the public from further criminal activity by the defendant; or

(ii) The defendant is in need of correctional treatment which can most effectively be provided if he is placed in total confinement; or

(iii) It would unduly depreciate the seriousness of the offense to impose a sentence other than total confinement,

Community hostility to the defendant is not a legitimate basis for imposing a sentence of total confinement.

Reference: Standard 2.5(c).

Note: Authorized sentences and the limits upon the court's discretion in sentencing to confinement must be provided by legislation. Suggestions for legislative draftsmen will be found in Standard 2.5 (a) (b) and (d). For a related standard, see Probation 1.3.

12-1.6. Special facilities.

(a) The court shall utilize such facilites as may be available to provide special treatment for youthful and other special groups of offenders as sentencing alternatives in appropriate cases.

(b) Utilization of such facilities shall not result in commitment or supervision for a period longer than would otherwise be authorized for the offense involved unless:

(i) A presentence report supplemented by a report of the examination of the defendant's mental, emotional

and physical condition has been obtained and considered; and,

(ii) The court finds specifically that a proper treatment program is available and that defendant will benefit from the program; and,

(iii) The maximum period for which such commitment or supervision can extend is no longer than two years; and,

(iv) The sentencing court shall require that at the conclusion of one year the custodial or supervisory authorities review the progress of the defendant and make a showing to the sentencing court to the effect that the contemplated treatment is actually being administered to the defendant and outlining the progress which the defendant has made.

(c) The sentencing court shall have the authority at any time to terminate the commitment or supervision.

Reference: Standard 2.6.

12-1.7. Fines.

(a) Whether to impose a fine in a particular case, its amount up to the authorized maximum, and the method of payment are within the discretion of the sentencing court. The court may permit any imposed fine to be paid in installments, having regard to the means of the particular offender.

(b) In determining whether to impose a fine and its amount, the court shall consider:

(i) The financial resources of the defendant and the burden that payment of fine will impose, with due regard to his other obligations;

(ii) The ability of the defendant to pay a fine on an installment basis or on other conditions to be fixed by the court;

(iii) The extent to which payment of a fine will interfere with the ability of the defendant to make any ordered restitution or reparation to the victim of the crime; and

(iv) Whether there are particular reasons which make a fine appropriate as a deterrent to the offense involved or appropriate as a corrective measure for the defendant. Revenue production is not an appropriate basis for imposing a fine.

(c) The court shall not impose alternative sentences of fine or imprisonment. The effect of nonpayment of a fine should be determined after the fine has not been paid and after examination of the reasons for nonpayment.

Reference: Standard 2.7(b) and (c).

Note: Paragraphs (a), (d), (f) and (g) of Standard 2.7 relate to legislation and are omitted from this rule.

PART II. JUDICIAL DISCRETION--
TOTAL CONFINEMENT

12-2.1. Maximum term.

(a) In any case in which the defendant is sentenced to confinement in a correctional institution, the court may fix any maximum term of confinement that is not greater than the maximum normal term of confinement fixed by statute for the category of offenses which includes the offense for which the defendant has been convicted.

(b) A special term of confinement shall be imposed only in exceptional cases and shall be related in severity to the sentence otherwise provided for the offense. In addition, the following general principles shall apply:

(i) The sentencing court may fix any maximum term greater than the maximum normal term but not greater than the maximum special term fixed by statute.

(ii) The sentencing court may fix a minimum term in accordance with Rule12-2.2.

(iii) Whether to sentence a particular offender to the normal term or to the special term is a matter of discretion for the sentencing court. Such discretion shall be exercised in favor of imposing a special term only if application of the stated statutory criteria supports the conclusion that the defendant fits within the exceptional class, and if the court

also concludes that commitment for such a special term is necessary in order to protect the public from further criminal conduct by the defendant.

Reference: Standard 3.1.

12-2.2. Minimum term.

(a) The court is authorized, but not required, to impose within the prescribed legislative limits a minimum sentence which must be served before an offender becomes eligible for parole.

(b) Minimum sentences are rarely appropriate and should in all cases be reasonably short. The authority to impose a minimum term is limited to the following:

(i) The highest minimum term of imprisonment may not exceed the minimum term fixed by the statute;

(ii) A minimum term in excess of ten years may be imposed only when the maximum is confinement for life;

(iii) The court may not impose a minimum term which exceeds one-third of the maximum term actually imposed;

(iv) The court may not impose a minimum term until a presentence report, supplemented by a report of examination of the defendant's mental, emotional and physical condition has been obtained and considered;

(v) Prior to imposing a minimum term, the court shall consider whether to make an advisory recommendation to the parole authorities respecting when the offender

should first be considered for parole in lieu of a minimum term and whether the public interest would served thereby;

(vi) Imposition of a minimum term requires affirmative action of the sentencing court. The court may impose a minimum term only after it finds that confinement for a minimum term is necessary in order to protect the public from further criminal conduct by the defendant;

(vii) Upon motion of the correctional authorities made at any time, the sentencing court may reduce an imposed minimum term to the time already served.

Reference: Standard 3.2.

12-2.3. Habitual offenders.

(a) Whether to sentence a particular offender to the normal term or to special term on the grounds of habitual criminality is a matter to be determined in the discretion of the sentencing court, and should be determined at the time of sentencing. An additional term may be imposed only if the court finds that such term is necessary in order to protect the public from further criminal conduct by the defendant, and in support of this finding also finds that:

(i) The defendant has previously been convicted of two felonies committed on different occasions, and the present offense is the third felony committed on an

occasion different from the first two and that the defendant has not been pardoned from any of such convictions on the ground of innocence nor have any of such convictions been set aside in a post-conviction proceeding; and

(ii) Less than five years have elapsed between the commission of the present offense and either the commission of the last prior felony or the offender's release, on parole or otherwise, from a prior sentence or other commitment imposed as a result of a prior felony conviction; and

(iii) The defendant was more than twenty-one years old at the time of the commission of the new offense.

Reference: Standard 3.3(b).

Note: Paragraph (a) of Standard 3.3 deals with matters of concern to the legislature and is omitted from this rule.

12-2.4. Multiple offenses; concurrent or consecutive terms.

(a) When separate sentences are imposed in the same proceeding for two or more offenses which are separately punishable or when the defendant is serving a prison sentence for another offense at the time of conviction, the sentencing court may, in its discretion, adjudge that such sentences shall run concurrently or consecutively.

(b) Consecutive sentences are rarely apprpriate, and shall be subject to the following limitations:

(i) The aggregate maximum of consecutive terms shall not exceed the term authorized for an habitual offender for the most serious of the crimes involved;

(ii) The aggregate minimum of consecutive terms shall be governed by the limitation stated in Rule 12-2.2; and

(iii) The sentencing court shall not impose consecutive sentences until a presentence report, supplemented by a report of the examination of the defendant's mental, emotional and physical condition has been obtained and considered; and

(iv) Sentences shall run concurrently unless consecutive sentences are expressly imposed by the sentencing court. The court shall not impose consecutive sentences until it has made a finding that confinement for such term is necessary in order to protect the public from further criminal conduct by the defendant.

These limitations also apply to any sentence for an offense committed prior to the imposition of sentence for another offense, whether a previous sentence for the other offense has been served or remains to be served.

Reference: Standard 3.4.

Note: If there is no provision for sentencing habitual offenders for the offense charged, the statute should impose a ceiling on the aggregate consecutive terms, which is related to the severity of the offenses involved (See Paragraph (b) (i).

12-2.5. Multiple offenses; other states.

(a) In imposing sentence in a particular case, the sentencing court shall consider all prison sentences imposed in other states, both those which have been served and those which remain to be served. The following general principles shall apply in such cases:

(i) The court shall not impose a sentence which, when added to the out-of-state sentences would exceed any limitations which would be in effect had all of the offenses occurred within this state, as provided in Rule 12-2.4;

(ii) The court may impose a sentence to run concurrently with out-of-state sentences even though the time will be served in an out-of-state institution.

(iii) Sentences shall run concurrently with any out-of-state sentence to which the defendant is subject at the time of sentencing, unless the court expressly imposes a consecutive sentence. A sentence to be served consecutively to an out-of-state sentence may be imposed only after a finding that confinement for such a term is necessary in order to protect the public from further criminal conduct by the defendant.

Reference: Standard 3.5(b).

Note: Standard 3.5(a) and (c) relate to matters for the legislature. For related standards, see Post-Conviction Remedies 6.3; Pretrial Release 5.12.

12-2.6. Credit.

(a) Credit against the maximum term and any minimum terms shall be given to a defendant for all time spent in custody as as result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. Such credit shall include time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to arrival at the institution to which the defendant has been committed.

(b) Credit against the maximum term and any minimum term shall be given to a defendant for all time spent in custody under a prior sentence if he is later re-prosecuted and re-sentenced for the same offense or for another offense based on the same conduct. In the case of such re-prosecution, credit shall be given in accordance with subsection (a) for all time spent in custody as a result of both the original charge and any subsequent charge for the same offense or for another offense based on the same conduct.

(c) If a defendant is serving multiple sentences, and if one of the sentences is set aside as the result of direct or collateral attack, credit against the maximum term and any minimum term of the remaining sentences shall be given for all time served since the commission of the offenses upon which the sentences were based.

(d) If the defendant is arrested on one charge and later prosecuted on another growing out of conduct which occurred

prior to his arrest, credit against the maximum term and any minimum term of any sentence resulting from such prosecution shall be given for all time spent in custody under the former charge which has not been credited against another sentence.

(e) The credit required to be given by this section shall be awarded by the procedure specified in Rule 12-4.8.

Reference: Standard 3.6.

Note: For a related standard, see Post-Conviction Remedies 6.3; Pretrial Release 5.12.

12-2.7. Reduction of conviction.

If the defendant has been convicted of a felony, and if the court, considering the nature and circumstances of the defense and the history and character of the defendant, concludes that it would be unduly harsh to sentence the defendant to the term normally applicable to the offense, the court may reduce the offense to a lower category of felony, or to a misdemeanor, and impose sentence accordingly.

Reference: Standard 3.7.

12-2.8. Re-sentences.

Where a conviction or sentence has been set aside on direct or collateral attack, a new sentence for the same or different offense based on the same conduct may not be more severe than the prior sentence less time already served.

Reference: Standard 3.8.

Note: For related standards, see Criminal Appeals 2.3; Post-Conviction Remedies 6.3. See also North Carolina v. Pearce 395 U.S. 711 (1969).

12-3.1. Pre-sentence report: general principles.

The court may call for an investigation and presentence report in every case. An investigation and report shall be made in every case where incarceration for one year or more is a possible disposition, where the defendant is less than twenty-one years old, or where the defendant is a first offender, unless the court specifically orders to the contrary in a particular case.

Reference: Standard 4.1.

Note: For a related standard, see Probation 2.1, 6.1.

12-3.2. Pre-sentence report: when prepared.

(a) Except as authorized in subsection (b), the pre-sentence investigation shall not be initiated until there has been an adjudication of guilt.

(b) A pre-sentence investigation report prior to an adjudication of guilt is appropriate only if:

(i) The defendant, with advice of counsel if he so desires, has consented to such action; and

(ii) Adequate precautions are taken to assure that nothing disclosed by the pre-sentence investigation comes to

the attention of the prosecution, the court, or the jury prior to an adjudication of guilt. The court may, however, examine the report prior to entry of a plea on request of the defense and the prosecution.

Reference: Standard 4.2.

Note: For a related standard, see Probation 2.4.

12-3.3. Pre-sentence report: disclosure; general principles.

A pre-sentence report is not a public record; it shall be available only to the following persons or agencies under the conditions stated:

(i) The report shall be available to the sentencing court for the purpose of assisting it in determining the sentence. The report shall be available to all judges who are participating in a sentencing discussion relating to defendant.

(ii) The report shall be available to persons or agencies having a legitimate professional interest in the information likely to be contained therein. Such persons or agencies include a physician or psychiatrist appointed to assist the court in the sentencing, an examining facility, correctional institution, or a probation or parole department.

(iii) The report shall be available for review in courts of appeal when relevant to an issue on which an appeal has been taken;

(iv) The report shall be available to the parties under the conditions stated in Rule 12-3.4.

Reference: Standard 4.3.

12-3.4. Pre-sentence report; disclosure; parties.

(a) The substance of all information which adversely affects the defendant's interest which has not otherwise been disclosed in open court shall be called to the attention of the defendant, his attorney, and others who are acting on his behalf by the person responsible for preparing the pre-sentence report.

(b) The sentencing court, upon request, shall permit the defendant's attorney, or the defendant himself if he has no attorney, to inspect the pre-sentence report. If the report is shown to the defense, it must also be shown to the prosecution. The court may except from disclosure such parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which has been obtained on a promise of confidentiality. In all cases where parts of the report are not disclosed under such authority, the court shall state for the record the reason for its action and shall inform the defendant and his attorney that information has not been disclosed. The action of the court in excepting information from disclosure shall be subject to appellate review.

Reference: Standard 4.4.

12-3.5. Pre-sentence report: time of disclosure; pre-sentence conference.

(a) The information made available to the parties under Rule 12-3.4 shall be disclosed a sufficient time prior to the imposition of sentence as to afford a reasonable opportunity for verification, and in no event later than [ten] days prior to the date set for sentencing.

(b) In cases where the pre-sentence report has been open to inspection, each party shall, at least [five] days prior to the sentencing proceeding, notify the opposing party and the court of any part of the report which he intends to controvert by the production of evidence. In such event, the court and the parties shall attempt to avoid the reception of evidence by stipulation as to the disputed part of the report. A report of the resolution of any issue at such conference shall be preserved for inclusion in the record of the sentencing proceeding. [See Rule 12-4.7(a)(iii)].

Reference: Standard 4.5.

Note: For a related standard, see The Defense Function 8.1.

12-3.6. Additional services.

(a) The sentencing court shall utilize in the sentencing process all facilities available to it to obtain information concerning the defendant's mental, emotional and physical condition, in addition to the information contained in the

pre-sentence report. The court may on a case by case basis employ such special medical and mental health facilities as it deems necessary to an appropriate disposition of the case.

(b) Reports which result from the use of such special services shall be subject to the disclosure and verification provisions which govern pre-sentence reports. (See Rules 12-3.3, 12-3.4 and 12-3.5).

Reference: Standard 4.6.

PART IV. SENTENCING PROCEDURES

12-4.1. Sentencing judge.

(a) If guilt was determined after a trial, the judge who presided at the trial shall impose the sentence unless there are compelling reasons in a specific case for sentence to be imposed by another judge. Where it is necessary for another judge to impose the sentence, a pre-sentence conference shall be held and attended by defense counsel and prosecution to enable the judge who did not preside at trial to acquaint himself with what occurred at the trial. The conference shall be recorded and the judge, with the assistance of counsel of record, shall acquaint himself with the facts that occurred at the trial.

(b) If guilt was determined by plea, the judge who accepted the plea shall, if possible, impose the sentence. If the judge who imposes the sentence is not the same judge who

received the plea and interrogated the defendant concerning its acceptance, the sentencing judge shall ascertain the facts concerning the plea and the offense in the same manner as provided in paragraph (a) of this Rule 12-4.1.

(c) If possible, the same judge should sentence all defendants who are involved in the same offense.

Reference: Standard 5.1.

12-4.2. Multiple offenses: consolidation for sentencing; pleading to prior offenses.

(a) If possible, all outstanding convictions against one defendant shall be consolidated for sentencing at one time. The prosecuting attorney shall be responsible for informing the judge if there are prior convictions awaiting sentence, or other pending criminal proceedings pending against the defendant. All outstanding charges shall be disposed of as promptly as possible and shall when possible be consolidated for sentencing at one time. Charges filed after sentencing shall be promptly prosecuted. Any sentence imposed upon an offender already under sentence for another offense shall be integrated with the prior sentence or sentences.

(b) After conviction and before sentence, defendant shall be permitted to plead guilty to other offenses he has committed which are within the jurisdiction of the sentencing court or any court or coordinate or inferior jurisdiction of the state. The plea shall not be accepted without the written

consent of the official responsible for prosecuting the charge. Submission of such a plea constitutes waiver of any objection the defendant might have to venue or where no charge has yet been filed, to formal charge. If such a plea is tendered and accepted, the court shall sentence the defendant for all of the offenses in one proceeding, subject to the limitations of the consecutive sentences stated in Rule 12-2.4.

Reference: Standard 5.2.

Note: For a related standard, see Pleas of Guilty 1.2.

12-4.3. Duties of counsel.

(a) Counsel for the prosecution and the defense have a continuing duty to render such assistance as the court may require during the sentencing process.

(b) The prosecuting attorney shall not make a specific recommendation as to the sentence, unless such recommendation is the result of a plea discussion or agreement or is requested by the court or other special circumstances exist.

(c) The duties of the prosecuting attorney with respect to each sentence shall include the following:

(i) He shall satisfy himself that the factual basis for the sentence is adequate and accurate and that the record of the sentencing proceeding reflects all relevant circumstances not disclosed earlier;

(ii) He shall disclose to the defense and the court all relevant information in his files favorable to the defendant;

(iii) If the plea is a result of plea discussions or an agreement which relates to the sentence, the prosecuting attorney shall disclose its terms to the court;

(iv) He shall determine whether there are grounds for inspection of a special term, based on particular characteristics of the defendant [Rules 12-1.5(b), 12-2.1(c) and 12-2.3]. If he finds that such grounds exist, he shall cause notice as provided by Rule 12-4.5(b)(i) to be served on the defendant and his attorney, and may make a factual presentation at the sentencing proceeding.

(d) The duties of the defense attorney with respect to each sentence shall include the following:

(i) He shall familiarize himself with all sentencing alternatives available to the court in disposing of the case, of the possible and probable consequences of each alternative, and of the facilities in the community and elsewhere which may be used in the execution of the sentence;

(ii) He shall explain the consequences of the possible sentences to the defendant and take such steps as may be necessary to assure that the defendant understands the nature of the sentencing proceeding.

(iii) He shall satisfy himself that the factual basis for the sentence is adequate and accurate and that the record of the sentencing proceeding reflects all relevant circumstances not disclosed earlier;

(iv) If the plea is a result of plea discussions or an agreement with the prosecution relating to the sentence, the defense attorney shall disclose its terms to the court;

(v) He shall, with the consent of the defendant, make a recommendation as to the utilization of special institutional and treatment facilities which are available and appropriate to the defendant's needs.

Reference: Standard 5.3.

Note: For related standards, see Fair Trial and Free Press 1.1; Pleas of Guilty 1.5; The Defense Function 8.1; The Function of the Trial Judge 4.1; The Prosecution Function 3.11, 6.1, 6.2.

12-4.4. Sentencing Proceeding.

(a) As soon as practicable after the determination of guilt and the examination of any pre-sentence reports, but in no event later than [45 days] after the determination of guilt, a proceeding should be held at which the sentencing court shall:

(i) Entertain submissions by the parties which are facts relevant to the sentence;

(ii) Afford to the defendant his right of allocution; and

(iii) In cases where guilt was determined by plea, inform itself, if not previously informed, of the existence of plea discussions or agreements and the extent to which they involve recommendations as to the appropriate sentence.

(b) When a need for further evidence has not been eliminated by pre-sentence conference pursuant to Rule 12-3.5 (b), evidence offered by the parties on the issue of sentencing shall be presented in open court with full rights of confrontation, cross-examination, and representation by counsel.

Reference: Standard 5.4.

Note: For a related standard, see Pleas of Guilty 1.5.

12-4.5. Special requirements.

(a) The sentencing court shall obtain and consider a pre-sentence report supplemented by a report of defendant's mental, emotional and physical condition, prior to the imposition of a minimum term of imprisonment, a consecutive sentence, a sentence as an habitual offender, or a special term based on exceptional characteristics of the defendant.

(b) The sentencing court shall not impose sentence as an habitual offender or a sentence based on exceptional characteristics of the defendant unless the following steps are taken:

(i) Written notice is served on the defendant and his attorney of the proposed ground on which such a

sentence could be based at least [10 days] prior to the date sentence is to be imposed.

(ii) With the exception of the pre-sentence report and any supplemental reports on the defendant's mental, emotional and physical condition, all the evidence presented to sustain the proposed grounds on which such a sentence could be based shall be presented in open court with full rights of confrontation, cross-examination and representation by counsel. The defendant shall be offered an opportunity to offer evidence and argument in opposition to the proposed action; and

(iii) The pre-sentence report and any supplemental reports on the defendant's mental, emotional and physical condition shall be disclosed to the prosecution and defense at least to the extent required by Rules 12-3.4 and 12-3.5; and

(iv) Each of the findings required as a basis for such a sentence shall be found by the court to exist by a preponderance of the evidence. Such findings are appealable in the manner and to the extent of similar findings made during the trial; and

(v) If the conviction was by plea, it shall affirmatively appear on the record that the plea was entered with knowledge that such a sentence was a possibility. If it does not so appear on the record, the defendant shall not be subject to such a sentence unless he is

first given an opportunity to withdraw his plea without prejudice.

(c) The provisions of subsection (b) shall apply in any proceeding for revocation of a sentence not involving confinement and for revocation of a sentence involving partial confinement.

Reference: Standard 5.5.

12-4.6. Imposition of sentence.

(a) After reaching the conclusions required as a prerequisite to the imposition of the sentence selected, when sentence is imposed, the court shall:

(i) Make specific findings on all controverted issues of fact that are deemed relevant to the sentencing decision;

(ii) State for the record in the presence of the defendant the reasons for selecting the particular sentence to be imposed. In an exceptional case, when the court deems it in the best interest of the defendant not to state fully in his presence the reasons for the sentence, the court shall prepare such a statement for inclusion in the record;

(iii) Assure that the record accurately reflects the time already spent in custody for which credit is given under Rule 12-2.6;

(iv) State the precise terms of the sentence imposed.

Reference: Standard 5.6.

Note: For a related standard, see Appellate Review of Sentences 2.3.

12-4.7. Record.

(a) A record of the sentencing proceeding shall be made and preserved in such a manner that it can be transcribed as needed. The record shall include:

(i) A verbatim account of the entire sentencing proceeding, including the testimony of witnesses and statements of the defendant, the defense attorney, the prosecuting attorney and the court;

(ii) A verbatim account of such parts of the trial on the issue of guilt, or the proceedings leading to acceptance of the plea, as are relevant to the sentencing decision;

(iii) Copies of the pre-sentence report and any other reports or documents available to the sentencing court as aids in passing sentence. That part of the record containing such reports or documents shall be subject to examination by the parties to the extent provided in Rules 12-3.3 and 12-3.4. The record shall reveal what parts of such reports or documents have been disclosed to the parties and by what method such disclosure was made. It shall also contain the record of any pre-sentence conference held in accordance with Rule 12-3.5(b).

(b) The court shall cause the transmission of relevant sentencing information to the prison authorities in the event of a commitment. If the defendant is sentenced to imprisonment for a maximum time in excess of one year, the court shall forward to the prison authorities copies of the items described in Rule 12-4.7(a)(iii). The court shall forward such other parts of the record as are deemed relevant to the defendant's classification and treatment.

Reference: Standard 5.7.

Note: For related standards, see Probation 2.2, 5.4.

12-4.8. Procedure for awarding credit.

(a) Credit required by Rule 12-2.6 shall be awarded in the following manner:

(i) The parties shall inform the court at the time of sentencing of the facts upon which credit for time served prior to the sentencing is claimed;

(ii) The court shall, at the time of sentencing, enter findings of fact regarding the existence of credit for time previously served, and, if appropriate, shall inform the defendant of the amount of such credit that he shall receive;

(iii) Facts upon which credit for time served prior to sentencing will be computed and shall be stated and recorded in the record required by Rule 12-4.7;

(iv) The court shall direct the sheriff or custodian of the person or defendant to communicate to the prison authorities at the time the defendant is delivered for commitment the amount of time spent in custody since the imposition of sentence and cause an entry reflecting that communication to be made a part of the court records;

(v) The total credit to be awarded against the sentence shall be computed by prison authorities as soon as practicable and application thereof shall be forwarded to the sentencing court for inclusion in the court's official record.

(vi) Questions concerning awards of credit shall be subject to post-conviction review.

Reference: Standard 5.8.

Note:

PART V. FURTHER JUDICIAL ACTION

12-5.1. Authority to reduce: general.

(a) The sentencing court shall retain jurisdiction over all persons sentenced before it for a period of [120 days] after imposition of sentence or the final resolution of an appeal. Within such period of time, the sentencing court may reduce or modify the sentence when new factors bearing on the

sentence are made known. Requests under this rule shall be made by defense counsel or others on the defendant's behalf only by written motion or in open court. All proceedings concerning such requests shall also be in open court at hearings set by the judge with notice to counsel of record.

(b) The sentencing court shall not increase a term of imprisonment after it has been imposed.

Reference: Standard 6.1.

12-5.2. Authority to reduce: minimum term.

The sentencing court is authorized to reduce an imposed minimum term to time served, upon motion of the corrections or releasing authorities made at any time.

Reference: Standard 6.2.

12-5.3. Authority to terminate: use of special facilities.

In the event that commitment is made to a special type of facility for a period beyond the maximum sentence normally applicable to the offense, the sentencing court may terminate the commitment or any supervision at any time. The custodial or supervisory authorities shall annually review the progress of the defendant and on such occasions shall make a showing to the sentencing court to the effect that the contemplated treatment is actually being administered to the defendant and shall indicate the progress which the defendant has made.

Reference: Standard 6.3.

12-5.4. Modification of sentence: sentence not involving confinement or sentence to partial confinement.

(a) The sentencing court may at any time terminate continued supervision or its power to revoke a sentence not involving confinement or a sentence involving a partial confinement. The sentencing court may also at any time lessen the conditions on which sentences were imposed, and shorten the time during which the power to revoke will exist.

(b) The sentencing court may revoke a sentence not involving confinement or a sentence to partial confinement on a violation of specific conditions of the sentence, or increase the conditions under which such a sentence will be permitted to continue in effect. The sentencing alternatives which are available upon revocation shall be the same as were available at the time of initial sentencing.

(c) The determination that there has been a violation of the conditions of sentencing shall be governed by the following procedure:

(i) The accusing party shall notify the defendant, his counsel, if he is then represented by counsel, that a specific violation of a specific condition is charged, and that evidence in support of such charge will be presented to the sentencing court at a hearing, and shall be served on the defendant and his

counsel at least [10 days] prior to the time set for hearing.

(ii) The defendant shall be represented by counsel at such hearing. If possible, the attorney who represented the defendant during the trial or plea, shall again represent the defendant for the purpose of the hearing prescribed by this rule.

(iii) At the hearing contemplated by this rule, both parties shall have the same right to produce evidence as in the criminal trial, including the right to subpoena witnesses and/or documentary evidence, the right to cross-examine witnesses and the defendant shall have the right to be confronted by his accusors.

(d) If the court shall determine that a violation of a specified condition has been shown by a preponderance of the evidence, a finding that such violation has occurred shall be made, and the court shall make written findings setting forth the basis of the determination that a violation has occurred. The finding that a violation has occurred or any ruling in connection therewith shall be appealable in the same manner and under the same procedure as rulings in the principal criminal case. The rules relating to appeals in criminal cases shall apply.

(e) The court shall not impose a sentence of total confinement upon revocation unless:

(i) The defendant has been convicted of another crime. The sentence in such a case shall be in accordance with limitations on consecutive sentences set forth in Rule 12-2.4; or

(ii) The defendant's conduct indicates that it is likely that he will commit another crime if he is not imprisoned; or

(iii) Such a sentence is essential to vindicate the authority of the court.

If the revocation of a sentence of partial confinement results in a sentence of total confinement, credit shall be given for all time spent in custody during the sentence to partial confinement.

Reference: Standard 6.4.

Note: For related standards, see Probation 1.1, 3.3, 4.2, 5.1, 5.4.

12-5.5. Modification of sentence: fines; nonpayment.

(a) The sentencing court may at any time revoke or remit a fine or any unpaid portion thereof or modify the terms and conditions of payment. Upon inexcusable failure to pay the fine adjudged against him, the defendant may be ordered to confinement.

(b) Confinement upon nonpayment of a fine shall be adjudged only after the sentencing court has examined the reasons for nonpayment. If nonpayment is found to be

inexcusable, the court may sentence the defendant to jail or to partial confinement for a term not longer than the term authorized by law for the offense for which the defendant was convicted, but in no case shall such term exceed one year. Service of such term shall discharge the obligation to pay the fine. Upon payment of the fine at any time the defendant shall be discharged from confinement.

(c) A fine may, if the court so adjudges, be collected in the manner provided for the collection of judgments in civil cases.

(d) In the event of inexcusable nonpayment by a corporation, the officers thereof may be ordered to confinement, as provided in subsection (b) or the assets of such corporation may be proceeded against, as provided in subsection (c) hereof.

Reference: Standard 6.5.

Title 13

PROBATION

PRELIMINARY COMMENT

The Standards Relating to Probation (1970) cover a wide range of subjects, extending from the powers of sentencing courts to grant probation to the qualifications and compensation of probation officers. It is obvious that full implementation of the Standards Relating to Probation will require legislation at the outset. Indeed, some of the matter covered by these suggested rules will probably, in some jurisdictions, be deemed more properly the subject of statute. Also, the providing of day-to-day probation services is administrative in nature, rather than judicial. Rules governing the structure and operations of the probation service are more appropriately administrative regulations and are not covered here.

Probation is one aspect of the sentencing process. Hence, there is a considerable amount of overlap with the Standards Relating to Sentencing Alternatives. For example, standards relating to the pre-sentence report are included in connection with both subjects. Because the pre-sentence report is fully covered in the Standards Relating to Sentencing Alternatives, the subject is not dealt with in these suggested rules.

The commentary which accompanies the published standards should be read with these proposed implementing rules. It is recognized that the standards are essentially statements of principle and that rules drawn in other forms may be equally effective to implement those principles.

PART I. GENERAL PRINCIPLES

13-1.1. Nature of a sentence to probation.

(a) In these rules the term "probation" means a sentence not involving confinement, but which releases the defendant subject to conditions imposed by the sentencing court and subject to the continuing jurisdiction of the court to modify the conditions of the sentence or to resentence the defendant if he violates such conditions. A sentence to probation shall not require the suspension of the imposition or the execution of any other sentence.

(b) Upon sentencing a defendant to probation the court may, in its discretion require as a condition of probation that the defendant shall be subject to such supervision by the probation service of the court as may be appropriate in the particular case.

(c) The court shall state at the time sentence is imposed the length of the term during which the defendant shall be subject to supervision and during which the court shall retain power to revoke the sentence for violation of the conditions of probation.

(d) A sentence to probation shall be treated as a final judgment for purposes of appeal or other post-conviction review.

Reference: Standards Relating to Probation, (1970) (hereafter in this Title cited as Standard), 1.1(b) through (e).

Note: The rule presupposes a statute authorizing the sentencing court in every case to impose a sentence of probation. (See Standard 1.1(a)). This position is consistent with that taken by the Advisory Committee on Sentencing Alternatives (see Standards Relating to Sentencing Alternatives and Procedures, (1968) 2.3(a).)

12-1.2. Criteria for granting probation.

(a) In determining whether to sentence a defendant to probation, the court shall consider the nature and circumstances of the offense, the history and character of the defendant, and the available institutional and community resources.

(b) A defendant shall be sentenced to probation unless the sentencing court finds that:

(i) confinement is necessary to protect the public from further criminal activity by the defendant; or

(ii) the defendant is in need of correctional treatment which can be most effectively provided if he is confined; or

(iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed.

(c) Whether the defendant pleads guilty, pleads not guilty or intends to appeal is not relevant to the issue of whether probation is an appropriate sentence.

Reference: Standard 1.3.

Note: For a related standard, see Sentencing Alternatives and Procedures 2.3.

PART II. CONDITIONS OF PROBATION

13-2.1. Imposition and implementation of conditions.

(a) All conditions of probation shall be prescribed by the sentencing court and a written statement of such conditions shall be supplied to the defendant. The purpose and scope and possible consequence of any violations of such conditions shall be explained to the defendant by the sentencing court at the time of sentence, or by the probation officer as soon as possible thereafter.

(b) The conditions of probation prescribed by the court shall be implemented by the probation officer, who shall be authorized to make such interpretations and applications as may be necessary to accomplish the objective of probation.

(c) The defendant may at any time apply to the sentencing court for clarification or change of the conditions of probation.

Reference: Standard 3.1.

Note: The intent of subsection (b) is to emphasize the power of the probation officer to exercise discretion in administering the conditions of probation. Literal and rigid enforcement of stated conditions may not always be appropriate. On the other hand, the probation officer ought not to be required to apply to the court for authority to permit minor deviations suggested or required by circumstances not foreseen when the conditions were imposed. At the same time, this rule should not be taken as a basis for the probation officer to

impose his own conditions, thus effectively by-passing the judicial role.

13-2.2. Conditions of probation.

(a) It shall be a condition of every sentence to probation that the defendant will not knowingly violate the law while he is on probation. The sentencing court shall impose such additional conditions as it deems reasonable and likely to assist the defendant to lead a law abiding life.

(b) The conditions of probation shall be stated in the sentence to probation. Such conditions may require that the defendant:

(i) cooperate in a program of supervision;

(ii) meet his family responsibilities;

(iii) maintain steady employment or engage or refrain from engaging in a specific employment or occupation;

(iv) pursue prescribed educational or vocational training;

(v) undergo available medical or psychiatric treatment;

(vi) maintain residence in a prescribed area or in a special facility established for or available to persons on probation;

(vii) refrain from consorting with certain types of people or frequenting certain types of places;

(viii) make restitution of the fruits of the crime or reparation for loss or damage caused thereby;

(ix) satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly

restrictive of his liberty or incompatible with his freedom of conscience.

(c) Conditions requiring payment of fines, restitution, reparation or family support shall be limited by the defendant's financial ability.

(d) It shall not be a condition of probation that the defendant pay the costs of such probation.

Reference: Standard 3.2.

13-2.3. Modification and termination of conditions.

At any time during the term of probation, the court, upon the application of the defendant or a probation officer or on its own motion, may modify or terminate any of the conditions of probation. The defendant shall be informed of any such modification and shall be supplied with a statement of the modified conditions of probation in the manner provided by Rule 13-2.1. When modifications are proposed which would result in some form of confinement as a condition of continued probation, such modification shall not be made until a hearing has been had pursuant to Rule 13-4.5.

Reference: Standard 3.3.

Note: For related standards, see Sentencing Alternatives and Procedures 2.3, 6.4.

PART III. TERMINATION

13-3.1. Completion of term of probation.

Unless his probation has been revoked or terminated at an earlier date, upon the expiration of the term of probation fixed by the sentencing court the defendant shall be discharged and relieved of all restraint and disability imposed by the sentence to probation and shall be deemed to have satisfied his sentence for his offense. No application by the defendant shall be required, but the probation department shall suggest the fact of expiration to the sentencing court who shall enter an order of discharge. A copy of the order of discharge shall be supplied to the defendant.

Reference: Standard 4.1.

13-3.2. Early termination.

If it appears that the defendant is no longer likely to violate the law and that further supervision or enforced compliance with other conditions is no longer necessary, the sentencing court may, upon application of the defendant or the probation officer or on its own motion, terminate the period of probation and discharge the defendant at any time prior to the expiration of the term fixed in the sentence.

Reference: Standard 4.2.

Note: For a related standard, see Sentencing Alternatives and Procedures 6.4. Standard 4.3 urges that every jurisdiction should have a method whereby the collateral effects of a criminal record can be avoided or mitigated during and following the successful completion of a term on probation. (See commentary, Probation, pp. 54-56.) Legislation is probably necessary to accomplish this objective. Hence, no rule is proposed to parallel this standard.

PART IV. REVOCATION OF PROBATION

13-4.1. Grounds for revocation.

The sentencing court may revoke a sentence to probation upon a finding by the court that the defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of probation.

Reference: Standard 5.1(a).

Note: For reasons of clarity and convenience, Standard 5.1 has been divided and is implemented by suggested Rules 13-4.1, 13-4.2 and 13-4.6. Also, much of the language used in Rules 13-4.1 and following is adapted from the Model Penal Code, Sec. 301.3 (P.O.D. 1962). For related standards, see Sentencing Alternatives and Procedures 2.3, 6.4.

13-4.2. Alternatives to revocation.

Before ordering the revocation of a sentence to probation, the court shall consider possible alternatives to revocation, including:

(i) a review of the conditions of probation, followed by such changes as may seem necessary or desirable;

(ii) a formal or informal conference with the defendant to re-emphasize the necessity of compliance with the conditions of probation;

(iii) a formal or informal warning that further violations could result in revocation.

In making its determination, the court may utilize data supplied by the probation department, the defendant, the prosecutor and such other sources of information as may be available to the court. Revocation shall be ordered only when no alternative disposition seems adequate to protect the best interests of the defendant or the public, or both.

Reference: Standard 5.1(b).

13-4.3. Arrest of probationer.

(a) Any person having knowledge that a defendant who has been sentenced to probation has committed an alleged violation of a condition of his probation may file an affidavit in the sentencing court stating the facts constituting such alleged violation. If, upon a consideration of the affidavit and such other evidence as may be presented, the court determines there is probable cause to believe that the defendant has violated a condition of his probation, the court shall summon the defendant to appear before it or issue a warrant for his arrest. The summons or warrant shall be directed to a law enforcement officer and shall be served as process in other criminal cases.

(b) A law enforcement officer, having probable cause to believe that the defendant has committed a felony, or in whose presence the defendant has committed a misdemeanor, may arrest the defendant without a warrant in order that he may be held to answer for violation of his probation.

Reference: Standard 5.2.

Note: It is a condition of every sentence to probation that the defendant not knowingly violate the law. Hence the commission of a fresh crime is a violation of a condition of probation and the circumstances which authorize arrest for the fresh crime also justify arrest and detention for violation of probation. In all cases where the alleged violation consists of conduct not criminal, an arrest for violation of probation can only be made by a law enforcement officer acting under a warrant.

13-4.4. Commission of another crime.

(a) If the alleged violation of probation consists solely of the commission of another crime, the sentence to probation shall not be revoked until the defendant has been convicted of such other crime.

(b) If there is probable cause to believe the defendant has committed another crime or if he has been held to answer therefor, the sentencing court may commit him without bail pending a determination of the charge of another crime by the court having jurisdiction thereof.

Reference: Standard 5.3; Model Penal Code 301.3(1) (c) (P.O.D. 1962).

13-4.5. The revocation proceeding.

(a) The court shall not revoke a sentence to probation or increase the requirements imposed on the defendant thereby except after a hearing. Written notice of the revocation hearing shall be served upon the defendant at least three days prior to the hearing, unless a shorter time is agreed to by the defendant. The notice of hearing shall state the grounds upon which revocation is proposed.

(b) The hearing shall be in open court. The defendant shall have the right to hear and controvert the evidence against him, to offer evidence in his behalf and to have the assistance of counsel. If the defendant is financially unable to procure the services of a lawyer, the court shall assign counsel in the manner provided for the assignment of counsel in the trial of criminal cases.

(c) If the alledged violation is contested, the state may be represented by counsel and shall have the burden of establishing the violation by a preponderance of the evidence.

(d) A record of the testimony and other proceedings at a revocation hearing shall be made and preserved in such a manner that it may be transcribed if needed.

(e) Upon hearing the evidence, if the court finds that the defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of his probation, the court may revoke the sentence to probation and sentence or resentence the defendant as provided by these rules.

Reference: Standard 5.4; Model Penal Code 301.3(1) (P.O.D. 1962).

Note: For related standards, see Criminal Appeals 1.3; Providing Defense Services 4.2, 5.2; Sentencing Alternatives and Procedures 5.5, 5.7, 6.4. See also Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

13-4.6. Resentence after revocation.

(a) When the court revokes a sentence to probation, it may impose on the defendant any sentence that might have been imposed originally for the offense of which he was convicted, except that the defendant shall not be sentenced to confinement unless the court finds on the basis of the original offense and the intervening conduct that:

(i) confinement is necessary to protect the public from further criminal activity; or

(ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or

(iii) it would unduly depreciate the seriousness of the violation if the defendant were sentenced to confinement.

(b) The proceedings on resentence shall be governed by the same rules and subject to the same limitations as are applicable to original sentencing proceedings.

Reference: Standards 5.1(a) and 5.4(a); Model Penal Code 301.3(2) (P.O.D. 1962).

13-4.7. Appeal.

An order revoking probation shall be appealable after the offender has been resentenced. Appeals from orders revoking probation shall be governed by the rules relating to criminal appeals.

Reference: Standard 5.4(d).

Title 14

APPELLATE REVIEW OF SENTENCES

PRELIMINARY COMMENT

It is generally assumed that legislation is a necessary prerequisite to the exercise of appellate jurisdiction to review sentences, although strong argument to the contrary is possible (See Commentary, Standard 1.1, pp. 13-15). Hence, it is likely that in most jurisdictions the Standards Relating to Appellate Review of Sentences will be implemented by rule only after appropriate changes have been made in the substantive law relating to the jurisdiction of Appellate Courts. Illustrations of statutes granting authority to review sentences may be found in Appendix A to the published Standards.

The manner in which sentence is determined and the range of alternatives available to the sentencing agency vary from state to state. In a few states the sentence is determined by the jury rather than by the court. Some jurisdictions make extensive use of the indeterminate sentence while in others fixed terms are imposed within a framework provided by the legislature. Modifications and adaptations of these suggested rules will be required by the sentencing structure of the particular jurisdiction where they are to be employed.

PART I. GENERAL PRINCIPLES

14-1.1. Principle of review.

(a) It is the intent of these rules that judicial review shall be available for all sentences imposed in cases where provision is made for review of the conviction by an appellate court. This includes:

(i) review of a sentence imposed after a guilty plea or plea of nolo contendere if the case is one in which review of the conviction would have been available had the case gone to trial;

(ii) review of a sentence imposed by a trial judge, a trial jury, or the two in combination; and

(iii) review of a re-sentence in the same classes of cases.

References: Standards Relating to Appellate Review of Sentences, Approved Draft, (1968). (Hereinafter in this Title cited as Standard), 1.1.

Note: Standard 1.1(b) provided "Although review of every such sentence ought to be available, it is recognized that it may be desirable, at least for an initial experimental period, to place a reasonable limit on the length and kind of sentence that should be subject to review."

14-1.2. Purposes of review.

The general objectives of sentence review are:

(i) to correct sentences which are excessive in length, having regard to the nature of offense, the character

of the offender and the protection of the public interest;

(ii) to facilitate the rehabilitation of offenders by affording each an opportunity to assert grievances regarding his sentence;

(iii) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and

(iv) to promote the development and application of criteria for sentencing which are both rational and just.

Reference: Standard 1.2.

PART II. AVAILABILITY OF REVIEW

14-2.1. Reviewing court.

Any court to which an appeal from a criminal conviction may be taken may, in accordance with these rules, review the sentence imposed pursuant to such conviction.

Reference: Standard 2.1.

Note: The Standard suggests the possibility of departures from the principles set forth by this rule where intermediate appellate courts are available to review sentences and it is deemed unwise to involve the highest court in such matters.

14-2.2. Procedure and conditions.

(a) If review of the sentence occurs in a case where there has been a trial and conviction on the merits, the review of the sentence on appeal shall be part of and be treated in the same manner as the review of the conviction.

(b) If the appeal is to review a sentence following a plea of guilty or a re-sentencing procedure, where the imposition of sentence was the only issue confronting the court, then an abbreviated procedure for the review shall be utilized as set out below:

(i) The notice of appeal shall be filed within [fifteen] days from the date of imposition of sentence. The notice shall be filed with the clerk of the court, or announced before the court which imposed the sentence. The court shall advise the defendant at the time of sentencing of his right to appeal, including his right to appeal the sentence; of the time within which the appeal must be taken; and of his right to be represented by counsel; and at the same time shall afford him the opportunity to comply orally with the notice requirement. The time for filing the notice of appeal may be extended for not more than [thirty] days by either the sentencing court or the appellate court.

(ii) The sentence appeal is an appeal of right, except in courts where appeal from conviction after trial is

by leave of court. In cases where leave is required, normal appellate procedure shall be followed instead of the special procedure set out in this subsection.

(iii) The notice of appeal will be treated as a request for appointment of counsel and the provisions of the Rules governing Criminal Appeals shall apply with regard to the appointment of counsel, preparation of copies of transcripts and records necessary to present the appeal, and the notice required to be given to representatives of the prosecution.

(iv) If a transcript of any portion of the proceedings is required, the clerk shall request such transcript on the date the notice of appeal is filed, and it shall be prepared forthwith and shall be filed within [ten] days. Copies of the transcript of trial proceedings, including the documents identified by Rule 14-2.3 of these rules shall be supplied to counsel for defendant or to defendant personally.

(v) Unless enlarged by the appellate court, all papers in support of the merits of the appeal shall be filed within [fifteen] days from the date defendant's attorney, or the defendant if he has no attorney, receives a copy of the record and relevant transcripts.

(vi) Any response which the state desires to file shall be filed within [ten] days from the receipt of appellant's submission. A representative of the state, either the local prosecutor or the Attorney General, shall notify the court if no response is being filed.

(vii) All written submissions may be typewritten rather than printed.

(viii) Insofar as they are relevant, the provisions of the Rules Governing Criminal Appeals apply to submissions under this rule. If oral argument is required in any case appealed under this rule, such argument shall be assigned on the calendar and heard as soon as possible. If a hearing is necessary, a panel of three judges may be designated to hear the sentence appeal, without a hearing en banc unless the court so orders. The appeal shall be decided as expeditiously as is consistent with a fair hearing of the defendant's claims.

(ix) The defendant shall commence service of the prison term adjudged upon imposition of the sentence, unless bail or other release is allowed by the sentencing court upon special application, or unless either the sentencing court or the reviewing court specifies upon application that the defendant shall be detained in a local jail until the sentence appeal has been concluded.

(x) The procedure provided in this subsection (b), shall also be followed in cases where the only matter to be appealed relates to the sentence.

Reference: Standard 2.2.

Note: For related standards, see Criminal Appeals 2.2, 3.2; Providing Defense Services 5.2, 5.3; The Defense Function 8.3.

14-2.3. Record on appeal; statement explaining sentence.

(a) The following items shall be included in the record on appeal:

(i) a verbatim record of the entire sentencing proceeding, including any statements in aggravation or mitigation made by the defendant, the defense attorney and the prosecuting attorney, together with any testimony of witnesses received on matters relevant to the sentence (any instructions or comments by the court to the jury in cases where the jury participated in the sentencing decision) and any statements by the court explaining the sentence;

(ii) a verbatim record of such parts of the trial on the issue of guilt, or the proceedings leading to the acceptance of a plea, as are relevant to the sentencing decision;

(iii) copies of the pre-sentence report, the report of a diagnostic facility, or any other reports or documents available to the sentencing court as an

aid in passing sentence. The part of the record containing such reports or documents shall be subject to examination by the parties only to the extent that such examination was permitted prior to the imposition of sentence.

(b) The record shall be prepared in each case in the same manner as is provided for any other record to be presented to the court to which the appeal is taken.

(c) The sentencing judge shall in every case state his reasons for selecting the particular sentence imposed. Such statement shall be made for the record in the presence of the defendant at the time of sentence, unless the judge deems it in the interests of the defendant not to state fully the reasons for the sentence in the defendant's presence. In the latter case, he shall prepare such a statement for transmission to the reviewing court as a part of the record.

Reference: Standard 2.3.

Note: For a related standard, see Sentencing Alternatives and Procedures 5.6.

PART III. SCOPE OF REVIEW

14-3.1. Duties of the reviewing court.

(a) The reviewing court shall make its own examination of the record. Such review shall be designed to effect the objectives of sentence review as stated in Rule 14-1.2.

(b) In those cases in which it would substantially contribute to the achievement of the objectives of sentence review as stated in Rule 14-1.2, the reviewing court shall set forth the basis for its disposition in a written opinion.

Reference: Standard 3.1.

14-3.2. Powers of reviewing court: scope of review.

The authority of the reviewing court with respect to the sentence extends to review of:

(i) The propriety of the sentence, having regard to the nature of the offense, the character of the offender, and the protection of the public interest; and

(ii) The manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based.

Reference: Standard 3.2.

14-3.3. Powers of reviewing court: available dispositions.

The reviewing court shall have power to:

(i) Affirm the sentence under review;

(ii) [With the exception stated in Rule 14-3.4], substitute for the sentence under review any other disposition that was open to the sentencing court; or

(iii) Remand the case for any further proceedings that could have been conducted prior to the imposition of

the sentence under review and, [with the exception stated in Rule 14-3.4,] for re-sentencing on the basis of such further proceedings.

Reference: Standard 3.3.

[14-3.4. Limitation on available dispositions.]

[(a) No reviewing court shall impose, or direct the imposition of, a sentence which results in an increase over the sentence imposed at the trial level.]

[(b) On a remand for the purpose of re-sentencing an offender, no sentencing court shall impose a sentence which results in an increase over the sentence originally imposed.]

Reference: Standard 3.4.

Note: The bracketed portions lf 14-3.3 and all of 14-3.4 are included as alternate provisions. The Standards approved by the Advisory Committee on Sentencing and Review did not include the alternate suggestions. The modifications suggested were approved by the Special Committee on Minimum Standards for Criminal Justice but were rejected by the Council of the Section of Criminal Law of the American Bar Association (See commentary to Revised Part III, pp. 2-3).

Title 15

CRIMINAL APPEALS

PRELIMINARY COMMENT

The text of the Standards Relating to Criminal Appeals (1970) does not, taken alone, provide comprehensive guidelines for a system of rules of appellate procedure. The Standards deal with concepts of justice and general statements respecting judicial policy. They are not concerned with such details as designation and preparation of the record on appeal, form and service of briefs, etc. Hence, the draftsman who seeks to implement the Standards within a system of workable rules governing appellate practice must look beyond the specific language of the Standards. The rules here suggested are an adaptation of the Federal Rules of Appellate Procedure, as amended to November 15, 1975, with such amendments, modifications and deletions as seem to the drafter to be necessary to comply with the Standards and requirements of state appellate practice.

Because we are particularly concerned with implementing standards for criminal justice, our focus here is upon appeals in criminal cases. However, it seems likely that in most jurisdictions the rules governing criminal appeals will be integrated with rules governing appellate procedure generally. A separate set of rules governing criminal appeals seems

justifiable only where, contrary to the recommendation of the Standards (1.2), there are separate courts of criminal appeal. The general procedures prescribed by these proposed rules, like the federal rules which they closely parallel, are suitable for processing both civil and criminal appeals. While those parts of the federal rules that seem to relate to matters purely non-criminal have been omitted from this draft, the addition of such material can be accomplished with minimal effort.

It should be noted that certain of the Standards contain matter that can be implemented only by legislation. Such subjects as the right to appellate review (1.1) and the structure of appellate courts (1.2) are matters of substantive law and hardly within the purview of court rule. To the extent that the text of the standards relates to matters of substantive law, their content may not be expressed in these rules. However, the rules assume a constitutional and statutory framework consistent with the Standards.

PART I. APPLICABILITY

15-1.1. Scope of rules.

These rules govern appeals to the [Supreme Court] [Court of Appeals] [other Appellate Court] of the state of _____ from judgments entered and sentences imposed in criminal cases by district courts [other trial courts] of the state of _____, and procedure upon applications for

other relief which the Appellate Court or a justice thereof is competent to give in criminal cases.

Reference: Rule 1(a), Federal Rules of Appellate Procedure (hereafter in References and Comments in this Title cited as Rule); Standards Relating to Criminal Appeals, (1970), (hereafter in this Title cited as Standard), 1.1.

Note: Standard 1.1 declares that every convicted defendant should have a right to appeal from the judgment of the trial court. As the right to appeal is a matter of substantive law, it is more appropriately a subject of legislation than for court rule. However, these rules contemplate a framework of substantive law which is consistent with the Standards. Standard 1.2 deals with the structure of appellate courts. This, too, is a subject for legislation. It should be noted that this draft assumes a single appellate review. Modifications will be necessary in jurisdictions with two levels of Appellate Courts. The phrase "Appellate Court", as used herein, may indicate, in a particular jurisdiction, the supreme court, court of appeals or other court of appellate review.

15-1.2. Purposes of appellate review.

These rules shall be construed to accomplish the purposes of appellate review, which are declared to be:

(i) to protect defendants against prejudicial legal error in proceedings leading to conviction and against verdicts unsupported by legally sufficient evidence;

(ii) to develop and refine the substantive and procedural doctrines and principles of criminal law; and

(iii) to foster and maintain uniform, consistent standards and practices in the criminal process.

Reference: Standard 1.2(a).

Note: For a related standard, see Probation 1.1, 5.4.

15-1.3. Rules not to affect jurisdiction.

These rules shall not be construed to extend or limit the jurisdiction of the Supreme Court as established by law.

Reference: Rule 1(b).

15-1.4. Suspension of rules.

In the interest of expediting decision, or for other good cause shown, the Appellate Court may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

Reference: Rule 2.

15-1.5. Limitations of defendant's appeals: final judgments and interlocutory appeals.

(a) A defendant may appeal as a matter of right from any final judgment adverse to him, including

(i) a conviction followed by a sentence of probation, or

(ii) a conviction followed by a sentence suspended as to imposition or execution, or

(iii) a conviction based on a plea of guilty or nolo contendere.

(b) A defendant may not appeal until final judgment adverse to him has been entered by the trial court, except

(i) a defendant may appeal from an order granting a new trial when the defendant claims that the district court should have entered a final judgment in his favor, or

(ii) a defendant may appeal from an order, not on his motion, finding him incompetent to stand trial.

(c) After final judgment adverse to him has been entered by the district court, a defendant may seek review of orders denying pre-trial defensive motions, even though he has thereafter entered a plea of guilty or nolo contendere.

(d) The district judge imposing sentence shall advise the defendant of his right to appeal and the time and place within which the notice of appeal must be filed.

Reference: Standards 1.3 and 2.1(b).

Note: For related standards, see Probation 1.1, 5.4.

15-1.6. State appeals; custody of the defendant.

The state may appeal

(i) from judgments dismissing an indictment or information on substantive grounds;

(ii) from pre-trial orders that terminate the prosecution;

(iii) from pre-trial orders that seriously impede the prosecution.

Reference: Standard 1.4.

Note: See Standard 1.4 and illustrations of grounds included in subdivisions i, ii and iii.

PART II. TRANSITION FROM TRIAL COURT TO APPEALLATE COURT

15-2.1. Notice of appeal.

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to the Appellate Court shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 15-2.2. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Appellate Court deems appropriate, which may include dismissal of the appeal.

(b) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the Appellate Court upon its own motion or upon motions of a party, or by stipulation of the parties to the several appeals.

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall state that the appeal is to the Appellate Court.

(d) Service of Notice of Appeal. The clerk of the district court shall serve notice of the filing of a notice of appeal by delivering a copy of the notice of appeal to the defendant personally or by mail addressed to him, and by mailing a copy thereof to counsel of record for each party. The clerk shall also mail a copy of the notice of appeal and the docket entries to the clerk of the Appellate Court. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

Reference: Rule 3; Standard 2.1.

15-2.2. Time for taking appeal.

The notice of appeal by a defendant shall be filed in the district court within [30 days] after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken with [30 days] after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will

similarly extend the time for appeal from a judgment of conviction if the motion is made before or [30 days] after entry of the judgment. When an appeal by the state is authorized by statute, the notice of appeal shall be filed in the district court within [30 days] after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed [60 days] from the expiration of the time otherwise prescribed by this subdivision.

Reference: Rule 4; Standard 2.1.

15-2.3. Trial counsel's duties with regard to appeals.

(a) Continuing Duty of Trial Counsel. Counsel who represented the defendant at his trial or plea shall continue to represent the defendant to advise on whether to take an appeal and, if an appeal is sought, through the appeal unless new counsel is substituted or unless the Appellate Court permits counsel to withdraw in the interests of justice or for other sufficient cause.

(b) Duty to Advise Client. Trial counsel shall advise the defendant of the meaning of the court's judgment. If the judgment is adverse to the defendant, counsel shall advise him

of his right to appeal, the possible grounds for appeal, his opinion of the probable outcome of the appeal and possible advantages of foregoing an appeal. He shall also advise the defendant that the taking of an appeal will not prejudice defendant's legal status with regard to probation, suspension of sentence, parole, place of confinement or later proceedings for executive clemency, pardon or collateral attack upon the conviction. The decision whether to appeal shall be made by the defendant after he has been advised by counsel.

(c) Appointment of New Counsel. The court may upon request or for cause relieve trial counsel appointed to represent an indigent defendant and appoint new counsel for the appeal. The appointment of new appellate counsel shall be made on the day that trial counsel is relieved of his duties.

(d) When Defendant Not Represented at Trial. In the case of a defendant who has waived counsel at his trial or plea, the court, upon announcing any judgment adverse to the defendant shall inform him of his right to appeal and the right of an indigent person to appeal in forma pauperis. If the defendant claims to be an indigent person and requests permission to proceed in forma pauperis, the court shall make such investigation as may be necessary to determine whether the defendant is in fact indigent. If the court determines that the defendant is an indigent person, it shall grant permission to proceed in forma pauperis, appoint an attorney forthwith and direct the clerk to assemble the records

necessary for the appeal, including the transcript of proceedings in the district court, and forward copies of such records to the attorney so appointed. If the court finds the defendant is not an indigent person, it shall inform him of the time limits established by law for the preparation and filing of the documents necessary to present the case on appeal.

Reference: Standard 2.2.

Note: For related standards, see Appellate Review of Sentences 2.2; Post-Conviction Remedies 4.4, 5.2; Providing Defense Services 5.2, 5.3; The Defense Function 8.2, 8.3.

15-2.4. Proceedings in Forma Pauperis.

(a) Leave to Proceed on Appeal in Forma Pauperis. A convicted defendant who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave to so proceed, together with an affidavit showing his inability to pay fees and costs or give security therefor, his belief that he is entitled to redress and a statement of the issues which he intends to present on appeal. If the motion is granted, he may proceed without further application to the Appellate Court and without prepayment of fees and costs or the giving of security therefor. If the motion is denied the district court shall state the reasons therefor in writing.

Notwithstanding the provisions of the preceding paragraph, a defendant who prior to trial or plea was

determined to be financially unable to obtain an adequate defense, may proceed on appeal in forma pauperis without further authorization.

If a motion for leave to proceed in forma pauperis is denied by the district court the clerk shall forthwith serve notice of such action. A motion for leave to proceed in forma pauperis may be filed with the Appellate Court within [30 days] after service of notice of the action of the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of the reasons given by the district court for its action.

(b) Form of Briefs, Appendices and Other Papers. A defendant who is allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form and may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.

Reference: Rule 24; Standards 3.3.

Note: Rule 24 requires a determination that the appeal is taken in good faith. This requirement is not included in the proposed rule. (See Standard 3.3(b) and commentary, pp. 88-91).

For suggested form of Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis, see Form 4, Appendix of Forms, Federal Rules of Appellate Procedure.

15-2.5. Stay of execution and relief pending review.

(a) Death. A sentence of death shall be stayed if an appeal is taken.

(b) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken and the defendant is released pending disposition of the appeal. If not stayed, the court may recommend to the director of penal [or other appropriate agency] institutions that the defendant be retained at, or transferred to, a place of confinement near the place of trial or the place where his appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of his appeal to the Appellate Court.

(c) Fine. A sentence to pay a fine, if an appeal is taken, may be stayed by the district court or by the Appellate Court upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets.

(d) Probation. An order placing the defendant on probation may be stayed if an appeal is taken. If not stayed the court shall specify when the term of probation shall commence. If the order is stayed, the court shall fix the terms of the stay.

Reference: Rule 38, Federal Rules of Criminal Procedure.

15-2.6. Release of defendant.

(a) Appeals From Orders Respecting Release Entered Prior to a Judgment of Conviction. An appeal authorized by law from an order refusing or imposing conditions or release shall be determined promptly. Upon entry of an order refusing or imposing conditions of release, the district court shall state in writing the reasons for the action taken. The appeal shall be heard without necessity of briefs after reasonable notice to the appellee upon such papers, affidavits, and portions of the record as the parties shall present. The Appellate Court or a justice may order the release of the appellant pending the appeal.

(b) Release Pending Appeal From a Judgment of Conviction Application for release after a judgment of conviction shall be made in the first instance in the district court. If the district court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review, may be made to the Appellate Court or to a justice thereof. The motion shall be determined promptly upon such papers, affidavits and portions of the record as the parties shall present and after reasonable notice to the appellee. The Appellate Court or a justice

thereof may order the release of the appellant pending disposition of the motion.

(c) The decision as to release pending appeal shall be made in accordance with the rules relating to pre-trial release. The burden of establishing that the defendant will not flee or pose a danger to any other person or the community rests with the defendant.

(d) Release Pending Appeal by State. When the state appeals from an order dismissing the indictment or information on substantive grounds, or from an order sustaining a pre-trial motion that terminates the prosecution, the defendant shall be released on nominal bail or his own recognizance pending decision on the appeal. In other cases of appeals by the state, the defendant shall not be denied liberty pending determination of the appeal unless there is cogent evidence that he will not abide by the judgment of the appellate court.

Reference: Rule 9; Standard 1.4(c).

15-3.1. Supervision during preparation.

Each departmental justice, with the assistance of the judicial administrator, shall be responsible for the continuing supervision of appeals originating in his department from docketing through hearing and submission, and shall determine such procedural issues as may arise during the pendency of the appeal.

Reference: Standard 3.1.

Note: For a related standard, see Providing Defense Services 5.2.

15-3.2. Counsel on appeal.

(a) Right to Counsel. Every appellant shall have the assistance of counsel at all stages of the appeal. Counsel shall be assigned to any unrepresented appellant proceeding in forma pauperis unless the right to counsel is waived in writing.

(b) Withdrawal. Counsel shall not be permitted to withdraw from a case solely because of his determination that the case lacks merit.

(i) Counsel shall give his client his best professional estimate of the quality of the case and shall endeavor to persuade the client to abandon a wholly frivolous appeal, or to eliminate particular contentions that are lacking in substance.

(ii) If the client determines to proceed, counsel shall present the arguments for the appellant in the most favorable light, so long as he does not deceive or mislead the court. After preparing and filing a brief on behalf of his client, counsel may appropriately suggest that the case be submitted on briefs or request permission to withdraw.

(c) Dismissal. Assigned counsel shall be dismissed at the request of the appellant only when cause therefor is shown.

Reference: Standard 3.2.

Note: For related standards, see Appellate Review of Sentences 2.2; Discovery and Procedure Before Trial 5.3; Post-Conviction Remedies 4.4; Providing Defense Services 2.4, 5.2, 5.3, 7.2, 7.3; The Defense Function 8.2, 8.3, 8.4.

15-3.3. The record on appeal.

(a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered. Except as provided in subsection (c), within [10 days] after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such findings or conclusions. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on the appeal. If the appellee deems a transcript of other parts of the

proceeding to be necessary he shall, within [10 days] after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the district court for an order requiring the appellant to do so. At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(c) Statement of the Evidence or Proceeding When No Report Was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within [10 days] after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

(d) Agreed Statement as the Record on Appeal. In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many

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of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the Supreme Court as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 15-3.4. Copies of the agreed statement may be filed as the appendix required by Rule 15-4.6.

(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the Appellate Court, or the Appellate Court, on proper suggestion or of its own initiative, may direct that the omission or misstatement be correct, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the Supreme Court.

Reference: Rule 10; Standard 3.3.

15-3.4. Transmission of the Record.

(a) Time for Transmission; Duty of Appellant. The record on appeal, including the transcript and exhibits necessary for the appeal, shall be transmitted to the Appellate Court within [40 days] after the filing of the notice of appeal unless the time is shortened or extended by an order entered under subdivision (d) of this rule. After filing the notice of appeal the appellant shall comply with the provisions of Rule 15-3.3(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is taken, each appellant shall comply with the provisions of Rule 15-3.3(b) and this subdivision, and a single record shall be transmitted within [40 days] after the filing of the final notice of appeal.

(b) Duty of Clerk to Transmit the Record. When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it to the clerk of the Appellate Court. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of the documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the Appellate Court. A party must make advance arrangements with the clerk for the transportation and receipt of exhibits of unusual bulk or weight.

Transmission of the record is effected when the clerk of the district court mails or otherwise forwards the record to the clerk of the Appellate Court. The clerk of the district court shall indicate, by endorsement on the face of the record or otherwise, the date which it is transmitted to the Appellate Court.

(c) Temporary Retention of Record in District Court for Use in Preparing Appellate Papers. Notwithstanding the provisions of subdivisions (a) and (b) of this rule, the parties may stipulate, or the district court on motion of any party may order, that the clerk of the district court shall temporarily retain the record for use by the parties in preparing appellate papers. In that event, the appellant shall nevertheless cause the appeal to be docketed and the record to be filed within the time fixed or allowed for transmission of the record by complying with the provisions of Rule 15-3.5(a) and by presenting to the clerk of the Appellate Court a partial record in the form of a copy of the docket entries, accompanied by a certificate of counsel for the appellant, or of the appellant if he is without counsel, reciting that the record, including the transcript or parts thereof designed for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the court may order, the appellant shall request the clerk of the district court to transmit the record.

(d) Extension of Time for Transmission of the Record; Reduction of Time. The district court for cause shown may extend the time for transmitting the record. A request for extension must be made within the time originally prescribed or within an extension previously granted, and the district court shall not extend the time to a day more than [90 days] from the date of filing of the first notice of appeal. If the district court is without authority to grant the relief sought or has denied a request therefor, the Appellate Court may on motion for cause shown extend the time for transmitting the record or may permit the record to be transmitted and filed after the expiration of the time allowed or fixed. If a request for an extension of time for transmitting the record has been previously denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given. The district court or the Appellate Court may require the record to be transmitted and the appeal to be docketed at any time within the time otherwise fixed or allowed therefor.

(e) Retention of the Record in the District Court by Order of Court. The Appellate Court may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record or any part thereof is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the

subject to the request of the court of appeals, and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow and copies of such parts as the parties may designate.

(f) Stipulation of Parties that Parts of the Record be Retained in the District Court. The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the Appellate Court shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(g) Record for Preliminary Hearing in the Appellate Court. If prior to the time the record is transmitted a party desires to make in the Appellate Court a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond, or for an intermediate order, the clerk of the district court at the request of any party shall transmit to the Appellate Court such parts of the original record as any party shall designate.

Reference: Rule 11.

15-3.5. Docketing the appeal; filing of the record.

(a) Docketing the Appeal. Within the time allowed or fixed for transmission of the record, the appellant shall pay

to the clerk of the Appellate Court the docket fee fixed by law, and the clerk shall thereupon enter the appeal upon the docket. If an appellant is authorized to prosecute the appeal without prepayment of fees, the clerk shall enter the appeal upon the docket at the request of a party or at the time of filing the record. The Appellate Court may upon motion for cause shown enlarge the time for docketing the appeal or permit the appeal to be docketed out of time. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, his name, identified as appellant, shall be added to the title.

(b) Filing of the Record. Upon receipt of the record or of papers authorized to be filed in lieu of the record under the provisions of Rule 15-3.4(c) and 15-3.4(e) by the clerk of the Appellate Court following timely transmittal, and after the appeal has been timely docketed, the clerk shall file the record. The clerk shall immediately give notice to all parties of the date on which the record was filed.

(c) Dismissal for Failure of Appellant to Cause Timely Transmission or to Docket Appeal. If the appellant shall fail to cause timely transmission of the record or to pay the docket fee if a docket fee is required, the appellee may file a motion in the Appellate Court to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the district court showing the date and substance of the judgment

or order from which the appeal was taken, the date on which the notice of appeal was filed, the expiration date of any order extending the time for transmitting the record, and by proof of service. The appellant may respond within [14 days] of such service. The clerk shall docket the appeal for the purpose of permitting the court to entertain the motion without requiring payment of the docket fee, but the appellant shall not be permitted to respond without payment of the fee unless he is otherwise exempt therefrom.

Reference: Rule 12.

PART IV. GENERAL PROCEDURAL PROVISIONS

15-4.1. Filing and Service.

(a) Filing. Papers required or permitted to be filed in the Appellate Court shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery of mail, excepting special delivery, is utilized. If a motion requests relief which may be granted by a single justice, the justice may permit the motion to be filed with him, in which even he shall note thereon the date of filing and shall thereafter transmit it to the clerk.

(b) Service of All Papers Required. Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or persons acting for him on all other parties to the appeal. Service on a party represented by counsel shall be made on counsel.

(c) Manner of Service. Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(d) Proof of Service. Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the person served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment or proof of service but shall require such to be filed promptly thereafter.

Reference: Rule 25.

15-4.2. Computation and extension of time.

(a) Computation of Time. In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall

not be included. The last day of the period shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

(b) Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time.

(c) Additional Time after Service by Mail. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period.

Reference: Rule 26; Standard 2.2.

Note: The term "legal holiday" is defined in Rule 26.

15-4.3. Motions.

(a) Content of Motions; Response; Reply. Unless otherwise prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought.

If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within [7 days] after service of the motion, but motions authorized by Rules 15-2.5, 15-2.6 and 15-4.13 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

(b) Determination of Motions for Procedural Orders. Notwithstanding the provisions of the preceding paragraph as to motions generally, motions for procedural orders, including any motion under Rule 15-4.2(b) may be acted upon at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.

(c) Power of a Single Justice to Entertain Motions. In addition to the authority expressly conferred by these rules or by law, a single justice of the Appellate Court may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single justice may not dismiss or otherwise determine an appeal or other proceeding, and except that the Appellate Court may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single justice may be reviewed by the court.

(d) Form of Papers; Number of copies. All papers relating to motions may be typewritten. [Seven] copies shall

be filed with the original, but the court may require that additional copies be furnished.

Reference: Rule 27.

15-4.4. Briefs.

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(i) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited with references to the pages of the brief where they are cited.

(ii) A statement of the issues presented for review.

(iii) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of the proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(iv) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.

(v) A short conclusion stating the precise relief sought.

(b) Brief of the Appellee. The brief of the appellee shall conform to the requirements of subdivision (a)(i)-(iv), except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(c) Reply Brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. No further briefs may be filed except with leave of court.

(d) Reference in Briefs to Parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee". It promotes clarity to use the designations used in the lower court or the actual names of parties.

(e) References in Briefs to the Record. References in the briefs to parts of the record reproduced in the appendix filed with the brief of the appellant (see Rule 15-4.7(a)) shall be to the pages of the appendix at which those parts appear. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 15-4.6(c). If the record is reproduced in accordance with the provisions of Rule 15-4.6(f), or if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved; e.g.,

Indictment, p. 7; Motion to Dismiss, p. 2; Transcript, p. 231. Intelligible abbreviations may be used. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) Reproduction of Statutes, Rules, Regulations, Etc. If determination of the issues presented requires the study of statutes, rules, regulations, etc., or relevant parts thereof, they shall be reproduced in the brief or in the addendum at the end, or they may be supplied to the court in pamphlet form.

(g) Length of Briefs. Except by permission of the court, principal briefs shall not exceed [50] pages of standard typographic printing or [70] pages of printing by any other process of duplicating or copying, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. And except by permission of the court, reply briefs shall not exceed [25] pages of standard typographic printing or [35] pages of printing by any other process of duplicating or copying.

(h) Briefs in Cases Involving Cross Appeals. If a cross appeal is filed, the plaintiff in the court below shall be deemed the appellant for the purposes of this rule and Rules 15-4.6 and 15-4.7, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall

contain the issues and argument involved in his appeal as well as the answer to the brief of the appellant.

(i) Briefs in Cases Involving Multiple Appellants. In cases involving more than one appellant, including cases consolidated for purposes of the appeal, any number may join in a single brief, and any appellant may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

Reference: Rule 28.

15-4.4. Brief of Amicus Curiae.

A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.

Reference: Rule 29.

15-4.6. Appendix to the briefs.

(a) Duty of Appellant to Prepare and File; Content of Appendix, Time for Filing; Number of Copies. The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portion of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other part of the record to which the parties wish to direct the particular attention of the court. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with his brief. [Ten] copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number.

(b) Determination of Contents of Appendix. The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than [10 days] after the date on which the record is filed, serve on the appellee a designation of the parts of the record

which he intends to include in the appendix and a statement of the issues which he intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, he shall, within [10] days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

(c) Alternative Method of Designating Contents in the Appendix; How References to the Record May be Made in the Briefs When Alternative Method is Used. If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed [21] days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deterred, the provisions of subdivision (b) of this Rule 15-4.6 shall apply, except that the designations referred to therein shall be made by each party at the time his brief is served, and a statement of the issue presented shall be unnecessary.

If the deferred appendix authorized by this subdivision is emloyed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event

the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where the page begins. Or if a party desires to refer in his brief directly to pages of the appendix, he may serve and file typewritten or page proof copies of his brief within the time required by Rule 15-4.7(a) with appropriate references to the pages of the parts of the record involved. In that event, within [14] days after the appendix is filed he shall serve and file copies of the brief in the form prescribed by Rule 15-4.8(a) containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.

(d) Arrangement of the Appendix. At the beginning of the appendix there shall be inserted a list of the parts of the record which it contains, in the order in which the parts are set out therein, with references to the pages of the appendix at which each part begins. The relevant docket entries shall be set out following the list of contents. Thereafter, other parts of the record shall be set out in chronological order. When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript

must be indicated by astericks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.

(e) Reproduction of Exhibits. Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. [Four] copies thereof shall be filed with the appendix and one copy shall be served on counsel for each party separately represented.

(f) Hearings of Appeals on the Original Record Without the Necessity of an Appendix. The Appellate Court may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

Reference: Rule 30.

15-4.7. Filing and service of briefs.

(a) Time for Serving and Filing Briefs. The appellant shall serve and file his brief with [40 days] after the date on which the record is filed. The appellee shall serve and file his brief within [30 days] after service of the brief of the appellant. The appellant may serve and file a reply brief within [14 days] after service of the brief of the appellee, but except for good cause shown, a reply brief must be filed

at least [3 days] before argument. The Appellate Court may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

(b) Number of Copies to be Filed and Served. [Twenty-five] copies of each brief shall be filed with the clerk, unless the court by order in a particular case shall direct a lesser number, and two copies shall be served on counsel for each party separately represented. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and [seven] legible copies shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented.

(c) Consequence of Failure to File Briefs. If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file his brief, he will not be heard at oral argument except by permission of the Appellate Court.

Reference: Rule 31.

15-4.8. Form of briefs, the appendix and other papers.

(a) Forms of Briefs and the Appendix. Briefs and appendices may be produced by standard typographic printing or by duplicating or copying process which produces a clear black image on white paper. Carbon copies of briefs and appendices

may not be submitted without permission of the court, except in behalf of parties allowed to proceed forma pauperis. All printed matter must appear in at least 11 point type on opaque, unglazed paper. Briefs and appendices produced by the standard typographic process shall be bound in volumes having pages 6 1/8 by 9 1/4 inches and type matter 4 1/6 by 7 1/6 inches. Those produced by any other process shall be bound in volumes having pages not exceeding 8 1/2 by 11 inches and type matter not exceeding 6 1/2 by 9 1/2 inches, with double spacing between each line of text. Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available, the cover of the brief of the appellant should be blue; that of the appellee red; that of the intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix, if separately printed, should be white. The front covers of the briefs and of appendices, if separately printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 15-3.5(a)); (3) the nature of the proceeding in the court (e.g., Appeal) and the name of the court below; (4) the title of the document (e.g., Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.

(b) Form of Other Papers. Petitions for rehearing shall be produced in a manner prescribed in subdivision (a). Motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8 1/2 by 11 inches in size. Lines of typewritten text shall be double spaced. Consecutive sheets shall be attached at the left margin. Carbon copies may be used for filing and service if they are legible.

A motion or other paper addressed to the court shall contain a caption setting forth the name of the court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper.

Reference: Rule 32.

15-4.9. Prehearing conference.

The court may direct the attorneys for the parties to appear before the court or justice thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or justice shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

Reference: Rule 33.

15-4.10. Oral argument.

(a) Notice of Argument; Postponement. The clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed reasonably in advance of the date fixed for hearing.

(b) Time Allowed for Argument. Unless otherwise provided by rule for all cases or for classes of cases, each side will be allowed [30] minutes for argument. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument he may request such additional time as he deems necessary; requests may be made by letter addressed to the clerk reasonably in advance of the date fixed for the argument and shall be liberally granted if cause therefor is shown. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

(c) Order and Content of Argument. The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Counsel will not be permitted to read at length from briefs, records or authorities.

(d) Cross and Separate Appeals. A cross or separate appeal shall be argued with the initial appeal at a single

argument, unless the court otherwise directs. If a case involves a cross-appeal, the plaintiff in the action below shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.

(e) Non-appearance of Parties. If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if his counsel is present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.

(f) Submission on Briefs. By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(g) Use of Physical Exhibits at Argument; Removal. If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the courtroom before the court convenes on the date of the argument. After the argument counsel shall cause the exhibits to be removed from the courtroom unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

Reference: Rule 34.

15-4.11. Entry of judgment.

The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

Reference: Rule 36.

15-4.12. Petition for rehearing.

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within [14 days] after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which is the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition

as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calender for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) Form of Petition; Length. The petition shall be in a form prescribed by Rule 15-4.8(a), and copies shall be served and filed as prescribed by Rule 15-4.7(b) for the service and filing of briefs. Except by permission of the court, a petition for rehearing shall not exceed 10 pages of standard typographic printing or [15] pages of printing by any other process of duplicating or copying.

Reference: Rule 40.

15-4.13. Issuance of mandate; stay of mandate.

(a) Date of Issuance. The mandate of the court shall issue [21 days] after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing

will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue [seven] days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(b) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the Supreme Court of the United States for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed [30 days] unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the Appellate Court a notice from the clerk of the Supreme Court of the United States that the party who had obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court of the United States. Upon the filing of a copy of an order of the Supreme Court of the United States denying the petition for writ of certiorari the mandate shall issue immediately.

Reference: Rule 41.

15-4.14. Voluntary dismissal.

(a) Dismissal in the District Court. If an appeal has not been docketed, the appeal may be dismissed by the district court upon the filing in that court of a stipulation for

dismissal signed by all the parties, or upon motion and notice by the appellant.

(b) Dismissal in the Supreme Court. If the parties to an appeal or other proceedings shall sign and file with the clerk of the Supreme Court an agreement that the proceeding be dismissed, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.

Reference: Rule 42.

Title 16

POST-CONVICTION REMEDIES

PRELIMINARY COMMENT

As used in this Title, the phrase "post-conviction remedies" includes those preceedings attacking the judgment which may be invoked collaterally after the final appeal from conviction has been decided or after the prescribed time for taking an appeal has passed. It does not include the appeal and proceedings incident thereto. It does include the claims for relief historically asserted by prisoners in the form of habeas corpus, coram nobis, and the like. Because the proposed standard changes significantly the traditional forms under which post-conviction relief is sought, legislation is probably necessary at the outset of the implementation process.

PART I. GENERAL PRINCIPLES

16-1.1. Unitary post-conviction remedy.

Any person desiring to seek a review of the validity of a judgment of conviction by a court exercising criminal jurisdiction, or the legality of custody or supervision based upon a judgment of conviction, may file an application for post-conviction relief in the manner prescribed by these rules.

The remedy herein provided shall encompass all claims, whether factual or legal in nature, and shall take primacy over any existing procedure or process for the determination of such claims.

Reference: Standards Relating to Post-Conviction Remedies, (1968), (hereafter cited in this Title as Standard), 1.1.

16-1.2. Characterization of the proceeding.

The application for post-conviction relief shall be filed as a separate proceeding in the case in which the judgment of conviction or sentence was entered. Proceedings thereon shall be consistent with the objectives of the remedy. The rules governing procedure in civil cases shall apply in such proceedings, unless otherwise provided by law or these rules.

Reference: Standard 1.2.

16-1.3. Parties; legal representatives of the respondent.

(a) The application for post-conviction relief shall be filed with the clerk of the appropriate court by the person seeking relief, who shall proceed in his own name. The respondent named in the application shall be the State of _____, or other entity in whose name the original prosecution was brought.

(b) The attorney general shall have primary responsibility for responding to applications for

post-conviction relief. The attorney general shall have power to assign any case to the local prosecutor in the county or district in which the original prosecution was had when he deems it in the best interest of the state to do so.

Reference: Standard 1.3.

16-1.4. Jurisdiction and venue.

(a) The district court shall have original jurisdiction to entertain and try applications for post-conviction relief.

(b) The application for post-conviction relief shall be filed in the district court in which the judgment of conviction and sentence challenged by the applicant was rendered. After the application has been received and filed it shall be transmitted by the clerk of the court to the district judge who shall hear the case. Upon motion of any party to the action or upon the court's own order, and when the interests of justice require, the application may be transferred for hearing to another district court or judge to be designated by the judicial administrator or clerk of the Supreme Court.

(c) If an application for post-conviction relief is assigned to the judge who presided at the prosecution in which the challenged judgment or sentence was rendered, he may, upon his own election, be excused from proceeding with the case, whether or not formally disqualified by bias or by being a potential witness. In any case in which the judge is excused under this rule he shall notify the judicial administrator or

clerk of the Supreme Court who shall assign another judge to hear the application.

Reference: Standard 1.4.

Note: Standard 1.4 authorizes jurisdiction to be vested in either local trial courts or a single court of statewide jurisdiction. The rule is drawn consistent with practice that appears currently in use in most jurisdictions.

The term "district court" is used to identify local trial courts exercising general criminal jurisdiction.

PART II. SCOPE OF REMEDY

16-2.1. Grounds for relief.

(a) The application for post-conviction relief provided by these rules may raise any meritorious claim challenging a judgment or conviction, including claims:

(i) that the conviction was obtained or sentence imposed in violation of the Constitution of the United States or the Constitution or laws of the State of _____.

(ii) that the applicant was convicted under a statute that is in violation of the Constitution of the State of _____, or that the conduct for which the applicant was prosecuted is constitutionally protected;

(iii) that the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;

(iv) that the sentence imposed exceeded the maximum authorized by law or is otherwise not in accordance with the sentence authorized by law;

(v) that there exists evidence of material facts, not previously presented and heard, which require vacation of the conviction or sentence in the interest of justice;

(vi) that there has been a significant change in the law, either substantive or procedural, applied in the process leading to applicant's conviction or sentence, and that sufficient reasons exist to allow retroactive application of the changed legal standard;

(vii) that there are grounds otherwise properly the basis for collateral attack upon the judgment.

(b) The application for post-conviction relief may challenge the legality of custody or restraint based upon a judgment of conviction, including claims that a sentence has been fully served or that there has been an unlawful revocation of probation or parole or conditional release.

Reference: Standard 2.1.

16-2.2. Prematurity of Application; postponed appeals.

(a) An application for post-conviction relief shall not be filed or heard so long as there is a possibility that the

issues sought to be presented may be raised by a timely appeal from the judgment and sentence.

(b) If an application for leave to take a postponed appeal, filed pursuant to the rules governing criminal appeals, is denied on the ground that it raises issues outside the record, or if for any other reason it appears more appropriate to consider the claim in a post-conviction proceeding, the Supreme Court may cause the proceeding to be transferred to district court having venue, where it shall be docketed and processed as an original application for post-conviction relief.

Reference: Standard 2.2.

Note: Provisions relating to the time within which appeals may be taken and the conditions under which postponed appeals are authorized will be found in the rules of the jurisdiction relating to criminal appeals.

16-2.3. Custody requirement.

The fact that an applicant for post-conviction relief is not then in custody or restraint pursuant to the judgment or sentence that he is attacking shall not be grounds for dismissal or denial of the relief sought. The right of an applicant to seek relief from an invalid conviction under these rules shall not be denied because:

(i) the applicant pleaded guilty;

(ii) the applicant was sentenced only to pay a fine;

(iii) the applicant applied for or was granted probation or suspended sentence;

(iv) the applicant has not commenced service of the challenged sentence;

(v) the applicant has completely served the challenged sentence or is on parole or conditional release.

Reference: Standard 2.3.

16-2.4. Limitations; abuse of process; stale claims.

(a) An application for post-conviction relief shall not be barred solely by the lapse of time. An applicant who has committed an abuse of process may be denied relief on his claim. Relief may be denied on stale claims unless there is a showing of present need for relief.

(b) It is an abuse of process for a person with a tenable and meritorious claim for post-conviction relief deliberately and knowingly to withhold presentation of that claim until an event occurs which he believes prevents successful reprosecution or correction of the vitiating error. Abuse of process is an affirmative defense which must be pleaded and proved by the state.

(c) A claim by an applicant who has completed service of the challenged sentence and who thereafter seeks post-conviction relief may be considered a stale claim. An applicant who asserts a stale claim shall be charged with responsibility for showing a present need for the relief sought. A sufficient showing of present need for relief upon a stale claim for post-conviction relief is made by proof that:

(i) the applicant is facing prosecution or has been convicted under a multiple offender law and the challenged conviction or sentence may be or has been a factor in sentencing for the current offense;

(ii) the applicant is facing prosecution or has been convicted of a crime, an element of which is the challenged prior conviction;

(iii) the applicant is or may be disadvantaged in seeking parole under a later sentence; or

(iv) the applicant is under a civil disability resulting from the challenged conviction which is demonstrably prejudicial to him in his present pursuit of legitimate and feasible objectives and activities.

Reference: Standard 2.4.

PART III. THE APPLICATION: PREPARATION, FILING AND SERVICE

Note: Standard 3.1 relates to resources to be made available to confined persons for use in preparation of applications for post-conviction relief. The implementation of this standard is primarily the responsibility of the prison administrator. Hence, no suggested court rule has been prepared to parallel this standard. However, courts faced with substantive questions concerning adequacy of prison facilities may find the standard helpful. For related standards, see Providing Defense Services 5.1, 7.1.

16-3.1. Standardized application forms.

The state judicial administrator or clerk of the Supreme Court shall prescribe standard forms for use in proceedings for post-conviction relief. Applications not on the forms prepared in compliance with this rule shall not be filed without the express approval of the court.

Reference: Standard 3.2.

Note: See Model Form of Application, Appendix A, Standards Relating to Post-Conviction Remedies, (1968).

16-3.2. Verification.

The application for post-conviction relief shall be verified by the applicant before a notary public or some other person authorized by law to administer oaths. The knowing verification of an application containing false statements shall subject the applicant to prosecution for perjury or false swearing.

Reference: Standard 3.3.

16-3.3. Supporting affidavits and statements as to intended proof not required.

Supporting affidavits or statements as to sources of intended proof of the factual allegations supporting the applicant's claim shall not be required as a condition for the consideration of the application for post-conviction relief.

Reference: Standard 3.4.

16-3.4. Filing fees.

(a) No filing fee shall be required at the time of filing an application for post-conviction relief. When costs are assessed at the conclusion of the action, a filing fee of _____ shall be included in costs adjudged against an applicant not determined to be indigent.

(b) The application for post-conviction relief shall be accompanied by an affidavit, prepared upon a form supplied by the state judicial administrator or the clerk of the Supreme Court, in which the applicant shall state his financial ability to retain counsel for the proceeding, to purchase copies of transcripts or other relevant documents, and to respond to a judgment for cost.

Reference: Standard 3.5.

PART IV. PROCESSING APPLICATIONS

16-4.1. Judicial responsibility for disposition; masters.

(a) The district judge to whom the application for post-conviction relief is transmitted shall determine the disposition to be made of such application, whether by refusal to docket or otherwise. In appropriate cases the district judge may

designate a master to conduct preliminary inquiries and evaluations and to report findings to the court.

(b) Final disposition of applications for post-conviction relief shall be made at the earliest stage consistent with the purpose of deciding claims on their underlying merits rather than on formal or technical grounds.

Reference: Standard 4.1.

Note: For related standards, see The Function of the Trial Judge 8.1, 8.2.

16-4.2. Preliminary judicial screening of applications.

Within ten days after the application if filed, the court may, solely upon consideration of the petition, if it finds that the allegations of the application are unmistakably frivolous, summarily dismiss the application. If such a disposition is made, a written order shall be entered, stating the reasons for the disposition. The clerk of the court shall mail a copy of such order to the applicant, the attorney general and the local prosecutor who tried the original criminal case. The copy of the order mailed to the above named parties shall specify the date of judgment and shall inform the applicant of his right to appeal from the decision, the time within which the notice of appeal must be filed and the office in which the notice of appeal must be filed.

Reference: Standard 4.2.

16-4.3. Responsive pleadings; calendar priority; bail, stays of execution; dismissal on the pleadings.

(a) In cases not disposed of under Rule 16-4.2, a responsive pleading shall be required, by a rule to show cause or otherwise, not more than thirty days after the application has been filed. The response shall fully and fairly meet the allegations of the application and shall admit or deny each allegation thereof, and shall assert any and all affirmative defenses to be raised by the respondent. In the alternative, the respondent may file a motion to dismiss or a motion for summary judgment. Regardless of the form of responsive pleading, the respondent shall file with his responsive pleading the record of the original judgment and conviction, including any transcripts or other documents in the official court file, excepting such documents as were appended to the application. Copies of transcripts or portions of the original court file appended to the responsive pleading need not be served on the applicant, although the responsive pleading must be so served. In the interests of justice the time to answer or otherwise plead may be enlarged by the court not to exceed [twenty] days.

(b) If the applicant is held under sentence of death or imprisonment, or if there is other reason for expeditious treatment, the court shall accord calendar priority to the determination of the application for post-conviction relief.

(c) The court may stay the execution of any sentence imposed pursuant to the challenged conviction and in appropriate cases may release the applicant on recognizance with sufficient sureties pending final disposition of the application for post-conviction relief.

(d) Upon the basis of the application for post-conviction relief, the responsive pleading and the record of prior proceedings filed therewith, the court shall determine whether to order further proceedings, including the appointment of counsel for a pro se applicant, or to terminate the case. If the court finds that there are no material issues of fact or non-frivolous questions of law, it may in an appropriate order make such findings of fact and conclusions of law as are required, and dismiss the proceeding. The order of dismissal shall be served upon the applicant and his attorney of record, if any. The order shall specify the date of judgment and shall inform the applicant of his right to appeal from the decision, the time within which the notice of appeal must be filed and the office in which the notice of appeal must be filed.

(e) No disposition of an application for post-conviction relief which requires the resolution of a non-frivolous question of law shall be made on the pleadings and record of prior proceedings unless the applicant is represented by counsel. No disposition shall be made at this stage if there exists a material issue of fact.

Reference: Standard 4.3.

Note: For a related standard, see Criminal Appeals 2.3, 2.5.

16-4.4. Appointment of counsel; withdrawal of counsel.

(a) If the court determines that the application for post-conviction relief presents material issues of fact or non-frivolous questions of law and if the affidavit filed with the application satisfies the court that the petitioner is indigent, the court shall appoint an attorney to represent the applicant in the proceedings. The attorney so appointed shall be a member of the bar of the court before which the case is pending and may be a public defender, a member of the staff of a legal aid society, or, when requested by the applicant, a legal intern from a law school within the jurisdiction who is authorized by the rules of the Supreme Court to represent applicants for post-conviction relief. A legal intern who is not a member of the bar of the court may be appointed only if the applicant's written and acknowledged consent to such appointment if filed with the court. Such consent shall contain a statement that the applicant is aware of his right to the appointment of a member of the bar of the court to represent him, and that he knows that the legal intern is a law student and not a member of the bar of the court, but that he waives representation by a member of the bar and requests representation by such legal intern. The forms for such consent shall be prepared by the state judicial administrator or the clerk of the Supreme Court.

(b) The responsibility of appointed counsel shall continue until the order originally appointing such counsel is superseded by a subsequent order of the appointing court, or an order of a court of superior jurisdiction. Unless relieved by the court, counsel who represents an applicant for post-conviction relief at the trial shall advise the applicant of his right to appeal from an adverse judgment and shall assist him in such proceedings as are necessary to preserve such right. He shall inform the applicant of the possible issues involved in the appeal and the standards by which the Supreme Court will determine the questions raised. He shall inform the applicant that no penalty or prejudice can result from the appeal, other than the imposition of costs if the applicant is not an indigent person. If the applicant wishes to proceed further, appointed counsel shall, unless relieved by the court, represent the applicant in all appellate proceedings including review by the Supreme Court of the United States.

Reference: Standard 4.4.

Note: For related standards, see Appellate Review of Sentences 2.2; Criminal Appeals 2.2, 3.2; Providing Defense Service 2.4, 4.2, 5.2, 5.3.

16-4.5. Summary disposition without plenary hearing; discovery.

(a) An application for post-conviction relief may be decided on the merits without a plenary evidentiary hearing when there is no material issue of fact or when the case is submitted on an agreed statement of facts. The personal

presence of the applicant at such proceedings shall not be required.

(b) For the purpose of advancing a case toward disposition the court may, upon a showing of good cause, authorize discovery proceedings to explore issues of fact. Such proceedings shall be subject to the continuing supervision of the court and shall be governed by this rule. Facts disclosed in the discovery process shall be utilized by the court in determining whether summary disposition is appropriate or whether a plenary evidentiary hearing is necessary to resolve material issues.

(i) Discovery shall be authorized only when the applicant is represented by counsel;

(ii) The privilege of the applicant against self-incrimination shall be protected, and no applicant shall be required to supply evidence which might prejudice him at any future trial;

(iii) The dispositions of applicants in custody shall be authorized in all cases. Such depositions may be oral or upon written interrogatories;

(iv) Procedures for the production of documents, including relevant parts of the transcript of the original trial, or tangible things, for taking depositions and for service of requests for admissions or written interrogatories on the opposing party shall be governed by the rules of civil procedure, except that the oral depositions of witnesses other than the

applicant may be taken only with express permission of the court.

(v) If the applicant is an indigent person the costs of discovery shall be borne by the state.

Reference: Standard 4.5.

16-4.6. Plenary hearing; presence of applicant; evidence and proof; findings of fact.

(a) A plenary hearing to receive evidence, by testimony or otherwise, shall be held whenever there are material questions of fact which must be resolved in order to determine the sufficiency of the application for post-conviction relief.

(b) The applicant shall be present at the plenary hearing unless he has expressly waived his right to be present and he shall be represented by counsel. The applicant's presence shall not be required at any preliminary conference held to frame the issues and to expedite the hearing.

(c) The rules of evidence applicable in civil cases shall be followed in post-conviction hearings. Evidence shall be given in open court and shall be recorded and preserved.

(i) The applicant shall have the right to subpoena witnesses to testify on his behalf, to require the production of relevant documents and court records and to cross-examine the witnesses for the respondent.

(ii) A duly authenticated record of the transcript, or portions thereof, may be used as evidence of facts

and occurrences during prior proceedings. Such record or transcript shall be subject to impeachment by either party.

(iii) Depositions of witnesses, unavailable for the hearing, shall be admissible if authorized by the court and taken subject to the right of cross-examination.

(iv) If facts within the personal knowledge of the judge who presided at an earlier hearing are to be adduced by his testimony or otherwise, he shall not preside at the hearing on the application for post-conviction relief. The judge who presides at the hearing may take into account facts within his personal knowledge when such facts properly may be judicially noticed.

(d) The proponent of factual contentions, whether the applicant's proof of a prima facie case or the respondent's proof of affirmative defenses, shall have the burden of establishing those facts by a preponderance of the evidence.

(e) At the conclusion of the plenary hearing, the court shall make written findings of fact and conclusions of law and enter its judgment. The order shall recite the date upon which the judgment was entered and, if adverse to the applicant, it shall inform the applicant of his right to appeal, the time within which the notice of appeal must be filed and the office in which the notice of appeal must be filed. A copy of the order of the court shall be served on the applicant.

Reference: Standard 4.6.

16-4.7. Disposition orders; trial court opinion.

(a) The order of the court made at the conclusion of the proceeding shall provide for an appropriate disposition.

(i) If the court finds in favor of the respondent it shall enter an order denying the application for relief. The order shall indicate whether the denial is after a plenary hearing, on summary disposition, or on the pleadings.

(ii) If the court finds in favor of the applicant, the order shall identify clearly the claim or claims found meritorious. The affirmative relief granted shall be appropriate to the nature of the meritorious claim. If the court finds in favor of the applicant for error in the trial or pre-trial stages of the process leading to conviction, relief may be by immediate discharge from custody or by release at a specified early date, unless, within that time, the state takes the necessary steps to commit the applicant to custody pending reindictment, rearraignment, retrial, or resentence, as the case may require. Where the court finds in favor of the applicant for error concerning his right to appeal from his judgment of conviction, the court shall fix a time in which the applicant may pursue such appeal.

(iii) The court may, upon timely request, stay its final order and issue supplementary orders regarding

custody of the applicant and bail pending review of its determination by the Supreme Court.

Reference: Standard 4.7.

PART V. APPELLATE REVIEW

16-5.1. Appellate jurisdiction; limitation on right to appeal.

(a) Either party may appeal to the Supreme Court as a matter of right from any final judgment on an application for post-conviction relief. Such appeals shall be taken within the time fixed for appeals from convictions in criminal cases and, except as otherwise provided by these rules shall be governed by the rules relating to criminal appeals. Upon proper application, the court whose judgment is appealed from may stay enforcement of the judgment upon such conditions it deems proper. Upon application, the court may enlarge the time for appeal to the extent that the interests of justice require.

(b) An applicant may appeal from an interlocutory order denying a stay of execution of a death sentence when it is necessary to prevent carrying out the sentence before final judgment in the trial court. The review upon such appeals may be by a single justice of the Supreme Court or by the entire court.

Reference: Standard 5.1.

Note: The rules relating to appellate review are drawn with reference to a system containing a single level of

appellate courts. Some modification will be required where there is an intermediate appellate level. For related standards, see Appellate Review of Sentences 2.2; Providing Defense Services 4.2, 5.2, 5.3.

16-5.2. Appellate court process; counsel; bail.

(a) The applicant for post-conviction relief shall be represented by counsel on appeal. Counsel appointed to represent the applicant in the court of original jurisdiction has a continuing responsibility to represent his client through any appellate proceedings, unless relieved by an order of the appointing court or a court of superior jurisdiction.

(b) The Supreme Court, or an individual justice therof, may order the release of the applicant for post-conviction relief under appropriate conditions or otherwise to stay the execution of the judgment pending appeal; provided, that the application for such relief shall be first addressed to the trial court. In its discretion the court to whom the application is addressed may prescribe any conditions of release that are authorized in criminal cases and order the applicant released from confinement or custody pending the appeal, or suspend the effect of a revoked parole or probation or imposition or sentence in a case where sentence has previously been suspended. Upon denial of such an application in the trial court, the application may be made to the Supreme Court.

Reference: Standard 5.2.

Note: For related standards, see Appellate Review of Sentences 2.2; Criminal Appeals 2.2; Providing Defense Services 4.2, 5.2, 5.3.

16-5.3. Appellate court disposition; scope of appellate review.

(a) Upon appeal the Supreme Court shall review all matters of fact and law consistent with fundamental rights subject to litigation in post-conviction proceedings and shall make appropriate determinations.

(b) A written opinion stating the basis or bases for the decision shall accompany the decision disposing of the appeal.

Reference: Standard 5.3.

PART VI. FINALITY OF JUDGMENTS

16-6.1. The judgment of conviction; waiver.

(a) Unless otherwise required in the interests of justice, any grounds for post-conviction relief set forth in the application which have been fully and finally litigated in the proceedings leading to the judgment of conviction shall not be re-examined in a post-conviction proceeding.

(i) The record of proceedings leading to judgments of conviction shall be evidence of issues litigated in such proceedings.

(ii) A question has been fully and finally litigated when the highest court of the state to which the defendant

can appeal as of right has ruled on the merits of the question.

(iii) Finality is an affirmative defense to be pleaded and proved by the respondent.

(b) Claims advanced in post-conviction applications which might have been, but were not, fully and finally litigated in the proceedings leading to the judgments of the conviction shall be decided on their merits.

(c) Where the applicant for post-conviction relief raises a factual or legal contention which he knew of and deliberately and inexcusably

(i) failed to raise in the proceeding leading to the judgment of conviction, or

(ii) having raised the contention in the trial court, failed to pursue the matter on appeal,

a court may deny relief on the ground of an abuse of process. If an application alleges a claim otherwise worthy of further consideration, the application shall not be dismissed for abuse of process unless the state raises the issue in its responsive pleading and the applicant has had an opportunity, with the assistance of counsel, to reply.

(d) Relief on meritorious claims shall not be denied solely on account of procedural defects.

Reference: Standard 6.1.

Note: For a related standard, see The Function of the Trial Judge 8.2.

16-6.2. Prior post-conviction applications; repetitive applications.

(a) The degree of finality accorded to a prior judgment denying relief to a post-conviction proceeding shall be governed by the extent of the litigation upon the earlier application and the relevant factual and legal differences between the present and earlier application.

(i) A judgment dismissing an application on its face for failure to state a claim for relief shall not bar consideration of the merits of a subsequent application that states a cognizable claim; and

(ii) A judgment denying relief, after a plenary evidentiary hearing, to an applicant represented by counsel shall be binding on questions of fact or of law fully and finally litigated and decided, unless otherwise required in the interests of justice. A question has been fully and finally litigated when the highest state court to which an applicant can appeal as of right has ruled on the merits of the question.

(iii) Finality is an affirmative defense to be pleaded and proved by the state.

(b) In any case where the applicant raises in a subsequent application a factual or legal contention which he knew of and deliberately and inexcusably

(i) failed to raise in an earlier application for post-conviction relief, or

(ii) having raised the contention in a trial court upon an earlier post-conviction petition failed to pursue the matter on appeal,

the court may deny relief on the ground of abuse of process. If an application otherwise indicates a claim worthy of further consideration, the petition shall not be dismissed for abuse of process unless the state has raised the issue in its answer and the applicant has had an opportunity, with the assistance of the counsel, to reply.

(c) A judgment granting relief in a post-conviction proceeding shall not foreclose renewal of prosecution proceedings against the applicant to the extent that such action does not conflict with the ground upon which relief is granted. The prosecution proceeding may commence with the stage at which the invalidating defect occurred without necessity to repeat valid processes.

Reference: Standard 6.2.

16-6.3. Sentence on re-prosecution; credit for time served.

(a) When an applicant who has obtained post-conviction relief is re-prosecuted or re-sentenced, the sentencing court shall not impose a more severe penalty than that originally imposed.

(b) The court shall give credit on the minimum and maximum terms of any new prison sentence for time served under a sentence that has been successfully challenged in a post-conviction proceeding.

Reference: Standard 6.3.

Note: For related standards, see Pretrial Release 5.12; Sentencing Alternatives and Procedures 3.5, 3.6, 3.8. See also, North Carolina v. Pearce, 395 U.S. 711 (1969).

PART II

A STUDY

OF THE

PROCEDURAL RULE MAKING POWER

IN THE

UNITED STATES

A Study of the Procedural Rule-Making Power in the United States*

An American Judicature Society

Research Report

by Jeffrey A. Parness

and

Chris A. Korbakes

*A second study on rule-making, "Uses of the Judicial Rule-Making Power," was undertaken in 1974 for the Alabama Department of Court Management, covering twenty-four areas of possible rule-making. This study is being reprinted. The American Judicature Society is considering an updating and consolidation of these two studies. For an overview of these studies, see the article, "Measuring the Judicial Rule-making Power," by Allan Ashman, Director of Research, American Judicature Society, in Judicature, December, 1975.

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INTRODUCTION

This American Judicature Society study is a nationwide survey of the procedural rule-making power. It was made possible by a grant from the American Bar Association Section of Criminal Law*, and we are greatly indebted to the A.B.A. for the opportunity to update an earlier Society publication on rule-making.

Because this subject matter does not lend itself to a strictly academic or textbook analysis, we decided on a somewhat novel approach in conducting our study. We began by researching the "sources" of the rule-making power in each jurisdiction. Provisions from the state constitutions and statutes, together with relevant case law, formed the basis for memoranda of our findings which were submitted to the chief justices of each of the state supreme courts for their consideration and comment. The responses which we recieved reinforced our belief in the soundness of our approach for we invariably found that a strictly academic approach led us to conclusions which did not completely conform with reality. We are deeply grateful, therefore, to the many supreme court justices and court administrators for their invaluable assistance in helping us more accurately describe the rule-making power in each of their jurisdictions.

The study is divided into two parts. The first part is called, "Procedural Rule-Making: The National Scene." It contains a general essay on the major issues involved in any state's system of establishing procedural rules. The essay is followed by three appendices. Appendix I is a detailed state-by-state survey of the various American

* The name was changed to Section of Criminal Justice in 1973.

rule-making systems; it includes relevant constitutional, statutory, and case law references. Appendices II and III are charts highlighting several of the key elements in the various rule-making systems. The second part of the study is a bibliography of materials dealing with procedural rule-making power.

PROCEDURAL RULE-MAKING POWER: THE NATIONAL SCENE

"Procedural Rule-Making Power" Defined

The phrase, "procedural rule-making power", is an old and familiar one within the legal profession. Yet, perhaps because of its familiarity, the phrase connotes several different, if not conflicting, meanings. Because of this confusion over its meaning, a brief review of our understanding of the phrase is in order.

The words "rule-making" are used herein to denote not only rules promulgated by courts, but also laws on court procedure passed by legislatures and other authorized bodies. The word "procedural" is used to classify the types of laws and rules which are referred to by these words. "Procedural rules" are commonly described simply as all laws and rules not encompassing the substantive law.[1] There is great variation as to which judicial rules are procedural and which are substantive. Generally, procedure includes pleading, process, and practice. However, some states exclude the rules of evidence from their interpretation[2] while

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1. See Notes, "The Judiciary and the Rule-Making Power," 23 S.C.L.Rev. 377, 387-392 (1971); A. Leo Levin and Anthony G. Amsterdam, "Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision," 107 U.Pa.L.Rev. 1, 14-24 (1958); Heat Pump Equipment Co. v. Glen Alden Corp., 93 Ariz. 361, 380 P.2d 1016, 1017 (1963); State v. District Court, 399 P.2d 583, 585 (1965); Busik v. Levine, (Sup. Ct. of N.J., July 6, 1973)[Busik was unreported as of date of publication].

2. See, e.g., Mo. Const. art. V, §5.

others include the regulation of attorney conduct.[3] The word "power" is used to denote the several degrees of a rule-making body's ability to pass on procedural rules. Thus "power" may refer to the final authority to enact procedural rules,[4] the authority of one body to merely veto rules adopted by a second body,[5] or the authority of one body to simply propose changes in procedural rules to the ultimate rule-maker.[6]

Possible Rule-Makers

The possessors of the rule-making power in the American states have varied during the 19th and 20th centuries. During this period, applicable patterns or trends in the shift of the rule-making power have also been difficult to detect. In 1949, Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey, wrote:

> In England there have been four stages in the development of the rule-making power. The first was that in which customs as developed by the tribunals prevailed. These

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3. See, e.g., Okla. Stat. Ann. tit. 5, "Code of Professional Responsibility," Ch. 1, App. 3 (1971).

4. Colo. Const. art. VI, §21; Hawaii Const. art. V, §6.

5. Conn. Gen. Stat. Ann. §51-14 (1960); Ohio Const. art. IV, §5B

6. For example, public hearings may be required prior to the adoption of procedural rules. Hawaii Rev. Stat. §§602-16, 602-21 to -24, 602-32 to -34, 602-36, 602-37 (1968). Auxiliary bodies may also be provided to assist the rule-maker in drafting new procedural rules. For an excellent discussion on the need for advisory committees, see Edson R. Sunderland, "Implementing the Rule-Making Power," 25 N.Y.U.L. Rev. 27 (1950). See also this study's appendix on judicial conferences and councils.

> customs were supplanted by formal rules of court, which in turn were displaced by legislative acts making specific radical changes. The fourth stage occurred with the return of the rule-making power to the court while reserving to the legislative body a veto power. In the various states comprising the United States these four stages have been represented at one time or another, although the courts of all states have not gone through a regular progression from stage to stage. Thus, no regular pattern of development may be traced in the several states. Although it may be seen that a state such as New York, with a comparatively long history, has gone through the first three stages of development traced for the English courts, other states, such as California, which did not come into being until later dates in United States history, did not go through such stages successively.
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> While it appears that certain states are in particular stage of development of the rule-making power, in other states there is no clear demarcation of development, and it may be said that several of the four stages of development are simultaneously in evidence.[7]

While it is beyond the scope of this study to document changes in the possession of the rule-making power in the various American jurisdictions, it can note the shifting attitudes reflected in proposed model judicial articles and in several American Bar Association reports on judicial administration during the past sixty years.

In March, 1917, the American Judicature Society published the second draft of a model state-wide judicature act.[8] The act

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7. Arthur T. Vanderbilt, Minimum Standards of Judicial Administration 97-98 (National Conference of Judicial Councils, 1949).

8. American Judicature Society, Second Draft of a State-Wide Judicature Act, Bulletin VII-A (March 1917).

seemed to vest the procedural rule-making power in both a General Court of Judicature (the unified court system)[9] and a Judicial Council (composed of the Chief Justice, and the Presiding Justices of the Superior and County Courts and a few other judges).[10] Yet the drafters of this particular model act suggested that if fundamental procedural rules were placed in a supplementary short practice act, the legislature might have been given the power to change any of the procedural rules.[11] Subsequently, the idea of a supplementary short practice act was abandoned.[12]

In February, 1920, the American Judicature Society first published the National Municipal League's model judiciary article.[13] That article proposed placing the rule-making power exclusively in a Judicial Council composed of the Chief Justice, the Presiding Judges of the several districts, and a few other Supreme Court and County Court judges.[14] The article declared:

> Section 15: The Judicial Council....shall have exclusive power to make, alter and amend all rules relating to pleading, practice and procedure in the General Court, and to prescribe generally by rules of Court the duties and jurisdictions of masters and magistrates, also

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9. Id., Section 82 at 80.

10. Id., Sections 78-80 at 75-80.

11. Id., Section 79 at 79.

12. "Rules of Civil Procedure," 2 J. Am. Jud. Soc. 169 (April 1919).

13. "Model Judiciary Article," 3 J. Am. Jud. Soc. 132 (February 1920).

14 Id., at 138-139.

> to make all rules and regulations respecting the duties and the business of the Clerk of the General Court and his subordinates, and all ministerial officers of the General Court and all its departments, divisions and branches.[15]

Notwithstanding section 15, a subsequent section was interpreted by the drafters as "vesting the power to make, alter or amend all rules of practice and procedure exclusively in the General Court."[16] The General Court was defined to include "three departments to be known as the Supreme Court, the District Court, and the County Court."[17] Finally, the drafters of the Municipal League article provided for possible formal legislative involvement in rule-making when they stated: "If it is considered that this makes too great a limitation upon the power of the legislature, the change of text should result in protecting the court in its exclusive power and responsibility for a period of at least five years, in order to give the judges a reasonable opportunity to exercise the rule-making power without interference."[18]

In 1938 a committee on judicial administration from the American Bar Association's Section in Behalf of Standards of Judicial Administration proposed the following: "Regulation of Practice by Rules of Court: That practice and procedure in the courts should be regulated by rules of court; and to this end the

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15. Id., at 139.
16. Id., comment following Section 16 at 139.
17. Id., Section 1 at 136.
18. Id., comment following Section 16 at 139.

courts should be given full rule-making power."[19] This proposal was approved by the A.B.A.'s House of Delegates.[20] The proposal was accompanied by recommendations that public hearings be held before the adoption of any rule; that an auxiliary body such as a temporary committee of the bar, a standing rules committee or a judicial council assist the supreme courts in the development of procedural rules; and that members of the bar and of legislative committees on the judiciary serve on these auxiliary bodies.[21]

In 1942, a new version of the Municipal's League model judicial article was published.[22] Its provisions on rule-making differed significantly from the proposals of 1920. For example, the model article now provided for non-judicial representatives on the Judicial Council. There were provisions for three practicing lawyers appointed by the governor, three layman citizens appointed by the governor, and the chairman of the judiciary committee of the legislature.[23] It should be noted that these additions to the Council were criticized by the American Judicature Society, on the

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19. "House of Delegates Approves Precepts," 22 J. Am. Jud. Soc. 66, 67 (August 1938).

20. Id., at 66.

21. "Notable Reports on Modes of Trial," 22 J. Am. Jud. Soc. 7, 16 (June 1938).

22. "Model Judicial Article and Commentary," 26 J. Am. Jud. Soc. 51 (August 1942).

23. Id., Section 606 at 58.

grounds that the Council might be dominated by the non-judicial members.[24] The power of the Judicial Council was also no longer to be an exclusive one. The new proposed article stated: "The legislature may repeal, alter or supplement any rule of procedure by a law limited to that specific purpose."[25] In commenting upon this modification the American Judicature Society did not expressly disagree with placing the final power in the legislature; rather, the Society simply said that "the initial responsibility is placed where it should be, in the Judicial Council."[26]

In 1962, the A.B.A. House of Delegates approved a new model judicial article drafted by a committee of its Section of Judicial Administration.[27] This proposal contained the following provision: "The Supreme Court shall have the power to prescribe rules governing appellate jurisdiction, rules of practice and procedure, and rules of evidence, for the judicial system. The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar."[28] The committee recognized its suggestion as to rules of evidence was highly controversial, and reiterated its recommendation that an auxiliary body be set up to assist the court in adopting rules. In 1971, the A.B.A. Section of Judicial Adminis-

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24. Id., comment following Section 606 at 58.

25. Id., Section 607 at 58.

26. Id., comment following Section 607 at 58-9.

27. "Text of the Model State Judicial Article," 47 J. Am. Jud. Soc. 8 (June 1963).

28. Id., Section 9 at 12.

tration repeated its call for full rule-making authority in the courts.[29]

Finally, in 1973, the A.B.A. Commission on Standards of Judicial Administration published a tentative draft of standards relating to court organization.[30] With regard to rule-making, the draft set out the following provision:

> Section 1.31 Rule-Making Authority. A court system should have authority to prescribe rules of procedure, civil and criminal. The authority should extend to all proceedings in all courts in the system and should include all aspects of procedure, including rules of evidence. The authority should be exercised through a procedure that involves opportunity on the part of the public and the bar to suggest, review and make recommendations concerning proposed rules. The rule-making body should have staff assistance for research and drafting. The procedure should also involve either:
>
> (a) A requirement that proposed rules of procedure be laid before the legislature for a specified time before becoming legally effective and be subject to disapproval by a majority vote of each house of the legislature; or
>
> (b) Provision for participation on the part of legislators and members of the bar to serve as additional members of the rule-making body or in an advisory capacity to it.[31]

29. The Improvement of the Administration of Justice, A Handbook Prepared by the A.B.A. Section of Judicial Administration, (5th ed. 1971) See specifically Chapter 8, entitled "Rule-Making by the Courts," at 70-76.

30. Standards Relating to Court Organization, Tenative Draft, American Bar Association Commission on Standards of Judicial Administration (American Bar Association, 1973).

31. Id., at 63.

The proposed alternative--allowing that a majority vote of the legislature would override court-made rules--seems to be a retreat from earlier A.B.A. support for investing full rule-making power in the courts. For example, in 1971, the Section of Judicial Administration had stated: "It is clear that courts do not have full rule-making power if the legisature is free to override judicial rules."[32] It went on to note that granting the legislature the power to change rules promulgated by the highest state court by a two-thirds vote of each house of the legislature was only a "reasonable compromise," and that "complete judicial control of practice and procedure is far superior in terms of judicial amdinistration."[33] Thus in 1973, the Commission (apparent successor to the A.B.A. Section of Judicial Administration) retreated from the A.B.A. positions on rule-making in 1938 and 1971 by proposing the alternative of a legislative veto over court rules by a simple majority vote.[34]

It is evident that there is no fixed position on the part of legal organizations with respect to the ultimate holder of the rule-making power. However, there does not appear to be a common

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32. The Improvement of the Administration of Justice, supra note 29, at 73.

33. Id.

34. Standards Relating to Court Organization, supra note 30, at vi. Note particularly that the 1973 Commission clearly recognized its origins lay with the A.B.A. Section of Judicial Administration and that Section's work in 1938 and 1971. Though the Commission stated (at vi) that it had "undertaken to draw as extensively as possible on these efforts" of 1938 and 1971, the Commission gave no explicit indication of why the policy regarding rule-making had been changed.

denominator among the different positions, i.e., that the judiciary, the legislature, the bar and the public at large all have some role in the establishment of procedural rules. The ideal balance between these participants and how this balance can be best achieved are questions that have yet to be determined.

Sources of the Rule-Making Power

Not only do states differ on who should possess the ultimate rule-making power, but they also differ in the manner in which they define the power. In any one state, the rule-making power may be defined explicitly by the constitution, may be defined explicitly by legislation, may be defined by case law resting on implicit constitutional grants of power, or may simply be defined by custom.

Direct constitutional grants of the procedural rule-making power are common.[35] These grants may authorize the state's high court, the state legislature, or both the court and the legislature to have ultimate responsibility for procedural rules. Although a direct constitutional grant clearly defines who has the authority to exercise the rule-making power, it often does not accurately describe who actually regulates procedure in the state's courts. For example, a constitution might invest the rule-making power in the legislature, but that power may be delegated by statute to a second body.[36] On the other hand a constitution may authorize the

35. See, e.g., discussions of Alaska, Florida, Colorado, Hawaii, Delaware, Montana, Ohio, Texas, Pennsylvania, and South Carolina, among others in App. I.

36. See, e.g., discussions of New York and Idaho in App. I.

high court to adopt procedural rules which are subject to legislative repeal or modification, but the veto power of the legislature might never be exercised.[37] Thus, an accurate picture of the rule-making power in many jurisdictions cannot be drawn with reference to only the direct constitutional grant of authority. Statutory law, case law, and local custom must also be considered.

Where there are no express constitutional grants of authority, the rule-making power is generally defined by statute. Statutes may assert legislative power in rule-making,[38] may recognize the court's power (perhaps inherent) to regulate procedure,[39] may divide the rule-making responsibility between the legislature and the courts,[40] may place the duty of adopting rules with the courts--subject to legislative modification or repeal,[41] and/or may establish an auxiliary body to assist the ultimate rule-maker.[42] Once again, however, review of explicit statutory grants or recognitions of the rule-making power may not suffice. In several states statutory authorization of supreme court power in

37. See, e.g., discussion of Maryland in App. I.

38. See, e.g., discussions of Mississippi, Louisiana, and Oregon in App. I.

39. See, e.g., discussions of New Hampshire, New Mexico, Arkansas, Maine, and Oklahoma in App. I.

40. See, e.g., discussions of Alabama, Nevada, Kansas, and Minnesota in App. I.

41. See, e.g., discussions of Vermont, Iowa and Connecticut in App. I.

42. See Sunderland, supra note 6, and App. III on judicial conferences and councils.

the area of rule-making is deemed by that state's court to be unnecessary.[43] In at least one state the legislature's statutory power to veto court-made rules has not been exercised for some time and serves as no deterrent to the complete regulation of court procedure by the supreme court.[44]

In some jurisdictions, the rule-making power is defined by case law interpretation of vague constitutional provisions. State courts have construed constitutional provisions dealing with the investiture of judicial power,[45] the separation of powers,[46] superintending control over the courts,[47] and administrative authority over the courts,[48] as authority to regulate court practice and procedure. In some instances this case law directly conflicts with legislative enactments.[49]

In other jurisdictions, courts have taken over areas of rule-making with no apparent or cited source of authority.[50] This

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43. See, e.g., discussions of Kentucky, New Hampshire, New Mexico and West Virginia in App. I.

44. See, e.g., discussion of Illinois in App. I.

45. West Virginia State Bar v. Early, 109 S.E. 2d 420, 437 (Sup. Ct. of Appls. of W. Va., 1959).

46. Craft v. Commonwealth, 343 S.W.2d 150, 151 (Ct. of Appls. of Kty., 1961).

47. See, e.g., discussion of Colorado in App. I.

48. See, e.g., discussion of Oklahoma in App. I.

49. See, e.g., discussion of Connecticut in App. I.

50. See, e.g., discussion of South Carolina in App. I.

assumed power is said to be an inherent judicial responsibility. Legislative acquiescence in such court action usually follows.

As with the possession of the rule-making power , there is no discernible pattern of sources for the rule-making power. The constitution, statutes, case law and custom all are sources describing rule-making. These sources should be checked to insure a complete and accurate understanding of procedural rule-making for any one jurisdiction.

Terms Associated with Rule-Making

Several terms are commonly employed by judges, legislators and drafters of constitutions in discussing the rule-making power. As with the phrase "procedural rule-making power," many of these terms have several meanings. It is often very difficult to determine the precise meaning which a jurisdiction places on any one of these terms, but such a determination is crucial since the possible meanings can greatly influence the balance of power between the judiciary and the legislature.

For example, almost all jurisdictions contain some reference to the "inherent power" of the courts. This term refers to several different types of judicial powers. In some jurisdictions the inherent power of the courts means that courts can negate, prospectively and retroactively, conflicting laws on procedure by promulgating their own court rules.[51] In other jurisdictions the inherent power of the courts means only that prior legislative

51. See, e.g., discussion of Wyoming in App. I.

acts can be overruled by court rules, while subsequent enactments by the legislature override court-made rules.[52] Within a single jurisdiction, different courts may possess different degress of inherent powers. For example, the inherent powers of constitutional courts may differ from the inherent powers of the statutory courts,[53] or the inherent power of one type of constitutional court may vary with the inherent power of a second type of constitutional court.[54] The inherent powers of state supreme courts are also quite dissimilar. In some states the power extends to rules governing admission to practice, judicial ethics, professional responsibility, the state bar association, and legal internships.[55] In other states the inherent power is more narrowly defined.[56]

When defining their courts' rule-making powers, many state constitutions and statutes declare that court-made rules are "subject to legislative repeal."[57] Such a limitation on the

52. See, e.g., discussion of Maryland in App. I.

53. See, e.g., discussion of Connecticut in App. I.

54. See, e.g., discussion of Maine in App. I.

55. See, e.g., discussion of Oklahoma in App. I. Inherent power to some courts has also meant the power to provide needed court personnel, facilities and equipment. Such a reading, however, goes far beyond the promulgation of procedural rules. For an excellent discussion and list of citations on the subject of courts' inherent powers to provide themselves with additional help, see Jim Carrigan, "Inherent Powers of Trial Courts to Provide Needed Court Personnel, Facilities and Equipment," 24 Juvenile Justice 38 (May 1973).

56. See, e.g., discussion of Mississippi in App. I.

57. Or they may state that court rules are subject to legislative veto, modification, disapproval, approval, alteration, modification, or review.

judicial rule-making power can be either great or minimal. Close examination of the manner in which the legislative power can be exercised is necessary to determine how much of the courts' power has been dissipated. In some jurisdictions a vote by two-thirds of each of the houses of the legislature is required before supreme court rules may be repealed.[58] In other jurisdictions a simple majority vote of the legislature is sufficient to overrule.[59] At least one jurisdiction permits the legislature to repeal court-made rules only by specifically stating within the superseding act that the purpose of the act is to change the court rule,[60] while in other jurisdictions prior acts may be enough to negate subsequent court rules on the same procedural matter.[61] Finally, this limitation on judicial rule-making power may be accompanied by a requirement that court promulgated rules be submitted to the legislature prior to the date they take effect.[62]

When reviewing this report's analysis of the rule-making power in each of the American jurisdictions, one must be careful to avoid the danger of equating the various catch phrases and words. Similar terms in this area often have quite dissimilar meanings.[63]

58. Alaska Const. art. IV, §15; Fla. Const. art. V, §2(a).

59. Md. Const. art. IV, §18; Mont. Const. art. VII, §2(3); Ohio Const. art. IV, §5B.

60. See, e.g., discussion of Alaska in App. I.

61. See, e.g., discussion of Mississippi in App. I.

62. See, e.g., discussion of Tennessee in App. I.

63. "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.).

Rule-Making Systems

One final question remains: What system of establishing procedural rules would best promote the efficient and equitable administration of justice? As discussed earlier, model provisions dealing with rule-making vary greatly and to date, no model has been accepted by a consensus of the legal community.

In the absence of complete uniformity among all the state judicial systems, we believe that no single model could be devised which would be appropriate for all jurisdictions. The locus and extent of the rule-making power in any jurisdiction primarily depends on several major features of that jurisdiction's judicial system. These features include court organization, court administration, territorial size and population, and the historical relationship between the judicial and legislative branches of government. Thus, the exercise of 'complete' rule-making power by the high court may not be as desirable in some jurisdictions as in others.

Though no common method for establishing rules of procedure can be devised for all states, there are several essential ingredients which must appear in any rule-making system. The necessary elements of any effective rule-making system include ".....the participation of judges, lawyers, legal scholars, and legislators in deliberations concerning the rules, the provision of staff assistance for research and drafting, and circulation of proposals for scrutiny and comment before their adoption."[64] Depending on the manner in which all

64. Standards Relating to Court Reorganization, supra note 30, at 64.

these elements are incorporated into the system of rule-making, the legislature or the supreme court may possess the final authority to establish procedural rules.[65]

These are several reasons for placing the rule-making power over pleading, practice and procedure in the highest state court or judicial council. Among these are the facts that (1) procedural rules lose their potential for efficiency where diluted by political compromise, (2) legislative sessions are too short, too busy, and too far apart for the correction of needed changes, (3) statutory procedural rules, having all the rigidity of ordinary statutes, force courts to decide cases on procedural grounds rather than on the merits.[66] "Judge Cardozo's summary is still in order:

> 'The legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend.'"[67]

Other arguments against legislative rule-making have been advanced. Two commentators recently stated:

> "Legislatures have neither the immediate familiarity with the day-by-day practice of the courts which would allow them to isolate the pressing problems of procedural revision nor the experience and expertness necessary to the solution of these problems; legislatures are intolerably slow to act and cause even the slightest and most obviously necessary matter of procedural change to be long delayed; legislatures

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65. It should be noted that in Wisconsin, the Supreme Court and the Legislature concurrently possess the rule-making power. See following discussion of Wisconsin.

66. The Improvement of the Administration of Justice, supra note 29, at 71.

67. Id.

> are subject to the influence of other pressures than those which seek the efficient administration of justice and may often push through some particular and ill-advised pet project of an influential legislator while the comprehensive, long-studied proposal of a bar association molders in committee; and legislatures are not held responsible in the public eye for the efficient administration of the courts and hence do not feel pressed to constant re-examination of procedural methods."[68]

However strong the preceding arguments may be, a number of serious objections have been raised to challenge the fitness of members of state supreme courts to promulgate rules of procedure. One objection is that judges prefer their own convenience to the legitimate interests of litigants in such matters as costs of printed briefs.[69] Another objection is that judicial rule-making will impinge on substantive rights because the distinctions between substance and procedure are difficult to draw.[70] In addition, it is argued that veto power over procedural rules may be justified by the fact that the rules are more than simply a matter of internal concern to the court system and thus procedural policy, unlike purely administrative court policy, should be scrutinized by the popularly elected representative of the community as a whole.[71] For example,

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68. Levin and Amsterdam, supra note 1, at 11. See also Roscoe Pound, "The Rule-Making Power of the Courts," 12 A.B.A. J. 599 (1926) and "Regulating Procedural Details by Rules of Court," 13 A.B.A.J. Supp. 12 (1927); Wigmore, "All Legislative Rules for Judiciary Procedure Are Void Constitutionally," 23 Ill. L. Rev. 276 (1928).

69. Levin and Amsterdam, supra note 1, at 13.

70. Id. at 13-14. See also Standards Relating to Court Organization, supra note 30, at 65.

71. Standards Relating to Court Organization, supra note 30, at 63-64.

the right to a jury trial has been said to be of such great significance that it should not be modified except in a manner involving general political assent.[72]

Undoubtedly, debate over who should hold final authority in the area of procedural rule-making will continue. While our national survey shows a current trend in the direction of more judicial control over procedural rules, no trend could be discerned in the manner in which this control is being asserted and there is no way of knowing how long this movement towards more judicial control will endure.

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72. Id. at 65. Some states explicitly exclude the right to jury trial from their grants of the rule-making power. See following discussion of Missouri in App. I.

APPENDIX I: State-by-State Survey

ALABAMA

The rule-making power in Alabama is shared by the Supreme Court and the Legislature.

The Judicial Article has no specific provision dealing with rule-making. It does, however, generally declare that the judicial power of the state is vested in, among others, a Supreme Court. Ala. Const. art. VI, §139.

Statutes more clearly pinpoint the rule-making power and indicate that the Legislature has delegated only part of its claimed rule-making power to the courts. One act recognizes equity rules previously adopted by the Supreme Court and empowers the Court to adopt further rules for pleading, practice and procedure in equity actions. The Court can also disregard prior statutes, rules or court decisions which are inconsistent. Ala.Code tit. 7, §289 (1958). A second act declares that equity rules shall prevail over inconsistent legislative enactments applicable to suits and causes in equity. Ala. Code tit. 7, §290 (1958).

A later act authorizes the Supreme Court to adopt a new system of rules to govern procedure in appeals to the Supreme Court, Court of Civil Appeals and Court of Criminal Appeals. This new system is said to prevail over all prior laws, court rules and court decisions which are inconsistent. Ala. Code tit. 13, §17(1) (Supp. 1971). Another recent act grants the Supreme Court the power to adopt by general rules the forms of process, writs, pleadings, motions, practice and procedure in all civil actions in all courts of the state. These rules will also prevail over all conflicting laws. Ala. Code tit. 13, §17(2) (Supp. 1971). A new set of Rules of Civil Procedures was recently promulgated under this act. Chief Justice Howell T. Heflin, "Rule-Making Power," 34 Ala. Law. 263 (July, 1973).

The power of courts other than the Supreme Court to promulgate rules has been recognized both in statute and case law. The Legislature recognizes the power of the circuit courts to adopt rules for their equity proceedings yet such rules are limited by Supreme Court rules and by laws. Ala. Code tit. 7, §291 (1958). And for at least a time, the Supreme Court held that circuit courts had the inherent power to make reasonable rules for the conduct of their business. This power was limited, however, by reasonableness, the constitution and statutory provisions. Brown v. McKnight, 216 Ala. 660, 114 So. 40, 41 (1927).

The Supreme Court has been quite hesitant to challenge legislative power in the rule-making area. In one case the Court stated that although its judicial power must be coordinated with the with the Legislature, the Legislature "cannot validly pass a law which will impede the functioning of the court." Yet at the same time the Court noted that were a positive rule of practice was established by statute, courts have no discretion in the matter. Ex parte Huguley Water System, 213 So. 2d 799, 805 (1968). Thus, although the Court

recognizes that the rule-making power may be derived from either the constitution or from statute, the Court has refrained from reading its constitution as granting the Court the inherent power to make all procedural rules for all courts. See Ex parte Leeth Nat. Bank, 38 So. 2d 1 (1948) and Ex parte Foshee, 246 Ala. 604, 21 So. 2d 827 (1945).

Finally, in 1973, a proposed constitutional amendment which would vest in the Supreme Court general rule-making powers was introduced in the Alabama Legislature. The proposal would empower the Legislature with the authority to change any court-promulgated rule upon a two-thirds vote of each house.

ALASKA

The rule-making power in Alaska rests with the Supreme Court, subject to change by the Legislature.

The Judicial Article clearly defines the locus of the rule-making power. It begins by placing the judicial power of the state in a Supreme Court, among others, and by describing the courts as forming a unified judicial system for operation and administration. Alaska Const. art. IV, §1. It then goes on to define rule-making by stating: "The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the Legislature by two-thirds vote of the members elected to each house." Alaska Const. art. IV, §15. The Article also provides for the creation of a Judicial Council which shall conduct studies and make reports and recommendations to the Supreme Court and the Legislature. Alaska Const. art. IV, §8.

Case law affirms the Supreme Court's rule-making power, yet accepts legislative review of the Court-made rules. The Court has, in fact, said legislative changes are desirable ".....where a particular rule of procedure may involve considerations of public policy that are better left to the Legislature to pass upon." However, the two-thirds vote requirement is felt by the Court to ".....prevent unintentional, rash, ill-considered and too easy intervention by the Legislature which would ultimately frustrate the sound purpose in giving the courts the primary authority and responsibility for regulating their own affairs." Legee v. Martin, 379 P.2d 447, 450 (1963). Even with a two-thirds vote, the Court has said ".....that a legislative enactment will not be effective to change court rules of practice and procedure unless the bill specifically states that its purpose is to effect such a change." Legee, supra, at 451; see also Ware v. City of Anchorage, 439 P.2d 793 (1968).

ARIZONA

The rule-making power in Arizona rests with the Supreme Court.

The Judicial Article clearly sets forth the Court's power. It initially declares that the judicial power shall be vested in an integrated judicial department. Ariz. Const. art. VI, §1. It goes on to state: "The Supreme Court shall have power to make rules relative to all procedural matters in any court." Ariz. Const. art. VI, §5(5). This latter constitutional provision was adapted in 1960. Since that time, the Court has recognized legislative withdrawal from the area of rule-making. State v. Meek, 8 Ariz. App. 261, 445 P.2d 463 (1968), and State. v. Blazak, 105 Ariz. 216, 462 P.2d 84 (1969). The Court has also continually asserted that its rule-making power is inherent. State v. Meek, supra, Arizona Podiatry Assn. v. Director of Ins., 101 Ariz. 544, 422 P.2d 108 (1967) and Heat Pump Equipment Co. v. Glen Alden Corp., 93 Ariz. 361, 380 P.2d 1016 (1963).

Statutes recognize the Court's complete rule-making power. One act declares: "The Supreme Court, by rules.....shall regulate pleading, practice and procedure in judicial proceedings in all courts of the state....." Ariz. Rev. Stat. Ann. §12-109 (1956). A second act allows for an advisory board to the Court. It states: "The state bar, or a representative group selected by the bar, shall act as an advisory board and shall either voluntarily or upon request of a majority of the judges of the supreme court, consult with, recommend to or advise the court on any matter dealt with or proposed to be dealt with in the rules." Ariz. Rev. Stat. Ann. §12-110(A) (1956). The act goes on to say that anyone can object in writing to a court rule and request changes; the Court is to consider such objections as advice and information only. §12-110 (B). The Court has employed advisory committees to assist in promulgating rules. See Greacen, J.M., "Preparing New Rules of Criminal Procedure," 7 Ariz. B.J. 23 (Fall 1971).

The Supreme Court has granted other courts the power to supplement its rules with locally applicable rules. Ariz. R. Civ. P. 83 (1956) and Ariz. R. Crim. P. 36 (West, 1973).

The Supreme Court's power has been effectively used. A good example is the case of In re Collins, 108 Ariz. 310, 497 P.2d 532 (1972) which involved the incarceration of an indigent misdemeanant who was unable to pay a $100 fine for shoplifting a can of meat. The Court ruled that under its constitutional rule-making power, it could adapt portions of the A.B.A. Minimum Standards relating to alternative sentencing procedures. The Court granted the indigent's writ of habeas corpus and gave him an appropriate time period within which to pay the fine.

ARKANSAS

The rule-making power in Arkansas is now vested in the Supreme Court.

The Judicial Article grants the Supreme Court a general superintending control over all inferior courts of law and equity. Ark.

Const. art. VII, §4. Until recently, this power was apparently used without supplement by legislative authorization in the adoption of varying procedural rules. For example, the Court adopted uniform rules for circuit and chancery courts in 1969. See Uniform Rules following Ark. Stat. Ann. §30-1006 (Supp. 1971). The Article also declares that the circuit courts exercise superintending control over various inferior courts. Ark. Const. art. VII, §14.

New legislative enactments have recognized the powers which the Court had already assumed. One such act says the Court has the power to ".....prescribe from time to time, rules of pleading, practice and procedure with respect to any or all proceedings in criminal cases and proceedings to punish for criminal contempt of court in all the inferior courts of law....." Ark. Stat. Ann. §24-242 (Supp. 1971). Related acts are Ark. Stat. Ann. §§24-243 and 24-244 (Supp. 1971). Another recent law says the Supreme Court has the power to prescribe similar rules for any or all civil proceedings; new civil rules are said to be limited only by the state constitutional right to jury trial and by the pre-existing rights to appeal. Furthermore, the act recognizes that all prior rules of the Court for civil cases are valid. Ark. Stat. Service, Vol. 1, Act 38 of 1973; the act should later appear at Ark. Stat. Ann. §27-137 (Supp. 1974).

CALIFORNIA

The rule-making power in California ultimately rests with the Legislature yet most of California's procedural rules are promulgated by the Judicial Council.

The Judicial Article invests the state's judicial power in the Supreme Court, among others. Calif. Const. art. VI, §1. It goes on to state: "The Judicial Council consists of the Chief Justice as chairman and one other judge of the Supreme Court, three judges of courts of appeal, five judges of superior courts, three judges of municipal courts, and two judges of justice courts, each appointed by the chairman for a two-year term; four members of the state bar appointed by its governing body for two-year terms; and one member of each house of the Legislature appointed as provided by the house." Calif. Const. art. VI, §6. It is in this Council that the rule-making authority is placed. The relevant provision declares: "To improve the administration of justice, the council shall survey judicial business and make recommendations to the court, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, not inconsistent with statute, and perform other functions prescribed by statute." Calif. Const. art. VI, §6.

At least one statute affirms the Council's powers while recognizing the Legislature's ability to overrule. Cal. Civ. P. §901 (West Supp. 1963). However, many other statutes provide for Judicial Council powers in the rule-making area without specifically mentioning statutory conflicts. Cal. Penal Code Ann. §§1246 and 1247(K) (West 1970); Cal. Civ. P. §§575 and 1034 (West 1967); Cal.

Civ. P. §1089 (West, Supp. 1973). Finally, some statutes not only provide for Judicial Council rule-making, but also declare that the Council's rules prevail ".....notwithstanding any other provision of law." Cal.Civ. P. §404.7 (West, Supp. 1973); Cal. Civ. Code Ann. §4001 (1970). One of these latter statutes (§4001, which deals with practice and procedure in proceedings under the Family Law Act) has been held to make the rules adopted by the Council "sui generis" and controlling over both statutory and decisional law. Dover v. Dover, 93 Cal. Rptr. 384, 15 Cal. App. 3d 675 (1971). The Supreme Court has since held: "The practical effect of §4001, therefore, is to remove any restraints of statutory consistency on the Judicial Council's rules of practice and procedure under the Family Law Act." McKim v. McKim, 100 Cal. Rptr. 140, 493 P.2d 868, 870, Note 4 (1972).

Provisions have been made for courts to adopt local rules. Cal. R. Ct. 532.5, 981 (West 1973).

The Judicial Council has used its powers quite extensively. It has adopted rules for the superior and municipal courts, as well as rules for appeals, censure, removal and retirement of judges, special family law, and miscellaneous rules relating to trial court procedure. The Council has adopted several recommended A.B.A. Standards of Judicial Administration and has also initiated a comprehensive set of Standard Court Forms to be used statewide. See California Rules of Court (West 1973).

COLORADO

The power to promulgate procedural rules in Colorado generally rests with the Supreme Court.

The Judicial Article declares that the state's judicial power is vested in a Supreme Court and that this court shall have "a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law." Colo. Const. art. VI, §§1, 2. It goes on to say that the Court has power to make and promulgate rules governing practice and procedure in civil and criminal cases. Colo. Const. art. VI, §21. Yet in the same section, this rule-making power is limited by an exception which grants the General Assembly the power to "provide simplified procedures in county courts for claims not exceeding $500 and for the trial of misdemeanors."

Statutory law appears to grant the Supreme Court even more rule-making power. It declares that the Court has the power to prescribe by rules the practice and procedure in civil actions in the courts of record, and that these rules override all conflicting laws. Colo. Rev. Stat. Ann. §37-2-8 (1963). This may be read as a delegation of legislative authority to make rules for county court claims under $500, since county courts are courts of record. Colo. Rev. Stat. Ann. §37-1-12 (Supp. 1965).

In early cases the Supreme Court described its rule-making power as being limited by both the state constitution and by state statutes. Boykin v. People, 23 Colo. 183, 46 P. 635 (1896), Phillips v. Corbin, 25 Colo. 567, 56 P. 130 (1899), and Ernst v. Lamb, 73 Colo. 132, 213 P. 994 (1923). Yet the Court did uphold legislative acts delegating rule-making power to the courts. Ernst, supra, 213 P. 995. In later cases the Court described its rule-making power as originating within the state constitution rather than within the common law or statutes. Such inherent court powers were derived from broad constitutional provisions which were predecessors to current sections 1 and 2 of Article VI. Kolkman v. People, 300 P. 575, 584 (1931). The adoption of Article VI, §21 in 1962 precluded the Court's reliance on these broader constitutional sections.

Local court rules are authorized both by statute and by case law. For example, see Colo. Rev. Stat. Ann. §37-4-20 (1963) and Boykin, supra, 46 P. 635.

CONNECTICUT

The rule-making power in Connecticut is vested in the Supreme Court but at least some of the rules adopted by this Court are subject to legislative veto.

The Judicial Article declares that judicial power of the state is to be vested in a Supreme Court, a Superior Court, and such lower courts as the General Assembly shall ordain and establish. Conn. Const. art. V, §1. No specific direct mention is, however, made of rule-making.

Statutory law more clearly defines rule-making. The relevant act says the Supreme Court shall adopt rules and forms regulating pleading, practice and procedure in judicial proceedings in all courts of the state. It further states that the Chief Justice of the Supreme Court shall report any such rules to the General Assembly for study and that the Assembly may void by resolution any rule or part thereof. Conn. Gen. Stat. Ann. §51-14 (1960).

Case law and Supreme Court practice appear to negate portions of the aforementioned statute. The Supreme Court has said: "Courts acting in the exercise of common-law powers have an inherent right to make rules governing procedure in them (cite omitted). The Supreme Court of Errors, established by the state constitution, likewise has the inherent power, independent of and despite any statute, to make rules governing procedure before it." State Bar Ass'n. of Conn. v. Conn. Bank & Trust Co., 145 Conn. 222, 140 A.2d 863 (1958). It thus seems that the Supreme Court has rejected the declared legislative veto power over rules made by the constitutional courts. The current constitutional courts are the Supreme Court and the Superior Court. Conn. Const. art. V, §1.

The Supreme Court apparently does not dispute the declared legislative rule-making authority with respect to the lower courts which have been established by statute. In State Bar Ass'n., the Court said that by virtue of current §51-14, it had the power to

adopt rules for judicial proceedings in the courts established by the General Assembly. Thus, the Court distinguished between its power to adopt rules for constitutional courts and for statutory courts. For similar distinctions between rule-making for the constitutional courts and for the "lower courts," see Adams v. Rubinow, 157 Conn. 150, 171-2, 251A.2d 49, 56 (1968) and Heiberger v. Clark, 148 Conn. 177, 169 A.2d 652 (1961).

DELAWARE

The power to make or amend rules of pleading, practice and procedure in Delaware ultimately rests with the Supreme Court.

The Judicial Article states that the "Chief Justice of the Supreme Court.....shall be the administrative head of all the courts in the state and shall have general administrative and supervisory powers in all the courts." It goes on to define such powers as encompassing the ability to adopt rules "for the administration of justice and the conduct of the business of any or all the courts." Del. Const. art. IV, §13. In the same section the Judicial Article also recognizes the power of the other state courts to adopt their own local rules of pleading, practice and procedure, subject only to the Supreme Court's overriding veto.

Various legislative enactments recognize the Court's rule-making powers. Del. Code Ann. tit. 10, §§161, 361 and 561 (1953). Case law recognizes rule-making as an inherent court power. Knox v. Georgia Pacific Plywood Co., 50 Del. 315, 130 A.2d 347, 351 (1957); Wilmington Trust Co. v. Baldwin, 195 A. 287, 295 (1937); and State v. Terry, 51 Del. 458, 148 A.2d 102 (1959).

To date the Supreme Court has refrained from exercising its supervisory and veto powers over rules adopted by the Chancery Court and the Superior Court. However, informal discussions between the various court officers invariably occur prior to the promulgation of rules. With respect to the remaining Delaware courts, the Supreme Court has so far promulgated all the rules governing their proceedings. It is contemplated that, by direction of the Chief Justice, these remaining courts will also soon be able to initially promulgate their own rules.

FLORIDA

The procedural rule-making power in Florida is vested in the Supreme Court, subject to legislative overview.

The Judicial Article clearly defines the locus of power. The relevant section states: "The supreme court shall adopt rules for the practice and procedure in all courts.....These rules may be repealed by general law enacted by two thirds vote of the membership of each house of the legislature." Fla. Const. art. V, §2(a). The current Judicial Article was ratified in March, 1972.

Statutory law supplements the aforementioned constitutional provision. One act states that when the Supreme Court adopts a rule

concerning practice and procedure and when such rule conflicts with an earlier statute, the rule supersedes the statute. Fla. Stat. Ann. §25.371 (1961). Thus, it seems that only subsequent legislative action can override any Supreme Court rule. Another enactment declares it to be the responsibility of a conference of circuit court judges to make recommendations on the improvement of rules and methods and practice in the courts. Fla. Stat. Ann. §26.55(b) (Supp. 1973). The validity of certain portions of this act have, however, been called into question by the ratification of the new constitution.

Case law prior to the new constitutional provision on rule-making recognized the legislative role as well as the judicial role. Petition of Florida State Bar Association, 21 So. 2d 605 (1945). The Court's power has, however, also been consistently recognized. See State v. Garcia, 229 So. 2d 489 (1972).

GEORGIA

The ultimate rule-making power in Georgia rests with the General Assembly though the courts have been delegated some authority.

The Judicial Article states that the judicial power shall be vested in a Supreme Court, among others. Ga. Const. art. VI, §2-3601. It goes on to declare: "The General Assembly may provide for carrying cases.....to the Supreme Court and the Court of Appeals from the trial courts otherwise than by writ of error, and may prescribe conditions as to the right of a party litigant to have his case reviewed by the Supreme Court or Court of Appeals." Ga. Const. art. VI, §2-3707. Another provision asserts: "The Court of Appeals shall have power to hear and determine cases when sitting in a body, except as may otherwise be provided by the General Assembly." Ga. Const. art. VI, §2-3709. Finally, the Article declares: "Except as otherwise provided in this Constitution,.....proceedings and practice of all courts.....invested with judicial powers (except City Courts) of the same grade or class, so far as regulated by law, ...shall be uniform. The uniformity must be established by the General Assembly." Ga. Const. art. VI, §2-4401.

Although there is some assertion of final judicial rule-making power in the Article (i.e., §2-3707), the aforementioned provisions appear to recognize ultimate legislative control over rule-making (§2-4401). Statutes clearly assert full legislative power. While the Supreme Court is granted the power to prescribe, modify and repeal rules of procedure, pleading and practice in all kinds of civil and criminal appeals, such rules do not take effect until they have been ratified and confirmed by the General Assembly. Court modification, repeal or amendment of rules must also be ratified and confirmed. Ga. Code Ann. §§81-1501, 81-1503 (1956). After granting the Court this somewhat limited power, the General Assembly sought to make certain its actions were not misunderstood or reinterpreted. It stated: "This chapter shall not be construed as constituting an abandonment or disclaiming of the power of the General Assembly to enact laws regulating procedure in the courts of this state." Ga. Code Ann. §81-1506 (1956) and §1507 (Supp. 1972).

Statutes provide aids to the Supreme Court in its limited exercise of rule-making authority. First, the Supreme Court must appoint at least one committee from the state bar to assist in the preparation of rules. Ga. Code Ann. §81-1504 (1956). Second, a Judicial Council is created for the state. The Council is composed of judges, legislators, lawyers and laymen; its duties include the study of and formulation of proposals on court procedure. Ga. Code Ann. §§81-1601, 81-1607 (1956).

Case law shows that the Supreme Court has so far refrained from proclaiming itself or other courts to have any authority to prescribe procedural rules outside the limit set by the General Assembly. Fair v. State, 220 Ga. 750, 141 S.E.2d 431 (1965) and Fulton County v. Woodside, 222 Ga. 90, 149 S.E.2d 140 (1966).

HAWAII

The rule-making power in Hawaii rests with the Supreme Court.

The Judicial Article states that the judicial power shall be vested in the Supreme Court, among others, and that its Chief Justice shall be the administrative head of the courts. Haw. Const. art. V, §§1, 5. It goes on to declare: "The supreme court shall have the 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." Haw. Const. art. V, §6. It should be noted, however, that the Attorney General, in Opinion 67-9, concluded that the rule-making power is not exclusively vested in the Supreme Court so as to preclude legislative action on procedural matters.

Statutes recognize the complete power of the Supreme Court to promulgate rules. Public hearings are, however, required for most rules adopted by the Court. Haw. Rev. Stat. §§602-16, 602-21 to 24, 602-31 to 34, 602-36, 602-37 (1968). Statutes also recognize the power of other courts to adopt procedural rules. Haw. Rev. Stat. §603-28 (1968). Preceding Title 32, and Legislature specifically stated: "Statutes relating to process, practice, procedure and appeals remain in force and effect if, but only if, they are not conflict with the rules of court." Haw. Rev. Stat. §601-1 (1968).

IDAHO

The ultimate responsibility for procedural rule-making in Idaho rests with the Supreme Court.

The Judicial Article declares that the judicial power of the state shall be vested in a Supreme Court and that the courts shall constitute a unified and integrated judicial system for administration and supervision by the Supreme Court. Idaho Const. art. V, §2. It also states: "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it.....but, the legislature shall provide a proper system

of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court as far as the same may be done without conflict with this Constitution." (emphasis added) Idaho Const. art. V, §13.

The Statutes claify the Court's complete rule-making power, and remove the possible contrary interpretations of art. V, §13. One relevant act states: "The inherent power of the supreme court to make rules governing procedure in all courts of Idaho is hereby recognized and confirmed." Idaho Code §1-212 (1948). Other statutes relating to judicial rule-making include Idaho Code §§1-213 to 215, 1-1604, 1-1605 (1948).

Case law holds the aforementioned statutory provisions to be a recognition of the Court's inherent powers rather than a delegation of legislative power. R.E.W. Construction Co. v. District Court, 88 Idaho 426, 400 P.2d 390 (1965). Case law also has seemingly foreclosed any possible use of art. V, 13 to derive legislative rule-making powers. State v. McCoy, 94 Idaho 236, 486 P.2d 247 (1971). In all respects then, the judicial rule-making power is complete. Abdication of legislative power in the area of rule-making is recognized ".....in order to remove any conflict which would inevitably result from both the Legislature and the Supreme Court promulgating rules of procedure." Allen Steel Supply Co. v. Bradley, 89 Idaho 29, 402 P.2d 394 (1965).

ILLINOIS

The ultimate rule-making power in Illinois in theory appears to rest with the Legislature, although there are some who deny this. Since at least 1964, however, the Supreme Curt has been the body which has in practice promulgated the procedural rules.

The Judicial Article does not clearly define the rule-maker. One section vests in the Supreme Court, among others, the judicial power. Ill. Const. art. VI, §1. Another vests "general administrative and supervisory authority over all courts" in the Supreme Court. Ill. Const. art. VI, §16. While there is some precedent for such provisions being the basis of a complete, inherent judicial rule-making power, People v. Callopy, 358 Ill. 11, 192 N.E. 634 (1934), the legislative history of the current Judicial Article seems to preclude such an inference. The Legislature which worked on the current constitution before its submission to the voters specifically deleted a constitutional amendment granting the rule-making power to the court. See Note, "The Rule-Making Powers of the Illinois Supreme Court," 1965 U. Ill. L.F. 903, 911 (Winter 1965). A less than complete inherent court power has, however, been inferred and is consistent with the Article's legislative history. See Joint Committee Comments after Ill. Ann. Stat. ch. 110, §2 (Smith-Hurd 1968).

Statutory law recognizes the power of the Supreme Court and other state courts to make rules governing procedure, yet the Legislature seems to have always reserved the right to override court-made rules. For example, see Ill. Ann. Stat. ch. 110, §§2, 4 (Smith-Hurd 1968).

Since 1964, however, the Supreme Court has been promulgating rules regarding both civil and criminal procedure without apparent legislative interference. Illinois Practice Act and Rules, ch. 110A (West 1973) and Ill. Stat. Ann. ch. 110A. (Supp. 1973). The consensus among legislative leaders has been that the real rule-making power under the 1964 court reforms and the 1970 Judicial Article exclusively belongs to the Supreme Court.* This consensus coincides with the legislative intention since 1964 to establish a unified court system for Illinois under the guidance of the Supreme Court.

Though the courts have been the exclusive source of rules since 1964, it is still recognized that there may be situtations where the Legislature would have the power to enact statutes having the effect of rules governing practice and procedure. People v. Capoldi, 37 Ill. 2d 11, 225 N.E.2d 634 (1967) and People v. Jones, 237 N.E.2d 495 (1968). And even prior to 1964, the Supreme Court's power to make rules governing practice was declared to be inherent and to be limited only by the constitution. People v. Lobb, 161 N.E.2d 325, 332 (1959).

*This opinion is based on a letter to the American Judicature Society from the Illinois Supreme Court which is now on file at the Society's main office.

INDIANA

The rule-making power in Indiana ultimately rests with the Supreme Court.

The Judicial Article states that the judicial power of the state shall be vested in one Supreme Court. Ind. Const. art. VII, §1. It also states that the "Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules." Ind. Const. art. VII, §4. Finally, the constitution declares that the General Assembly shall not pass any local or special laws dealing with the regulation of practice in the Indiana courts of justice, the jurisdiction and duties of justices of the peace, or the changing of venue. Ind. Const. at. IV, §22(1), (3), (4). These are the sole constitutional provisions relating to rule-making.

Statutes clarify the Supreme Court's powers. A 1937 act grants the Supreme Court the power to "adopt, amend and rescind rules of court which shall govern and control practice and procedure in all the courts" of the state and further states that conflicting laws shall be of no further force or effect. Ind. Code §34-5-2-1 (1971). A 1969 act declares that the General Assembly affirms the inherent power of the Supreme Court to promulgate procedural rules and reaffirms the power given to the court by the Legislature under the 1937 act. Ind. Code §34-5-1-2 (1971). The Legislature has also recognized the ability of other state courts to establish local rules within certain limitations. Ind. Code §34-5-2-2 (1971). These local rules do have their limits. Slagle v. Valenziano, 134 Ind. App. 360, 188 N.E.2d 286 (1963).

While the Supreme Court may be said to have an ultimate veto power over all procedural rules in Indiana, some people have indicated that the enactment of procedural statutes is not an unconstitutional exercise of judicial power and that these procedural statutes are valid until overruled by the Court. See Note, "The Court v. the Legislature: Rule-Making Power in Indiana," 36 Ind. L.J. 87, 98 (Fall 1960). The Supreme Court would apparently accept non-conflicting procedural statutes. The Court has long recognized legislative abandonment of any right to govern fully procedural rules. Emerett v. Hamilton Circuit Court, 223 Ind. 418, 61 N.E.2d 182 (1945). However, it has also said the rule-making power is "neither exclusively legislative nor judicial." State v. Gibson Circuit Court, 239 Ind. 394, 399, 157 N.E.2d 475, 477 (1958). Such a position may stem from a desire to avoid friction with the legislative branch.

IOWA

The ultimate authority to prescribe procedural rules in Iowa rests with the Legislature, though responsibility for making rules has been delegated to the Supreme Court.

The Judicial Article of Iowa begins by vesting the state's judicial power in a Supreme Court, among others. Iowa Const. art. V, §1. It goest on to assert: "The Supreme Court.....shall constitute a Court for the correction of errors at law, under such restrictions as the General Assembly may, by law, prescribe;..... and shall exercise a supervisory and administrative control over all inferior Judicial tribunals throughout the State." Iowa Const. art. V, §4. Finally, it states: "It shall be the duty of the General Assembly to provide for the carrying into effect of this article, and to provide for a general system of practice in all the Courts of this state." Iowa Const. art. V, §14.

Statutes more clearly locate and define rule-making. One relevant act states: "The supreme court shall have the power to prescribe all rules of pleading, practice and procedure, and the forms of process, writs and notices, for all proceedings of a civil nature in all courts of this state....." Iowa Code Ann. §684.18 (1950). Yet another act declares: ".....any such rules and forms prescribed by the supreme court shall be reported by it to the General Assembly.....and shall take effect.....with such changes, if any, as may have been enacted.....and thereafter all laws in conflict therewith shall be of nor further force or effect." Iowa Code Ann. §684.19 (Supp. 1973). This latter provision, however, does not seem to apply to all rules. See Iowa R. Civ. P. 371, and the revised appellate rules of civil procedure adopted by the Court without submission (effective 1/1/73).*

At least two other acts relate to the rule-making power. Judicial conferences may be ordered by the Chief Justice on matters concerning the administration of justice. Iowa Code Ann. §684.20 (Supp. 1973). The final act appears to delegate more rule-making

power to the courts than was done by §684.18. It states: "The Supreme Court shall adopt and enforce rules for the orderly and efficient administration of the courts inferior to the supreme court, which rules shall be executed by the chief justice. Such rules shall be adopted in the manner provided in §684.19." Iowa Code Ann. §684.21 (Supp. 1973).

Case law indicates that the Supreme Court has apparently accepted ultimate legislative responsibility for prescribing most procedural rules, though this responsibility has been delegated to the Court. "The Iowa Court has never claimed to have the power to enact all necessary procedural rules and has made no attempt to prohibit the legislature from acting in this area. Rather, the court has reserved small areas of exclusive judicial rule-making under the state constitution and its inherent power as a co-equal branch of government, otherwise subordinating itself to the legislature." Note, "Judicial Rule-Making: Propriety of Iowa Rule 344(f)," 48 Iowa L. Rev. 919, 924 (1963). See also Siesseger v. Puth, 234 N.W. 540 (1931); Donlan v. Cooke, 237 N.W. 496 (1931); Hohl v. Board of Education of Powesheik County, 94 N.W.2d 787, 791 (1959) State v. Fagan, 190 N.W.2d 800 (1971). Case law also recognizes that there are certain areas in which local rules may be adopted. Thews v. Miller, 255 Iowa 175, 121 N.W.2d 518, 522 (1963).

*This information is based on a letter to the American Judicature Society from the Supreme Court of Iowa which is now on file at the Society's main office.

KANSAS

The rule-making power in Kansas jointly rests with the Supreme Court and the Legislature.

The Judicial Article vests the judicial power of the state in one court of justice. It further grants the Supreme Court general administrative authority over all courts of the state. Kansas Const. art. III, §1. While many other state courts read similar provisions as implicitly recognizing their courts' inherent rule-making power, such a reading has not and probably will not be made in Kansas. The relatively new Judicial Article cannot be interpreted as implicitly recognizing the Court's inherent rule-making powers because of the Article's legislative history. Section 1 of Article III was originally intended to grant rule-making power to the Supreme Court for all civil and criminal cases. Kansas House and Senate Journal, 1971 Sess. 130-131. However, the Legislature struck out the language relating to the Court's rule-making powers before the Article was passed. The Article was then adopted by the electorate in 1972 without any mention of rule-making power.

Statutory law places the responsibility for rule-making with respect to civil and criminal matters in both the Supreme Court and the Legislature. The Legislature has adopted codes of civil and

criminal procedure. Yet is has also recognized the power of the Court to supplement or amend the codes insofar as they pertain to pleading, practice, procedure, etc. Kan. Stat. Ann. §60-2607 (1964), §22-4601 (Supp. 1972). Neither body appears reluctant to exercise its power.

With respect to matters of probate, the Legislature has not granted similar powers to the Court. The Supreme Court is only empowered to promulgate rules on matters covered by the Probate Court which are not inconsistent with that code. Kan. Stat. Ann. §59-2501 (1964).

KENTUCKY

The rule-making authority in the Commonwealth of Kentucky currently rests with the Court of Appeals for both civil and criminal matters.

The Judicial Article states that the judicial power on matters of law and equity shall be vested in the Senate when sitting as a court of impeachment and in the constitutional courts. Ky. Const. §109. Other constitutional sections recognize the division of powers among the three governmental branches. Ky. Const. §§27, 28. Yet no section of the constitution speaks directly on the matter of procedural rule-making.

Statutory provisions do, however, deal with rule-making. One relevant act states that the Court of Appeals shall regulate by rules the pleadings, practice, procedures and forms in all civil proceedings in all the state courts. Ky. Rev. Stat. Ann. §447.151 (Baldwin's 1969). Further acts describe the manner in which civil rules are to be promulgated by the Court. Ky. Rev. Stat. Ann. §§447.152, 447.157 (Baldwin's 1969). Legislative enacments also recognize the inherent power of the Court of Appeals to adopt rules in the area of criminal procedure. Ky. R. Crim. P. 13.04, 13.08 (Baldwin's 1969). It should also be noted that rule-making power is statutorily authorized for courts other than the Court of Appeals. Ky. R. Crim. P. 13.02, 13.08 (Baldwin's 1969).

Case law indicates statutory provisions dealing with rule-making may be unnecessary in establishing the ultimate power of the Court of Appeals. The Kentucky Court has said that the constitutional courts have the inherent power to prescribe rules regulating their own proceedings. Craft v. Commonwealth, 343 S.W.2d 150 (1961). Such power was said to exist even without an express grant by the constitution, the statutes, or even the Court's own rules. The Court of Appeals noted: "When we say that an express constitutional grant of rule-making is unnecessary, we do not mean that the rule-making power does not flow from this instrument. The foundation source of that power is in the act of division of powers among the three branches og government.....and the grant of judicial power to the courts by the constitution carries with it, as a necessary incident, the right to make that power effective in the administration of justice." Id. at 151.

The Court did, however, allow for certain rules of practice to be fixed by the Legislature. Id. at 151-2.

LOUISIANA

The Legislature has the power to make the rules of pleading, practice and procedure for the courts of Louisiana, yet this power is by no means absolute.

The Judicial Article states that the judicial power shall be vested in a Supreme Court, La. Const. art. VII, §1, and that this Supreme Court shall have general supervisory jurisdiction over all inferior courts, La. Const. art. VII, §10. While these constitutional provisions form a basis upon which the Court could claim an inherent power or constitutional duty to make procedural rules, these provisions have to date, only served to limit the power of the Legislature to regulate pleading and practice. Tate, "The Rule-Making Power of the Courts of Louisiana," 24 La. L. Rev. 555, 560-564 (1964).

Statutes establish the supremacy of the Legislature in the area of rule-making. The Louisiana Code of Criminal Procedure recognizes the courts' inherent powers, La. Crim. P. 17 (1966), yet is also states that courts may only adopt local rules for the conduct of criminal proceedings which do not conflict with the provisions of the Louisiana Criminal Procedure Code or other laws, La. Crim. P. 18 (1966). Similarly, the Louisiana Code of Civil Procedure recognizes the inherent powers of the courts, La. Civ. P. 191 (1960), but it too adds that the courts may adopt only those local rules governing matters of practice and procedure which are not contrary to the rules provided by law. La. Civ. P. 193 (1960). Case law recognizes that were a rule of court conflicts with a statute, the statutory provision will prevail. Tahran v. Petroleum Casualty Co., 250 La. 949 200 So.2d 6 (1967).

Although court practices and procedures are generally established by legislation in Louisiana, such enactments are not completely immune from judicial attack. The aforementioned constitutional limitations exist, and the constitution authorizes court-made rules in a few limited instances. Tate, supra, at 559. For example, the Supreme Court prescribes by rule the order of preference for the trial of all appeals filed therein. La. Const. art. VII, §18. In addition, the constitutional authority of the Supreme Court to order writs, orders and process has been invoked to limit legislative regulation of judicial procedure. Tate, supra, at 559; La. Const. art. VII, §2; Roksvaag v. Reilly, 237 La. 1094, 113 So. 2d 285 (1959). Finally, the constitution provides that the Legislature may not enact any local or special laws regarding matters of practice and procedure. La. Const. art. IV, §4.

It should be noted that plans are now underway for major reviews and revisions of Louisiana constitution. One suggested reform is that a definitive and direct statement on the rule-making power be inserted. The outcome of such a proposal is unknown at the time of this study's publication.

MAINE

The power to establish procedural rules in Maine currently rests with the Supreme Judicial Court.

The Judicial Article makes no direct mention of rule-making but simply declares the judicial power to be vested in a Supreme Judicial Court. Me. Const. art. VI, §1.

Statutes more clearly define the locus of power. One act grants the Court power to prescribe general rules for civil actions. Me. Rev. Stat. Ann. tit. 4, §8 (1964). Another grants the Court equal power for criminal actions. Me. Rev. Stat. Ann. tit. 4, §9 (1964). When the rules promulgated under these acts take effect, conflicting laws have no further force or effect. Finally, a third act recognizes the Supreme Judicial Court's ultimate power over rules of practice and procedure in the courts of probate. Me. Rev. Stat. Ann. tit. 4, §351 (Supp. 1972-73).

It does not appear that Supreme Court rules are promulgated under any inherent powers existing outside of the aforementioned statutes. In adopting the Maine Rules of Court, no mention is made of any judicial power originating from Me. Const. art. VI, §1. Me. R. Ct. (West 1972). Prior to these statutes, the Court apparently accepted legislative power in rule-making, and only those court rules not "repugnant to law" were to be established. Cunningham v. Long, 135 A. 198, 199 (1926). Since enactment of Title 4, Sections 8 and 9, of the Maine Revised Statutes, Cunningham has been reaffirmed. Cote v. State, 286 A.2d 868, 869 (1972); Collett v. Bither, 262 A.2d 353, 356 (1970).

Both the Legislature and the Supreme Judicial Court recognize the power of other courts to adopt rules. Such rules, however, are not to conflict with Supreme Court rules or with statutes. Me. R. Crim. P. 57a (West 1972); Me. Rev. Stat. Ann. tit. 4, §114 (1964); Me. Rev. Stat. Ann. tit. 4, §351 (Supp. 1972-73).

MARYLAND

The rule-making power in Maryland currently rests with the Court of Appeals, although the Court's rules are subject to change by the General Assembly.

The Judicial Article defines the rule-maker. One relevant section provides in part: "It shall be the duty of the judges of the Court of Appeals to make and publish rules and regulations for the prosecution of appeals to the appellate courts, whereby they..... shall regulate, generally, the practice of said Court of Appeals and intermediate Courts of Appeal.....It shall also be the duty of said Judges.....to devise and promulgate by rules, or orders.....proceedings and pleadings in Equity.....and all rules and regulations hereby directed to be made, shall, when made, have the force of Law, until

rescinded, changed or modified by the said Judges, or the General Assembly." Md. Const. art. IV, §18. It goes on to state: "The Court of Appeals.....shall make rules and regulations to revise the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law." Md. Const. art. IV, §18A. Although the aforementioned constitutional provision defines the high court's rule-making power as being limited by legislative action, a question remains as to what practical limits are imposed on the court by the Legislature.

The Judicial Article also recognizes the power of the Court of Appeals. Court-made rules have been found to take precedence over pre-existing statutes until a new statute is enacted which was intended to revise the rules. County Federal Savings & Loan Ass'n. v. Equitable Savings & Loan Ass'n., 261 Md. 246, 274 A.2d 363 (1971). See also Ginnayan v. Silverstone, 216 Md. 500, 229 A.2d 124 (1967). Observers have also noted judicial deference to legislative veto power and reported that, as yet, ".....no battle lines have been drawn between the Court of Appeals and the General Assembly." Institute of Judicial Administration, Survey of the Judicial System of Maryland, 54 (August, 1967).

In the late 1960's a draft constitution proposed by the Maryland Constitutional Convention Commission stated, in part:

> "Section 5.29 Rule-Making Power
> .....the Supreme Court by rule and the General Assembly by law shall have concurrent power to prescribe regulations governing practice and procedure in all courts.....In the event a rule and a law prescribing a regulation.....conflict, the rule, if adopted or re-adopted after the enactment of the law, shall take precedence over the prior law to the extent of the conflict. 'Rule' as used in this article means a rule adopted by the Supreme Court." See Survey of the Judicial System of Maryland, supra, at 96-97.

To date such a proposal has not been adopted.

MASSACHUSETTS

The rule-making power in Massachusetts ultimately rests with the Legislature, though the Supreme Judicial Council, in practice, promulgates most all procedural rules.

The Judicial Article of Massachusetts makes no specific reference to the rule-making power. The sole provision of the Massachusetts Constitution having any direct bearing on rule-making is Article 30 of the Massachusetts Declaration of Rights, which contains a general separation of powers provision.

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Although statutes speak more directly on the locus of the rule-making power, they are not clearly definitive. One act states that the Supreme Judicial Council shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein; and shall also have general superintendence of the administration of all courts of inferior jurisdiction and shall have the power to issue ".....such orders, directions, and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration." Mass. Gen Laws Ann. ch. 211, §3 (1955; Supp. 1972). Although the foregoing could be interpreted as conferring very broad rule-making powers on the Supreme Judicial Council, such is not the case, according to the legislative history of the act. See Report of the Legislative Research Council to Rule-Making Power of the Supreme Judicial Council, S. Rep. No. 911 at 16-17 (January 22, 1968).

Another act states: "The courts shall, respectively, make and promulgate uniform codes of rules, consistent with law, for regulating the practice and conducting the business of such courts in cases not expressly provided for by law, for the following purposes: First, simplifying and shortening pleadings and procedure.....Third, conducting trials.....Eleventh, the superior court may also make and promulgate such rules for the regulation of the printing, publication and distribution of trial lists.....The rules of the superior court shall not conflict with those of the supreme judicial court." Mass. Gen. Laws Ann. ch. 213, §3 (1955). Though the terms of this act are quite vague, a legislative research report said that ".....the reasonable interpretation of ch. 213, §3 is that the Supreme Judicial Council has the power to promulgate rules of practice and procedure provided that a proposed rule does not deprive a person of a substantive or fundamental right and provided that there is no statute which is directly contradictory to the proposed rule. The word 'expressly' .....militates against an argument that under the statute the mere existence of legislation in the general area precludes the court from promulgating rules in the same area." Report of the Legislative Research Council, supra, at 18-19.

The power of all courts to adopt rules for their own procedure is reaffirmed in other statutes. One act declares that judges of the probate courts shall make rules for their courts, subject to Supreme Judicial Court modification. Mass. Gen. Laws Ann. ch. 215, §30 (1955). Another act states the district courts' chief justice shall make certain uniform rules. Mass. Gen. Laws Ann. ch. 218, §43 (Supp. 1972). A third act grants the Municipal Court of Boston the power to make rules for regulating its practice in all cases not expressly provided for by law. Mass. Gen. Laws Ann. ch. 218, §50 (Supp. 1972). Finally, statutes provide for the creation and duties of a judicial council. One of the council's duties is to "..... submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable." Mass. Gen. Laws. Ann. ch. 221, §§34A, 34B, 34C (1955; Supp. 1972). The council also reports annually to the Governor and Legislature on recommended changes in statutory law dealing with court procedure. For example, the council recommended several changes

in the areas of notice, evidence, appeals and small claims in 1972. Forty-Eighth Report of Judicial Council of Massachusetts, Pub. Doc. No. 144 (December 1972).

The current Supreme Judicial Court believes it has both inherent and statutory power to promulgate rules.* Statutes relied on are Chapter 211, Section 3 and Chapter 213, Section 3. These statutes are construed as a partial relinquishment of the rule-making power by the Legislature in procedural matters. The Court has even provided for a Judicial Conference to help it formulate procedural policy. Sup. Jud. Ct. R. 3:16. The power to establish this conference is provided by statute. Mass. Gen. Laws Ann. ch. 211, §3F (Supp. 1972). Recent examples of the use of the Court's power include the adoption of rules on appellate review by the new Appeals Court, on ethics and discipline in the practice of law, and on judicial conduct. Sup. Jud. Ct. R. 3:24, 3:22, 3:25.

The Supreme Judicial Court has used Chapter 211, Section 3 to change court procedure in at least one area. In Kennedy v. Justice of the District Court of Dukes County, 252 N.E.2d 201, 205 (1969), the Court relied on this statute to dictate procedure to be followed in conducting an inquest. This decision was said to ".....so completely change the procedural law of the Commonwealth, with regard to the manner of conducting an inquest and the manner of handling the record thereof, as to remove any probative value from the sparse evidence which alluded to procedures at inquests conducted prior to the date of that opinion." Lipman v. Commonwealth of Massachusetts, 311 F. Supp. 593, 595 (D. Mass. 1970)

*This information was obtained in a letter to the American Judicature Society from the Massachusetts Supreme Judicial Court which is now on file at the Society's main office.

MICHIGAN

The rule-making power in Michigan rests with the Supreme Court.

The Judicial Article says that the judicial power of the state is vested in one court of justice, and that the Supreme Court--as part of that court of justice--has general superintending control over all the state courts. Mich. Const. art. VI, §§1, 4. It further states that "the supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts" of the state. Mich. Const. art. VI, §5. Thus, the Supreme Court derives its complete rule-making power from the Constitution.

The Legislature has codified this power. Mich. Comp. Laws Ann. §600.233 (1968). Case law on the foregoing constitutional provisions has interpreted the rule-making power of the Supreme Court to be both broad and inherent. For example, see Buscaino v. Rhodes, 385 Mich. 474, 189 N.W.2d 202 (1971) and Jones v. Eastern Michigan Motor Buses, 287 Mich. 619, 630, 283 N.W. 710, 719 (1939).

MINNESOTA

The rule-making power in Minnesota currently rests with the Supreme Court in civil and criminal actions, subject to legislative modification or repeal, and with the Legislature in probate matters.

The Judicial Article does not clearly define the locus of rule-making power. However, at least one provision must be mentioned, for it relates in an indirect way to the status of the state's rule-making power. That provision vests the judicial power of the state in the Supreme Court, among others. Minn. Const. art. VI, §1. While such wording has been interpreted in other states as forming the basis of inherent court rule-making powers, no such reading has been made as yet in Minnesota. It should be noted that there are some members of the current Supreme Court who would interpret Section 1 as the basis of such inherent judicial power.* It should also be noted that the Judicial Article was only recently revised and that the opportunity to define constitutionally the rule-making power was not taken.

The statutes define the rule-makers in Minnesota. One act states that the Supreme Court may prescribe, modify and amend its own rules of practice. Minn. Stat. Ann. §480.05 (1971). Another says the Supreme Court has the power to regulate by rules the pleadings, practice and procedure of civl actions in all the courts of the state except the probate courts. Minn. Stat. Ann. §480.05 (1971). A recently adopted act also grants the Supreme Court the power to similarly regulate the criminal actions in all courts of the state. Minn. Stat. Ann. §480.059 (Supp. 1973).

Legislative deference to Supreme Court rule-making is, however, not complete. The Legislature has reserved the right to modify or repeal any Supreme Court rules. Minn. Stat. Ann. §§480.058, 480.059 [8] (1971; Supp. 1973). As mentioned earlier, it has also apparently withheld from the Supreme Court the right to prescribe the rules for probate courts.

Besides the statutory enactments and Supreme Court rules, procedure may also be regulated by local court rules. The Legislature has expressly recognized the rule-making powers of courts inferior to the Supreme Court. Minn. Stat. Ann. §§480.55, 480.059[5] (1971; Supp. 1973).

A few final points should be noted. Although the Legislature does have the power to override court rules, so far there has been little or no interference by that body in the promulgation of Supreme Court rules.* Also, there is currently a proposal before the Legislature which would enable the Supreme Court to adopt rules of evidence. The fate of this bill is unknown at the time of this report's publication.

*This information was obtained from a letter to the American Judicature Society from the Minnesota Supreme Court which is now on file at the Society's main office.

MISSISSIPPI

The rule-making power appears to rest with the Legislature in Mississippi although courts do promulgate some rules based on their limited inherent powers.

The Judicial Article says that the judicial power of the state is to be vested in a Supreme Court. Miss. Const. art. VI, §144. It also says the Circuit Court has original and appellate jurisdiction. Miss. Const. art. VI, §156. It further states that the Legislature shall provide by law for the due certification of all causes transferred to or from any chancery or circuit court, for the reformation of pleadings in these causes, and for the adjudication of the transfer costs. Miss. Const. art. VI, §163. These are the sole provisions which even indirectly relate to rule-making.

The statutes are only slightly more definitive and illustrate legislative predominance in the area of rule-making. One act grants the Supreme Court the power to ".....prescribe the mode of pleading in causes therein, civil and criminal, and the manner of trying the same; and it may also establish such rules of practice and proceedings therein as may be deemed necessary.....and may dismiss causes for non-compliance with any of the rules; but such rules must be consistent with law." Miss. Code Ann. §1961 (1957). Another act declares the pleading, practice and mode of trial in all cases and matters in the chancery courts may be determined by either court rules or statutory regulations, but that prior or subsequent statutes could negate court-made rules. Miss. Code Ann. §1279 (1957). This provision does recognize rule-making by courts other than the high court, as do other provisions. See Miss. Code Ann. §1664 (1957).

Case law has recognized an inherent power in the state courts to promulgate procedural rules, and this inherent power is based on the aforementioned constitutional Sections 144 and 156. Southern Pacific Lumber Co. v. Reynolds, 206 So.2d 334 (1968). Although the inherent power assumed by the Supreme Court in Southern was very broad, the Court has so far been reluctant to exercise it in a very broad manner. Custom, the desire for stable legislative-judicial relations, and early case law yielding to legislative rule-making all partially explain the Court's reluctance until now to fully utilize the concept of inherent powers.*

A recent bill in the Mississippi Legislature proposed the establishment of an advisory committee to the Supreme Court which would draft rules of civil procedure. The Court would be able to approve, alter or reject the submitted rules. All rules approved by the Court would become effective unless the next session of the Legislature vetoed the adopted rules. The fate of this bill was uncertain at the time of this report's publication. Constitutional changes concerning rule-making have also been proposed. In 1966 the Mississippi State Bar Associaton approved a resolution calling for a constitutional amendment granting rule-making power to the Supreme Court. The 1967 convention, however, refused to re-recommend the amendment.

*This information was obtained in a letter to the American Judicature Society from the Supreme Court of Mississippi which is now on file at the Society's main office.

MISSOURI

The Supreme Court of Missouri has partial rule-making authority, yet it is subject to legislative repeal or amendment.

The Judicial Article describes the rule-makers as follows: "The supreme court may establish rules of practice and procedure for all courts. The rules shall not change.....the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal.....Any rule may be annulled or amended by a law limited to the purpose." Mo. Const. art. V, §5. Thus, the Supreme Court can change rules only in certain procedural areas, and these changes are subject to legislative review.

Statutory law confirms the Legislature's ultimate veto power over rules promulgated by the Supreme Court. The relevant act says that although the Supreme Court has the power to establish some general rules for all courts of the state, no such rules shall be contrary to or inconsistent with the laws in force. Vernon's Mo. Ann. Stat. §477.010 (1952).

The Missouri courts have accepted their incomplete rule-making power, recognizing the limitations on their ability to make rules of practice and procedure. State v. Adams, 291 S.W.2d 74, 77 (1956) and State v. McClinton, 418 S.W.2d 55, 62 (1967). This acceptance has come despite strong declaration in other areas of the Supreme Court's inherent powers. State v. St. Louis County, 451 S.W.2d 99 1970).

A Missouri Bar Committee has recently suggested that the Court's rule-making power be expanded. The proposal is that Article V, Section 5 be altered to allow the Supreme Court to establish, subject to legislative annulment, new rules of evidence.

It should finally be noted that the preceding analysis of rule-making in Missouri does not preclude individual state courts from establishing any of their own procedural rules. These local rules must, of course, be set within the aforementioned limits. See Vernon's Mo. Ann. Stat. §482.280 (1952).

MONTANA

The procedural rule-making power in Montana presently rests with the Supreme Court, subject to Legislature veto.

The new Judicial Article, effective July 1, 1973, states that the judicial power is vested in one Supreme Court, that this Court has general supervisory control over all other courts, and that this Court many make rules governing appellate procedure, practice and procedure for all other courts. Mont. Const. art. VII, §§1, 2(2), 2(3). Such provisions more clearly define the rule-making authority than did the former Judicial Article. However, the new constitution also states that, "Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation." Mont. Const. art. VII, §2(3).

The resulting effects of the new constitution on rule-making are unknown. The inter-action between the judicial and legislative branches may vary over time. However, the Legislature has already recognized the right of courts to promulgate rules. All courts of record other than the Supreme Court may make rules for their own government, yet such rules must not conflict with state laws. Mont. Rev. Codes §93-502 (1947). This same provision also recognizes the Supreme Court's rule-making power with respect to the state's district courts, yet no mention is made of contradictory state law.

NEBRASKA

The ultimate rule-making power in Nebraska still rests with the Legislature, although the Supreme Court has been assuming an increasing share of the responsibility in recent years.

The Judicial Article establishes the legislative power. After investing the state's judicial power in a Supreme Court, among others, one relevant provision states: "In accordance with rules established by the Supreme Court and not in conflict with other provisions of this Constitution and laws governing such matters, general administrative authority over all courts in this state shall be vested in the Supreme Court and shall be exercised by the Chief Justice." Neb. Const. art. V, §1. Two other constitutional provisions recognize the legislative power. One states: ".....the Supreme Court may promulgate rules of practice and procedure for all courts, uniform as to each class of courts, and not in conflict with laws governing such matters." Neb. Const. art. V, §25. Another states: "The organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated by law and the force and effect of the proceedings, judgements and decrees of such courts, severally, shall be uniform." Neb. Const. art. V, §19.

Despite the aforementioned provisions, the Supreme Court has recently expanded the exercise of its rule-making authority, apparently with legislative approval. The 1972 Nebraska Legislature completely reorganized courts of limited jurisdiction and in so doing, it specifically provided for Supreme Court administrative and rule-making authority in some areas (i.e., budgets, salaries, courtroom facilities and recordkeeping). See Neb. Rev. Stat. §§24-513 to 515, 24-545 (Supp. 1972). The Legislature implicitly permitted the Supreme Court to establish rules of procedure in other areas by declining to act. The Judiciary Committee of the Legislature refrained, for example, from acting on a uniform waiver system for traffic offenses and on appeals procedure in the new County Courts. These areas had been covered by legislation prior to the reorganization. Currently, the Supreme Court is considering adopting rules in these areas.*

The Supreme Court recognized its incomplete rule-making power when it stated: "The proceedings of the Constitutional Convention of 1920 reveal an attempt to give to the court unrestricted procedural

rule-making power.....The proposal was rejected and the restrictive provision was adopted and is now part of the organic law of the state." Peck v. Dunlevey, 184 Neb. 812, 172 N.W.2d 613, 615-616 (1969). Yet recent action shows increasing use of the Supreme Court's rule-making power within the constitutional limits recognized in Peck, and increasing understanding and acceptance of that power by the Legislature.*

*This information was obtained in a letter to the American Judicature from the Supreme Court of Nebraska which is now on file at the Society's main office.

NEVADA

The rule-making power in Nevada is vested in the Supreme Court for civil actions and in the Legislature for criminal matters.

The Judicial Article says that the judicial power is vested in the Supreme Court and that this Court has the power to issue all writs necessary or proper to the complete exercise of its appellate jurisdiction. The power to issue writs is also vested in the district courts. Nev. Const. art. VI, §§1, 3, 6. These rather vague provisions have not as yet been interpreted by the courts to contain any foundation for judicial rule-making. Other sections of the constitution specifically limit legislative special or local rule-making. Nev. Const. art. IV, §20. These are the sole constitutional sections bearing any relation at all to rule-making.

The rule-making power in Nevada is defined by statute. The relevant act appears to put the power in the Legislature. It says that the Supreme Court may make rules for the government of the courts which are not inconsistent with the constitution and with the laws of the state. Nev. Rev. Stat. §2.120[1] (1971). However, the same act goes on apparently to delegate at least the civil rule-making power to the Supreme Court. The act further states that ".....the Supreme Court by rule.....shall regulate original and appellate civil practice and procedures including.....without limitations, pleadings, motions, writs.....for the purpose of simplifying the same and promoting the speedy termination of litigation....." Nev. Rev. Stat. §2.120[2] (1971). Statutory law also recognizes the power of other courts to promulgate rules. Nev. Rev. Stat. §3.020 (1971).

The Nevada courts have until now accepted this division of rule-making power. There are indications that the reason for this is the desire on the part of the courts to maintain a friendly relationship with the Legislature--which, incidentally, annually passes on the judicial budget.* See State v. Eighth Judicial District Court, 79 Nev. 280, 382 P.2d 214 (1963).

*This information was obtained in a letter to the American Judicature Society from the Supreme Court of Nevada which is now on file in the Society's main office.

NEW HAMPSHIRE

Final rule-making power for the New Hampshire courts is currently vested in the Supreme Court.

The Judicial Article states that the judicial power shall be vested in a Supreme Court. N.H. Const. art. 72-a. This appears to be the only statement in the constitution which bears any direct relation to rule-making.

The statutes more clearly define the location of the rule-making power. In 1971 several acts became effective which established a "unified court system" for the state. It was the aim of the legislature to "improve the administration of justice and efficient operation of all the courts." N.H. Rev. Stat. Ann. §490-A:1 (Supp. 1972). One of the enactments gives the Chief Justice the duty, power and authority to "issue rules to provide for the expeditious disposition of all litigated matters" and to issue rules "as may be necessary for the improvement of the administration of justice." N.H. Rev. Stat. Ann. §490-A:3(a) and (f) (Supp. 1972). Another act gives the Supreme Court "general superintendence of all courts of inferior jurisdiction.....including the authority to approve rules of court." N.H. Rev. Stat. Ann. §490:4 (Supp. 1972). The power to make rules is also held by the state Superior Court as well as by the Supreme Court. See N.H. Rev. Stat. Ann. 491:10 (1968 Replac.).

The foregoing legislation is not the only source of the courts' rule-making responsibilities. The state's Judicial Council has recognized the Superior Court's inherent powers to promulgate rules. Seventh Report of the N.H. Judicial Council 26 (1958). More importantly, the Supreme Court has often recognized the inherent authority and common law power of courts of general jurisdiction to prescribe rules of practice and procedure. Garabedian v. Donald William Inc., 106 N.H. 156, 207 A.2d 425 (1965) and Nassif Realty Corp. v. National Fire Insurance Co. of Hartford, 220 A.2d 748 (1966). Rules of limited and special jurisdiction courts may not be promulgated by these courts directly; rather, administrative committees consisting of judges from these courts have been established to recommend new rules to the Supreme Court. N.H. Rev. Stat. Ann. §502-A:18 (1968 Replac.), §547:34 (Supp. 1972).

NEW JERSEY

The rule-making power in New Jersey rests with the Supreme Court.

The Judicial Article states that the judicial power shall be vested in a supreme court, among others. N.J. Const. art VI, §1. It goes on to declare: "The supreme court shall make rules governing the administration of all courts in the state, and subject to law, the practice and procedure in all such courts....." (emphasis added) N.J. Const. art. VI, §2(3). Finally, it asserts: "The chief justice of the supreme court shall be the administrative head of all the courts of this state." N.J. Const. art. VI, §7.

In Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406 (1950), the Supreme Court construed the phase "subject to law" in article VI, section 2(3) to mean substantive law as distinguished from pre-existing legislation, and thus Court rules were said to supersede conflicting legislation in the area of court practice and procedure. The construction given to article VI, section 2(3) in Winberry was thought by many to be dictum; yet this so-called dictum was transmuted into virtual holding in George Siegler Co. v. Norton, 8 N.J. 374, 381-2 (1952). The Court has never since retreated from the position of exclusivity in the Court over practice and procedure. See also State v. Otis Elevator Co., 12 N.J. 1,12 (1953); Permutter v. Berowe, 58 N.J. 5,274 A.2d 382 (1971); and Busik v. Levine (Supreme Court of New Jersey; decided July 6, 1973; no official cite available on date of report's publication).

The Legislature has so far acquiesced in the Court's power in the area of procedural rule-making. However, the Legislature has provided by L. 1970 c.258, N.J. Stat. Ann. §2A:84A-39.1 to 39.6, for a permanent legislative commission called the State Rules of Court Review Commission to ".....study and review any rule of court in effect, or proposed, which the commission considers may call for legislative action to aid in the achievement of the intended purpose or the solution of a problem, by means of amendatory, supplemental, revisory or new legislation." (N.J. Stat. Ann. §2A:84A-39.3). It has been suggested that this new Commission, currently inoperative because of lack of staff, should function in those judicial areas which have both procedural and substantive aspects. See concurrence by Judge Hall in Busik v. Levine.

Finally, the Supreme Court has allowed for the courts of the state to dispense with Supreme Court rules if adherence would result in an injustice, and has allowed for the courts to adopt local rules in the absence of Supreme Court rule. N.J. Court Rules, 1969 R.1:1-2.

NEW MEXICO

Responsibility for procedural rule-making in New Mexico rests with the Supreme Court.

The relevant portions of the Judicial Article declare that the judicial power of the state shall be vested in a Supreme Court and that this Court shall have a superintending control over all inferior courts. N.M. Const. art. VI, §§1, 3. These are the sole constitutional provisions related in any direct way to rule-making.

Statutes define the source of rule-making power. One act grants the Supreme Court the power to regulate by rules the pleading, practice and procedure in all of the state's courts. N.M. Stat. Ann. §21-3-1 (1970). Another act declares that all statutes relating to pleading, practice and procedure which existed prior to the aforementioned grant of power shall remain in effect only until modified or suspended by the Court. N.M. Stat. Ann. §21-3-2 (1970).

The Court has upheld the above provisions, stating that they are not an unconstitutional delegation of exclusive legislative power to the judiciary. The Court explained that the promulgation of court rules was an exercise of an inherent court power. Yet in upholding the provisions and asserting its inherent power to make rules, the Court refrained from stating that rule-making was exclusively a judicial responsibility (and that the Legislature therefore had no control whatsoever over court rules). Thus, the Court did not at first answer the question of ".....who is paramount in the rule-making field, the court or the legislature....."; but rather left this "academic proposition" for the future. State v. Roy, 40 N.M. 397, 60 P.2d 646, 659-660 (1936). Thirty-three years later the Court did answer the question; it declared the court to be paramount in rule-making by holding that a court rule prevailed over a contrary statute. The Court's rule-making power was said to be a constitutional duty, but no specific constitutional provision was cited (it seems article VI, section 1 or 3 would suffice). Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969).

NEW YORK

The rule-making power in New York is constitutionally vested in the Legislature, yet some of this power has been delegated to other bodies.

The Judicial Article states that the Legislature may delegate any power it possesses to regulate court practice and procedure; this delegation may be made, in whole or in part, to the administrative board of the judicial conference, to the judicial conference, or to the appellate division of the supreme court. N.Y. Const. art. VI, §30. Although not constitutionally compelled to do so, the Legislature has delegated some of its rule-making power (i.e., in civil practice area) to the judicial conference and some to the administrative board. N.Y. Jud. Law §§212(5), 229(3) (McKinney 1968)

The Court of Appeals of New York has apparently conceded that the rule-making power is vested in the Legislature, although some members of the Court have strongly disagreed with such a placement of power. Cohn v. Borchard Affiliations, 250 N.E.2d 690 (1969). The case of Riglander v. Star Co., 98 App. Div. 101, 90 N.Y.S. 772 (1904), 73 N.E. 1131 (1905) seems to be implicitly overruled by Cohn; Riglander held that a statute regulating court procedure was unconstitutional.

Local court rules are authorized by the constitution and by statutes, but they must be made consistent with the general practice and procedure as provided by statute or general rules. N.Y. Const. art. VI, §30.

A recent study of the New York state court system recommended changes in the exercise of the rule-making power. It recommended abolishing the judicial conference and the administrative board and urged placing the rule-making power in the Court of Appeals. A committee having representatives of both the state court system and the state bar was also proposed to help the Court of Appeals. And Justice For All: Report of the Temporary Commission on the New York State Court System, Part I at 18, 24 and 25 (January 1973).

NORTH CAROLINA

The rule-making power in North Carolina is shared by the Supreme Court and the General Assembly. The Supreme Court has ultimate authority for the Appellate Division, while the General Assembly has ultimate responsibility for the superior court and district court divisions.

Rule-making is defined by the constitution. The Judicial Article initially asserts that the judicial power is vested in a General Court of Justice and that the General Assembly has no power to deprive the judicial department of any power that rightfully pertains to it. N.C. Const. art. IV, §1. It subsequently states: "The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division. The General Assembly may make rules of procedure and practice for the superior court and district court divisions, and the General Assembly may delegate this authority to the Supreme Court.....If the General Assembly should delegate.....the General Assembly may, nevertheless, alter, amend or repeal any rule of procedure or practice adopted by the Supreme Court for the Superior Court or District Court Divisions." N.C. Const. art. IV, §13(2).

Statutory law recognizes Supreme Court power in appellate division procedure, N.C. Gen. Stat. §7A-33 (1969 Replac.), and delegates legislative rule-making to the Court. The relevant act states: "The Supreme Court is hereby authorized to prescribe rules of practice and procedure for the superior and district courts supplementary to, and not inconsistent with, acts of the General Assembly." N.C. Gen. Stat. §7A-34 (1969 Replac.).

Case law on rule-making indicate only that Supreme Court rules are mandatory, and are strictly enforced. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970) and Balint v. Grayson, 256 N.C. 490, 124 S.E.2d 365 (1962).

Recent legislation has gone further and recognized the power of the Supreme Court to make rules outside the area of procedure. One new act authorizes Court rules on standards of judicial conduct. N.C. Gen. Stat. §7A-10.1 (1973 Advance Legislative Service, Pamphlet No. 2).

NORTH DAKOTA

The rule-making power in North Dakota rests with the Supreme Court.

The Judicial Article vests the judicial power of the state in a Supreme Court, among others. N.D. Const. art. IV, §85. It goes on to state: "The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law." N.D. Const. art. IV, §86. Yet it does

not appear that the rule-making power of the Supreme Court is derived from these constitutional provisions. The Court has itself said that article IV, section 86 is ".....unlimited, save as its exercise may be regulated and limited by statute." State v. District Court, 194 N.W. 745 (1923). Recently the Court declared that its superintending control power was only to be used in extraordinary situations when no other remedy was available. Ingalls v. Bakken, 167 N.W.2d 516, 518 (1969).

The Court's authority in the area of procedural rule-making is derived from statute. One relevant act provides: "The supreme court of this state may make all rules of pleading, practice and procedure which it may deem necessary for the administration of justice in all civil and criminal actions, remedies, and proceedings in any and all courts of this state; and the method of taking, hearing, and deciding appeals to the court.....in any case where an appeal from any such decision is allowed by law." N.D. Cent. Code §27-02-08 (1960). Another declares: "All statutes relating to pleadings, practice, and procedure in civil and criminal actions.....shall remain in effect only as rules of court and shall remain in effect unless and until amended or otherwise altered by rules promulgated by the supreme court." N.D. Cent. Code §27-02-09 (1960). Other acts define the manner in which rules are to be promulgated by the Court. N.D. Cent. Code §§27-02-10 to 27-02-15 (1960). See also N.D. Cent. Code §27-05-08.1 (1960) and particularly §27-02-05.1 (Supp. 1973).

Recent Court action in rule-making has specifically cited the aforementioned statutes as sources of power. See the Rules of Civil Procedure, N.D. Cent. Code §28 et seq., and Rules of Appellate Procedure, N.D. Cent. Code §29 et seq. (Supp. 1973). There are, however, indications that the Supreme Court may one day interpret the aforementioned constitutional provisions as granting it the power to promulgate procedural rules. The Court has already stated it promulgation of rules regarding admission and discipline of attorneys as part of its "inherent jurisdiction." In re Christianson, 175 N.W.2d 8 (1970). The Court has not yet promulgated a set of rules for criminal procedure. Finally, the Court has provided for adoption of local rules by the district courts. N.D. R. Civ. P. 84.

OHIO

The Supreme Court of Ohio is vested with rule-making authority, but the General Assembly retains the power to change or veto rules adopted by the Court.

The Judicial Article declares that the judicial power of the state is vested in a Supreme Court, and that this Court has general superintending power over all state courts. Ohio Const. art. IV, §§1, 5A. It also states: "The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state.....unless .....the general assembly adopts a concurrent resolution of disapproval." Ohio Const. art. IV, §5B. The latter provision allows for the adoption of local procedural rules by lower courts.

This constitutional veto power of the Legislature is reiterated in statutory law. One relevant enactment declares that the Supreme Court can make and publish procedural rules only for itself, that these rules cannot be inconsistent with the laws of the state, and that the common pleas and appellate courts can make local procedural rules, which are subject to Supreme Court approval, consistent with the laws of the state. Ohio Rev. Code Ann. §2505.45 (Baldwin 1971). Other statutes confirm the ability of the Legislature to reject court rules. Ohio Rev. Code Ann. §§2501.08, 2503.36, 2937.46 (Baldwin 1971). Case law is in harmony. Grecian Gardens, Inc. v. Board of Liquor Control, 206 N.E.2d587 (Ohio Court of Appeals, Franklin County, 1964).

It should be noted that the Legislature has stated that certain rules promulgated by the Supreme Court do not have to be submitted for legislative review. Ohio Rev. Code Ann. §2937.46 (Baldwin 1971). Yet these rules--dealing in large part with minor traffic cases--must still be consistent with the statutory law.

Only a few cases can be found which discuss inherent court powers in the area of judicial rule-making. Fry v. Pennsylvania R.R. Co., 35 N.E.2d 756, 757 (Ohio Court of Appeals, Delaware County, 1941), or Weier v. Thorne, 207 N.E.2d 568, 569 (Ohio Court of Appeals, Ottawa County, 1965).

OKLAHOMA

The procedural rule-making power in Oklahoma is vested in the Supreme Court.

The Judicial Article declares that the state's judicial power is vested in a Supreme Court, among others. Okla.Const. art. VII, §1. It also gives the Supreme Court general administrative authority over all courts. Okla.Const. art. VII, §6. Some observers have asserted that this latter provision grants the Supreme Court the constitutional authority to promulgate procedural rules.*

The rule-making responsbility is more clearly defined by statute. One enactment states that the Supreme Court has the power to make amendments to the civil procedure code which may apply to all courts of record in the state. Okla. Stat. Ann. tit. 12, §74 (1960). Another states that the Supreme Court is authorized by rule order to make rules and orders which would bring about a more speedy and efficient administration of justice. Okla. Stat. Ann. tit. 20, §23 (Supp. 1972-73). A third act flatly declares: "Nothing herein shall impliedly limit the rule-making authority which the Supreme Court inherently has or has by virtue of other statutory provisions." Okla. Stat. Ann. tit. 20, §24 (Supp. 1972-73). While this latter provision does not wholly exclude the Legislature from the rule-making area, it does indicate that legislative action could be erased by case law or court rule. This new act is particularly significant when one considers a recently repealed statute which provided that when any rule of the Supreme Court was in conflict with any law of the state, the rule would have no effect. Okla. Stat. Ann. tit. 20, §13 (repealed January, 1969).

It appears that the Oklahoma courts have so far refrained from declaring rule-making to be an inherent court duty. The Supreme Court has not expanded its power of "superintending control" to encompass rule-making. Okla. Const. art. VII, §4; State v. Knight,

49 Okla. 202, 152P. 362, 363-4 (1915). Nor has such an inherent duty been developed in a manner analogous to the Court's assumption of power over the regulation of the practice of law. In re Integration of State Bar of Oklahoma, 185 Okla. 505, 95 P.2d 113 (1939) and Ford v. Board of Tax-Roll Corrections, 431 P.2d 423, 427-431 (1967). Supreme Court restraint with respect to its inherent power to promulgate rules has been criticized in the past. Note, "Rule-Making--The Judicial Regulation of Procedure," 4 Okla. L. Rev. 259 (1951).

*Based upon a letter on file with the American Judicature Society from the Supreme Court of Oklahoma. The Court also cited this constitutional provision when it adopted new rules for the district courts on July 23, 1973--along with citing title 12, section 74 and title 20, section 24. See Okla. B.A.J. (July, 1973).

OREGON

The rule-making power in Oregon is vested in the Legislature.

The Oregon Constitution states that the judicial power of the state shall be vested in one Supreme Court. Ore. Const. art. VII, original, §1. It also says that the Legislature shall not pass any special or local laws in the areas of justices of the peace jurisdiction and duties; the regulation of practice in Courts of Justice; and the changing of venue in civil and criminal cases. Ore. Const. art. IV, §23. Finally, it declares that, notwithstanding section 23 of article VI, laws prescribing the manner in which the jurisdiction of the courts inferior to the Supreme Court may be exercised are valid although applicble only to certain classes of judicial subdivisions or to particular judicial subdivisions. Ore. Const. art. VII, amended, §2b. These appear to be the only constitutional provisions connected with rule-making.

Statutes are somewhat more definitive with respect to the procedural rule-makers. One act recognizes the Supreme Court's general administrative and supervisory authority over the courts, yet expressly denies the high court the power to make rules of civil and criminal procedure. Ore. Rev. Stat. §1.002 (1971). However, other statutes recognize the power of individual courts to adopt rules covering their own proceedings. Ore. Rev. Stat. §§2.120 (Supreme Court); 2.560(6) (Court of Appeals); 3.220(1)(b) (circuit courts); 3.380 (circuit courts); 46.280 (district courts) (1971). See also "Uniform Rule" 33 Ore. St. B. Bull. 9 (July 1973).

Case law seems to accept legislative control over procedural rule-making. The Court has described itself as "a court of limited jurisdiction, circumscribed in its powers by constitution and statute." State v. Reid, 298 P.2d 990, 997 (1956). The Court has also stated that".....in respect to regulating the practice in courts of justice, it (i.e., the Legislative Assembly) must proceed by general laws, and not by local or special enactments, so that the uniformity of practice may not be impaired or destroyed." In re McCormick's Estate, 144 P. 425, 427 (1914).

It should finally be noted that proposed legislation currently pending before the Legislative Assembly and the Governor could soon change the nature of rule-making in Oregon. Senate Bill 813, (1973 Sess.) which has a very good chance of passing, would amend section 1.002 to allow the Supreme Court to adopt rules prescribing the forms of all motions, notices, process and other written pleadings used in both civil and criminal proceedings in all of the state's courts. These rules could not, however, alter or revise any statutory provisions on the form of written pleadings. House Bill 2905 (1973 Sess.) would give the Supreme Court full rule-making power. Its chances of passages are much slimmer.

PENNSYLVANIA

The power to promulgate procedural rules for the Pennsylvania courts rests with the Supreme Court.

The Judicial Article states that the Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace. Pa. Const. art. V, §10(a). More specifically, it grants to the Supreme Court the power to prescribe general rules governing practice, procedure and conduct in all Pennsylvania's courts and for the state's justices of the peace. Such power is said only to be limited by other constitutional sections and by the right of the General Assembly to determine the jurisdiction of the courts and justices of the peace and to enact statutes of limitation and repose. Pa. Const. art. V, §10(c).

Statutes confirm the ultimate power of the Supreme Court in rule-making. Prescription of rules for criminal cases is recognized in Pa. Stat. Ann. tit. 17, §2084 (Purdon 1962) and for civil cases in Pa. Stat. Ann. tit. 17, §61 (Purdon 1962). Other statutory provisions dealing with the rule-making powers of lower courts as well as of the Supreme Court are Pa. Stat. Ann. tit. 17, §§61-65, 67 (Purdon 1962).

No case law could be found directly dealing with the issue of rule-making in Pennsylvania. The Court has, however, recognized that its powers are not totally unlimited. Leahey v. Farrell, 362 Pa. 52, 54, 66 A.2d 577, 578-9 (1949). It has also accepted the legislative grant of rule-making power. In re Templeton, 399 Pa. 10, 159 A.2d 725, 729 (1960).

RHODE ISLAND

The procedural rule-making power in Rhode Island currently rests with the Supreme Court.

The Judicial Article states that the judicial power is vested in one Supreme Court. R.I. Const. art. X, §1. It further states that the Supreme Court has final revisory and appellate jurisdiction upon all questions of law and equity and other jurisdiction as may from time to time be prescribed by law. R.I. Const. amend. 12, §1.

There appears to be no other constitutional provisions directly connected with procedural rule-making.

The rule-making power in Rhode Island seems to be defined by statutes and granted exclusively to the Supreme Court. A recent statutory amendment provides that the supreme, superior, family and district courts all have the power to make rules regulating practice, procedure and business within themselves but it also declares that all such rules shall be subject to Supreme Court approval. Furthermore, once the rules have been approved by the Court, all conflicting statutory regulations are superseded. R.I. Gen. Laws Ann. §8-6-2 (Supp. 1972).

Before the statutory amendments to general law 8-6-2, the Rhode Island Supreme Court had at least hinted in a series of cases that it felt it had the inherent power to prescribe procedural rules. Lettendre v. R.I. Hospital Trust Co., 60 A.2d 471, 474 (1948); State v. Garnetto, 63 A.2d 777, 780 (1949); and Berberian v. Lussier, 139 A. 2d 869, 874 (1958). It appears. therefore, that exclusive Supreme Court rule-making power may be derived at some time in the future from the constitution rather than from the statutes (perhaps article X, section 1).

SOUTH CAROLINA

The ultimate rule-making power in South Carolina currently rests with the Supreme Court, subject to legislative veto.

The new Judicial Article defines the rule-making authority. It first invests the judicial power in a unified judicial system--including a Supreme Court. S.C. Const. art. V, §1. It then goes on to state: "The Supreme Court shall make rules governing the administration of all the courts of the state. Subject to statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts." S.C. Const. art. V, §4. The new Article thus differs from the old constitution not only by discussing rule-making, but also by directly recognizing legislative power to override Court-made rules. The new Article was ratified by the General Assembly on April 4, 1973. With the adoption of amendments to the 1895 Constitution, the General Assembly provided for a committee to study the manner of implementing the new Article. The committee report should be ready for consideration at the 1974 meeting of the Legislature.

In the interim, the Court is expected to exercise the rule-making power in the absence of a prohibitory statute. Current statutes grant the Supreme Court the power to make rules not inconsistent with the laws. S.C. Code Ann. §§10-16, 10-17, 15-447 (1962). They also recognize the power of courts other than the Supreme Court to participate in rule-making. S.C. Code Ann. §§10-16, 15-231 (1962). The General Convention of Justices and Judges has used this power to amend circuit court rules. See Note, "The Judiciary and the Rule-Making Power," 23 S.C.L. Rev. 377 (1971).

Case law seems to accept legislative veto power over judicial

rule-making. No cases could be found dealing with the inherent authority of the Supreme Court to override statutes. In one case the Court delcared its inherent power to order certain procedural rules; yet, the case involved an instance where there were no applicable statutes on the matter covered by the Court's order. Ex Parte Goodyear Tire and Rubber Co., 150 S.E.2d 525, 529 (1966).

It has been argued by some observers in South Carolina that the Supreme Court has, in effect, overridden certain statutes without so stating and relying solely on section 10-16. When these rules were adopted, the General Assembly apparently recognized their effect on existing statutes yet made no real effort to abrogate them. Thus, the effective rule-making power in South Carolina may be stronger than indicated in the statutes and in the constitution. See Note, 23 S.C.L. Rev., supra, note 20, at 384.5. This stronger rule-making authority may be derived from the Court's joint use of a separation of powers argument and a favorable reading of the constitutional term "judicial power." Id. It should be noted that the Court has taken this arguably unauthorized step before ratification of the new Judicial Article, and that article V, section 4 may alter court practice.

SOUTH DAKOTA

The rule-making power in South Dakota currently rests with the Supreme Court, subject to legislative change.

The new Judicial Article, adopted by the voters in November, 1972, clearly defines the rule-making power. It states: "The Supreme Court shall have general superintending powers over all courts and may make rules of practice and procedure and rules governing the administration of all courts. The Supreme Court by rule shall govern terms of courts, admission to the bar, and discipline of members of the bar. These rules may be changed by the Legislature." S.D. Const. art. V, §12.

Statutes enacted after the adoption of the new Judicial Article confirm legislative ability to change Court rules. S.D. Compiled Laws Ann. §§16-3-1 to-7 (1967; Supp. 1973). These new statutes supersede acts which had given the Court the power to amend, repeal or otherwise alter legislation on pleadings, practice and procedure in civil or criminal actions. S.D. Compiled Laws Ann. §§16-3-1, 16-3-4 (1967).

TENNESSEE

The rule-making power in Tennesee currently rests jointly with the Supreme Court and the Legislature.

The Judicial Article fails to define rule-making in Tennessee. It vests the judicial power in one Supreme Court, among others. Tenn. Const. art. VI, §1. It divides the powers of the government

into the three departments. Tenn. Const. art. II, §1. Yet it makes no explicit mention of the rule-making power.

Statutes define rule-making and indicate there are roles for both the Court and the Legislature. One act asserts that the Supreme Court has the power to make rules of practice for the cases before it. Tenn. Code Ann. §16-31-1 (1955). Another grants the Court power to prescribe by general rules the forms of process, writs, pleadings and motions, and the practice and procedure in all of the courts of the state in all civil suits, actions and proceedings. Tenn. Code Ann. §16-112 (Supp. 1972) An act following this latter provision states, however: ".....such rules shall not take effect until they have been reported to the General Assembly.....and until they have been approved by joint resolution of both houses of the General Assembly." Tenn. Code Ann. §16-114 (Supp. 1972). Another subsequent act declares that after such rules become effective, all conflicting laws shall have no further force. Tenn. Code Ann. §16-116 (Supp. 1972).

From these legislative provisions, it appears that ultimate responsibility for rule-making in Tennessee rests with the Legislature. However, one could argue that section 16-114 applies only to section 16-112, and that "all of the courts of the state" in section 16-112 does not include the Supreme Court which is covered by section 16-311. Thus, because section 16-311 does not mention legislative approval of rules, the Supreme Court may be said to have exclusive authority over the promulgation of rules for its own proceedings. This argument is bolstered by the old case of Wood v. Frazier, 86 Tenn. 500, 8 S.W. 148 (1888) where the Supreme Court stated that the precursor to section 16-311 (which read exactly the same) precluded any legislative interference with rules covering Supreme Court cases. The argument is also strengthened by the fact that there is no indication that the Rules of the Supreme Court were submitted for legislative approval, while it is known that the new Rules of Civil Procedure were submitted. Tenn. R. Civ. P., R.1, Compiler's Notes. There is currently no set of Court-adopted rules on criminal procedure; criminal actions were specifically excluded in section 16-112.

Both statute and case law provide for the adoption of additional or supplementary rules of practice by other state courts. Tenn. Code Ann. §16-117 (Supp. 1972); Memphis State Ry. Co. v. Johnson, 114 Tenn. 632, 88 S.W. 169, 170 (1905). The Supreme Court has recently indicated that such trial court power is inherent as well as statutory. Shettles v. State, 209 Tenn. 157, 352 S.W.2d 1, 3 (1961).

TEXAS

The ultimate responsibility for procedural rule-making theoretically rests with the Texas Legislature. Yet the Supreme Court is the body which possesses the real power.

The Judicial Article states that the judicial power shall be vested in one Supreme Court, Tex. Const. art. V, §1, and that the

Supreme Court shall have the power to make and establish rules of procedure not inconsistent with the laws of the state for the government of said Court and other Texas courts, Tex. Const. art. V, §25. The constitution thus seems to grant ultimate rule-making power to the Legislature.

The statutes affirm this legislative power. One act claims to invest the Supreme Court with full rule-making power in civil judicial proceedings. While the question of whether the Legislature could relinquish a constitutionally imposed duty is an interesting one, it does not seem to arise because there is, in fact, no such relinquishment. The act declares that in order to yield to the Supreme Court full rule-making power in civil judicial proceedings, all laws governing the practice and procedure in civil actions are repealed. After the effective date of repeal, the Supreme Court is given the power to promulgate any specific rules it deems proper for civil actions. However, the same act also states that the new Supreme Court rules will remain effective unless and until disapproved by the Legislature. Thus, while the Supreme Court may partially participate in civil rule-making, ultimate authority apparently still rests with the Legislature. Tex. Ann. Civ. Stat. art. 1731a (Vernon 1962).

A review of Texas case law reveals the courts have historically recognized ultimate legislative control over rule-making. Missouri K.&T. Ry. Co. of Texas v. Beasley, 106 Tex. 160, 155 S.W. 183, 187 (1913); Few v. Charter Oak Fire Insurance Co., 463 S.W.2d 424, 425 (1971). Yet the current Chief Justice has indicated that the Legislature has until now acquiesced in the Court's responsibility for writing the procedural rules. There has as yet been no confrontation between the Legislature and the court as to the extent of the court's "inherent powers."*

Constitutional and statutory changes may soon reflect the true source of the procedural rule-making power. A constitutional convention is planned for 1974, and from it there may arise new constitutional provisions on rule-making.

*This information is based on a letter from the Supreme Court of Texas to the American Judicature Society which is now on file in the Society's main office.

UTAH

The rule-making power in Utah currently rests with the Supreme Court.

The Judicial Article states the judicial power shall be vested in a Supreme Court. Utah Const. art. VIII, §1. This is the only provision which has any relationship whatsoever to specific rule-making powers. Under this provision, however, the Supreme Court claims it has inherent powers to establish procedural rules.*

The rule-making power in Utah is more clearly defined by statute. The relevant act states that the Supreme Court has the power to prescribe and modify rules of practice and procedure for all actions in all state courts. It specifically declares that the conflicting laws on court procedure will carry no force. Utah Code Ann. §78-2-4 (1953). Courts of record are authorized by statute, however, to promulgate their own rules but such rules must be consistent with law. Utah Code Ann. §78-7-6 (1953).

State case law in no way conflicts with the aforementioned analysis. As an example of the Court's power, one may look to its adoption of uniform rules of evidence, effective as of July 1, 1971.

*This is based on information contained in a letter to the American Judicature Society from the Supreme Court of Utah which is now on file in the Society's main office.

VERMONT

The rule-making power in Vermont presently rests with the Supreme Court; however, the General Assembly may modify or repeal Supreme Court rules before the date on which they are to take effect.

The current Judicial Article contains no explicit statement concerning rule-making responsibility. Yet some constitutional provisions, e.g., Vt. Const. ch. II, §5 on the separation of powers, may be raised in the context of any debate on the rule-making authority in Vermont.

The rule-making power in Vermont is defined by statute and appears to rest with the Supreme Court. The relevant statute declares that the Supreme Court is empowered to prescribe and amend general rules on pleadings, practice and procedures in all courts of Vermont. While the rules must be reported to the General Assembly before they take effect, there seems to be no need for the Assembly to approve the rules before they become effective. The statute also declares that all laws in conflict with Supreme Court rules shall have no further force or effect. Vt. Stat. Ann. tit. 12, §1 (Supp. 1972). The statute does indicate, however, that the General Assembly may amend or repeal the Court-made rules before the date of their effectiveness.

Although the rule-making power is currently defined by statute, there are many in Vermont's legal community who feel the rule-making authority should be set out in the state's constitution. Thus there is a proposed constitutional amendment dealing with rule-making which is presently being debated in the state. The proposal designated as article IV, section 28d, reads as follows: "The Supreme Court shall make and promulgate rules governing the administration of all courts, and shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. Any rule adopted by the Supreme Court may be revised by the General

Assembly." This proposed amendment will be acted upon by the electorate on Town Meeting Day, in March, 1974.

VIRGINIA

The rule-making power in Virginia ultimately rests with the General Assembly, for Court-made rules are subject to legislative repeal.

The Judicial Article declares that the Supreme Court shall have the authority to make rules on appeals, practice and procedure to be used in the courts of the state, but that such rules shall not conflict with the laws of the General Assembly. Va. Const. art. VI, §5. Thus the General Assembly can be said to possess ultimate control over rule-making.

The statutes on rule-making confirm this ultimate legislative power. The relevant statutes, as well as the constitution, provide for rule-making by the Supreme Court of Appeals yet they too note that such rules are to be superseded by statutory pronouncements. Va. Code Ann. §8-1.1 (1957), §8-1.2 (Supp. 1972).

Case law seems to allow this possible legislative veto. Davis v. Sexton, 177 S.E.2d 524, 526 (1970). At least one judge, however, has stated that the Court requires no statutory authorization to make procedural rules, as that power is inherent in the Court. Smith v. Commonwealth, 172 S.E. 286, 288 (Holt, J. dissenting) (1934).

WASHINGTON

The Supreme Court of Washington has ultimate responsibility for procedural rule-making.

The Judicial Article states that the judicial power of the state shall be vested in a Supreme Court. Wash. Const. art. IV, §1. It also states that the superior court judges shall establish uniform rules for the government of their courts. Wash. Const. art. IV, §24. These are the only constitutional provisions directly related to rule-making.

The statutes are more explicit with respect to rule-making. One relevant statute declares the Supreme Court has the general power to regulate and prescribe by rule the practices, pleadings and procedures to be used in all suits. Rev. Code Wash Ann. §2.04.190 (1961). Another states that such rules of court overrule conflicting statutory provisions. Rev. Code Wash. Ann. §2.04.200 (1961). See also Rev. Code Wash. Ann. §§2.04.180, 2.04.210 (1961).

State case law is not in conflict. In fact, some cases indicate that the Supreme Court recognizes its rule-making responsibility as an inherent duty. So while the legislative enactments on rule-making are recognized as constitutional and valid legislative delegations

of authority, they may be unnecessary to the Supreme Court's ultimate control over procedural rules. State v. Superior Court, 267 P. 770, 773 (1928); White v. Million, 27 P.2d 320, 322 (1933); O'Connor v. Matdeff, 458 P.2d 154, 158, 163 (1969).

WEST VIRGINIA

The rule-making power in West Virginia is vested in the Supreme Court of Appeals.

The current Judicial Article states that the judicial power shall be vested in a Supreme Court of Appeals. W. Va. Const. art. VIII, §1. This is the only provision of the Article which relates in any direct way to the procedural rule-making power.

Rule-making in West Virginia is now defined by statute and seems to rest ultimately with the Supreme Court of Appeals. While implicitly recognizing the Legislature's ability to enact provisions on pleading, practice and procedure, the relevant statute declares that the rules of the Supreme Court of Appeals established for all courts of record override all prior conflicting legislative acts. It also provides for local court rule-making, yet such rules are subject to approval by the Supreme Court of Appeals. W. Va. Code Ann. §51-1-4 (1966).

Case law indicates that the responsibility for rule-making may lie with the Court even without the specific legislative authorization. While the Supreme Court of Appeals has recognized that the prescription of reasonable procedural rules by the Legislature is lawful, it has also suggested that ultimately the Court possesses the inherent power to regulate court procedure. Thus, statutes such as section 51-1-4 may be unnecessary. This inherent power may be said to exist in article VIII, section 1 of the constitution. W. Va. State Bar v. Early, 109 S.E.2d 420, 438 (1959), and Boggs v. Settle, 145 S.E.2d 446, 452 (1965).

The inherent power asserted by the Court is not absolute. In fact, the Court has not as yet even assumed its inherent statutory power. While statutes allow prior acts to be overruled by subsequent court rules, the Court itself has often declared its own rules to be limited by legislation. In one case the Court declared: "Courts of general jurisdiction have inherent power and authority to prescribe and enforce rules and regulations for the conduct of their business, not inconsistent with positive law, nor unreasonable, oppressive, or obstructive of common right. [cites omitted] While this power is recognized generally, it is obvious that a rule of court contravening organic or statutory law is void." Teter v. George, 103 S.E. 275, 277 (1920). In a much later case, the foregoing declaration was reasserted. State v. Davis, 141 W. Va. 488, 493, 93 S.E.2d 28, 31 (1956). In this case, the Court also specifically reserved the question of whether section 51-1-4 was indeed necessary to authorize the Supreme Court's adoption of a rule respecting the consolidation of cross-actions in tort. Id.

Finally, it should be noted that there is pending in the Legislature a constitutional amendment relating to the judiciary and judicial functions. It would in part grant full rule-making power to the Supreme Court of Appeals. The Chief Justice has informed us, however, that the proposed amendment will probably not be passed.*

*This information was obtained in a letter to the American Judicature Society from the Supreme Court of Appeals of Virginia which is now on file at the Society's main office.

WISCONSIN

The rule-making power in Wisconsin rests concurrently with the Supreme Court and the Legislature.

The Judicial Article states that the Supreme Court shall have a general superintending control over all inferior courts. Wis. Const. art. VII, §3. It also states that the Legislature, at its first session after the adoption of this constitution, shall provide for the appointment of three commissioners who shall inquire for the rules of practice. Wis. Const. art. VII, §22. It should be noted, however, that the present constitution was first adopted in 1848.

One statute speaks more directly of rule-making and places ultimate responsibility both in the Supreme Court and the Legislature. It states that statutes related to pleading, practice and procedure may be modified or suspended by Court rules yet it also states that the Court's defined rule-making power shall not abridge the Legislature's right to enact to repeal statutes or rules relating to pleading, practice or procedure. Wis. Stat. Ann. §251.18 (1971). Thus the power to prescribe rules rests concurrently with the Supreme Court and Legislature.

A review of the case law fails to clarify the uncertainty as to whether Court rule or legislative act will ultimately prevail on matters of procedure. The Supreme Court has said that the Court and the Legislature have equal power to improve practice and procedure. Spoo v. State, 262 N.W. 696, 698 (1935). It has also said that at the time of the adoption of the Constitution, "the power to regulate procedure was considered to be essentially a judicial power or at least not a strictly legislative power." Mosing v. Hagen, 148 N.W.2d 93, 97 (1967).

Procedural rules in Wisconsin are thus a combination of legislative enactments and Supreme Court policy. Existing legislation in this area may be altered by the Court or by the Legislature and existing Court adopted rules may be amended by the Court or by the Legislature. Court procedure is thus dictated by the latest Court or legislative pronoucement.

One may see a potential for confrontations between the Court and the Legislature over procedural rule-making, but the Court's Chief Justice has indicated that such a clash has not yet occurred, and each body is consulted before the other adopts new procedural rules. On matters purely procedural, the present Legislature usually defers to the Court.*

*This information is based on a letter to the American Judicature Society from the Supreme Court of Wisconsin which is now on file in the Society's main office.

WYOMING

The Supreme Court of Wyoming possesses the final procedural rule-making power. The current Chief Justice has said that, "In case of challenge, our inherent authority would prevail in all procedural matters not involving substantive rights of litigants."*

The Judicial Article states that the judicial power shall be vested in a Supreme Court. Wyo. Const. art. V, §1. It also states that the Supreme Court has the power to issue orders necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Wyo. Const. art. V, §3. These appear to be the only constitutional provisions which relate to the question of procedural rule-making.

Statutory law speaks more directly to the question of rule-making authority and declares that the ultimate responsibility for most, if not all, of the rule-making lies with the Supreme Court. One relevant statute states that the Court can adopt rules for all courts on pleading, practice and procedure with no limitation on such power. Wyo. Stat. Ann. §5-18 (1957). However, another statute, speaking of the Supreme Court's ability to make rules for its own proceedings, indicates that the Court's rule-making power is partially limited for it says Court rules are not to conflict with the constitution or laws of the state. Wyo. Stat. Ann. §5-17 (1957).

Case law on rule-making, however, affirms the Court's inherent powers to establish rules of procedure. One case states that the exercise by the Supreme Court of the power to prescribe rules of procedure is probably inherent in the Court. In recognizing the legislative delegation of this inherent power in section 5-18, the Court says "it is impossible to follow the precise method mentioned in the legislative act." State v. Hull, 199 P.2d 832, 838 (1948). A second case asserts: "It is well recognized generally and particularly in this jurisdiction that the courts have inherent rights to prescribe rules, being limited only by their reasonableness and conformity to constitutional and legislative enactments (cites omitted)." State v. District Court, 339 P.2d 583, 584 (1965). A third case holds: "Courts have the inherent power to control the course of litigation and to adopt suitable rules therefor. (cites omitted). This means, of course, it is not within the power of the Legislature to prescribe how courts shall perform their functions." Holm v. State, 404 P.2d 740, 743 (1965).

*This information was obtained in a letter to the American Judicature Society from the Supreme Court of Wyoming which is now on file in the Society's main office.

DISTRICT OF COLUMBIA

The rule-making power in the District of Columbia rests with the District of Columbia Court of Appeals, the Superior Court and the United States Congress.

The District of Columbia Code vests the judicial power in several federal courts, in the District of Columbia Court of Appeals and in the Superior Court of the District of Columbia. D.C. Code Ann. §11-101 (Supp. V 1972). It goes on to state: "The District of Columbia Court of Appeals shall conduct its business according to the Federal Rules of Appellate Procedure unless the court prescribes or adopts modifications of those Rules." D.C. Code Ann. §11-743 (Supp. V 1972). With respect to the Superior Court proceedings, it states: "The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in title 23) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules....." D.C. Code Ann. §11-946 (Supp. V 1972). A final act declares that the Superior Court may make rules for the conduct of business in its Tax Division. D.C. Code Ann. §11-1203 (Supp. V 1972).

These code provisions illustrate the four possible sources of rules for the District of Columbia's Court of Appeals and Superior Court; these sources are the Federal Rules, the Court of Appeals itself, the Superior Court itself, and the United States Congress (in title 23 on criminal procedure). Each of the sources has exclusive authority over some area of procedural rules used by the two courts of the District of Columbia.

PUERTO RICO

The rule-making power in Puerto Rico is exercised by the Supreme Court, subject to legislative disapproval.

The Judicial Article of Puerto Rico begins by vesting the judicial power in the Supreme Court, among others. P.R. Const. art. V, §1. It goes on to state: "The Supreme Court shall adopt for the courts rules of evidence and of civil and criminal procedure..... The rules thus adopted shall be submitted to the Legislative Assembly.....which shall have the power to amend, repeal or supplement any of said rules by a specific law to that effect." P.R. Const. art. V, §6.

Statutes affirm the ultimate legislative power. P.R. Laws Ann. tit. 4, §2 (1965); tit. 34, §2006 (1971). Case law seems to acquiesce in ultimte legislative control. Gonzalez v. Superior Court, 75 P.R. 550 (1953).

Statutes also provide for aides to the Supreme Court in exercising its rule-making authority. A Judicial Council is created, and it consists of judges, legislators and at least one representative from the bar association. Its duties include studying and reporting to the Governor and Legislature on the advisability of

establishing new methods of court practice and procedure. P.R. Laws Ann. tit. 4, §§307 to 311 (1965). Legislation also provides for judicial conferences to be ordered by the Supreme Court to assist the court in establishing measures which will help to improve the judicial system. P.R. Laws Ann. tit. 4, §306 (1965). Such a conference has been ordered by the court. P.R. Laws Ann. tit. 4, App. V, ch. I (1965).

VIRGIN ISLANDS

The procedural rule-making power in the Virgin Islands rests with the District Court of the Virgin Islands, yet the court-made rules covering its own proceedings are limited by U.S. Supreme Court rule and by laws of the Virgin Islands.

The Constitution vests the judicial power in a court of record, designated the District Court of the Virgin Islands, among others. V.I. Rev. Organic Act of 1954, §21. It goes on to state: "The rules governing the practice and procedure of the inferior courts.....and the procedure for appeals to the district court shall be as may hereafter be established by the district court." V.I. Rev. Organic Act of 1954, §23. Finally, it asserts: " The rules of practice and procedure heretofore or hereafter promulgated and made effective by the Supreme Court of the United States.....in civil cases.....in admiralty cases, and.....in bankruptcy cases, shall apply to the District Court of the Virgin Islands and to appeals therefrom." V.I. Rev. Organic Act of 1954, §25.

Statutory law affirms the District Court's power. One act states: "The practice and procedure in the municipal court shall be as prescribed by rules adopted by the district court." V.I. Code Ann. tit. 4, §77 (1967). Incidentally, this same act grants the muncipal court the power to "prescribe rules for the conduct of its business consistent with law and with rules prescribed by the district court." However, the statutes appear to clarify the District Court's inability to fully establish rules for its own proceedings. The relevant act declares: "The district court may from time to time prescribe rules, consistent with law and with the rules adopted by the Supreme Court, for the conduct of its business....." V.I. Code Ann. tit. 4, §34 (1967). General provisions preceding statutory laws on criminal and civil procedure assert that such laws are applicable to proceedings in the District Court, and they make no mention of any court power to override acts on procedure. V.I. Code Ann. tit. 5, §§1, 3501 (1967). The limited ability of the District Court of the Virgin Islands to adopt rules for its own proceedings is also recognized in the rules of the U.S. Supreme Court. V.I. Code Ann. tit. 5, App. I, R.83 (1967) and tit. 5, App. II, R.57 (Supp. 1973).

There is little case law on rule-making in the Virgin Islands. The Virgin Islands District Court has held that section 25 of the Organic Act did not make it a district court of the United States, and therefore, that provisions of the United States Judicial Code not mentioned in section 25 were not applicable to its proceedings. Callwood v. Callwood, 127 F. Supp. 179 (D.V.I. 1954).

APPENDIX II: Chart Depicting Key Elements of Rule-Making Systems in American Jurisdictions Today

	Rule-Maker	Source of Rule-Making Power	Legislative Veto	Legislative Delegation
ALABAMA	L	St.	No	Yes
ALASKA	C	Const.	Yes (2/3)	No
ARIZONA	C	Const.	No	No
ARKANSAS	C	Const. & St.	No	No
CALIFORNIA	JC	Const.	Yes (JC)	No
COLORADO	C	Const.	No	No
CONNECTICUT	C	St.	Yes	No
DELAWARE	C	Const.	No	No
FLORIDA	C	Const.	Yes (2/3)	No
GEORGIA	L	Const. & St.	Yes	Yes
HAWAII	C	Const.	No	No
IDAHO	C	Const. & St.	No	Yes
ILLINOIS	C	St. (Const?)	Yes	Yes
INDIANA	C	St.	No	No
IOWA	C	St.	Yes	Yes
KANSAS	C & L	St.	Yes	Yes
KENTUCKY	C	St.	No	No
LOUISIANA	L	St.	No	No
MAINE	C	St.	No	No
MARYLAND	C	Const.	Yes	No
MASSACHUSETTS	C	St. (Const?)	No	No
MICHIGAN	C	Const.	No	No
MINNESOTA	C & L	St. (Const?)	Yes	No
MISSISSIPPI	C & L	St.	Yes	Yes
MISSOURI	C & L	Const.	Yes	No
MONTANA	C	Const.	Yes	No
NEBRASKA	C & L	Const. & St.	Yes	Yes
NEVADA	C & L	St.	Yes	Yes
NEW HAMPSHIRE	C	St.	No	No
NEW JERSEY	C	Const. & C.L.	No	No
NEW MEXICO	C	Const. & C.L.	No	Yes (?)
NEW YORK	L (JC)	Const. (St.)	Yes	Yes
NORTH CAROLINA	C & L	Const.	Yes	Yes
NORTH DAKOTA	C	St.	No	No
OHIO	C	Const.	Yes	No
OKLAHOMA	C	St. (Const?)	No	No
OREGON	L	St.	Yes	No
PENNSYLVANIA	C	Const.	No	No
RHODE ISLAND	C	St.	No	No
SOUTH CAROLINA	C	Const.	Yes	No
SOUTH DAKOTA	C	Const.	Yes	No
TENNESSEE	C & L	St.	Yes	No
TEXAS	C	Const.	Yes	Yes (?)
UTAH	C	St. (Const?)	No	No
VERMONT	C	St.	Yes	No
VIRGINIA	C & L	Const.	Yes	No
WASHINGTON	C	St. (C.L.?)	No	No
WEST VIRGINIA	C	St. (CL & C)	No	No
WISCONSIN	C & L	St.	Yes	No
WYOMING	C	St. (Const?)	No	No
DISTRICT OF COLUMBIA	C & L	St.	No	No
PUERTO RICO	C	Const.	Yes	No
VIRGIN ISLANDS	C	Const. & St.	Yes	No

KEY: C=Court L=Legislature JC=Judicial Council CL=Case Law Const.=Constitution St.=Statute

APPENDIX I...: Constitutional and Statutory Bodies Involved in Rule-Making

	JUDICIAL COUNCILS AND COMMISSIONS			JUDICIAL CONFERENCES		
	mem	rpt ag	sources	mem	rpt ag	sources
ALABAMA				JA	C	Ala Code §9(2)...(Sp71)
ALASKA	JAP	C,L	Const art IV §§8,9			
ARIZONA *1						
ARKANSAS						
CALIFORNIA	JAL	C,L,G	Const art VI §6			
COLORADO						
CONNECTICUT *2	JA	C,G	Conn Gen St Ann §51-25(Sp73)	JA	C	Conn Gen St Ann §51-7(Sp73)
DELAWARE *3	JALP	C,L,G	Del Code Ann t 10, §2001(Sp73)	J	C	Del Sup Ct Rules,R 35
FLORIDA	JAP	C,L,G	Fla St Ann §43.15(Sp73)	J	C,L,G	Fla St Ann §26.55(Sp73)
GEORGIA	JALP	C,L,G	Ga Code Ann §81-1606(Rev56)			
HAWAII *4	JAP	C	Haw Rev St §601-4(68)			
IDAHO	JA	C,L,G	Ida Code §1-2101...(Sp73)			
ILLINOIS *5	AL	C,L	Ill Ann St c 37,§601...(72)	J	C	Ill Sup Ct Rules,R 41;Cons VI,§1
INDIANA	JALP	C,L,G	Ind St Ann §4-7501(Sp72)	J	C	Ind St Ann §4-7601(68)
IOWA	J	C	Iowa R Civ Pro,R 380	J	C	Iowa Code Ann §684.20(Sp73)
KANSAS	JAL	C,L	Kan St Ann §20-2201...(64)			
KENTUCKY *6	JAL	C,L	Ky Rev St Ann §22.050(71)	J	C,L,G	Ky Rev St Ann §22.060(71)
LOUISIANA						
MAINE	JAP	C,G	Me Rev St Ann t 4,§451(Sp73)	J	C	Me Rev St Ann t 4,§106(64)
MARYLAND						
MASSACHUSETTS	JA	C,G	Mass Ann L c 221,§34(57)	J	C	Mass Ann L c 211,§3F(Sp72)
MICHIGAN *7				J	C	Mich Comp L Ann §600.1450(Sp73)
MINNESOTA *8	JAP	C,L,G	Minn St Ann §483.02...(71)	JAL	C	Minn St Ann §480.18(71)
MISSISSIPPI						
MISSOURI				J	C,L	Mo Ann St §476.320...(52;Sp73)
MONTANA						
NEBRASKA						
NEVADA						
NEW HAMPSHIRE	JAP	C,L,G	NH Rev St Ann §494:1...(p72)	J	C	NH Rev St Ann §502-A:18(68)
NEW JERSEY *9				JALP	C	NJ R of Gen App,R 1:35-1
NEW MEXICO	JALP	C,L,G	NM St Ann §16-10-1...(70)	J	C,L,G	NM St Ann §16-9-1(70)
NEW YORK				J	C,L,G	NY Judiciary §224...(McK,68)
NORTH CAROLINA *10	JALP	C,L,G	NC Gen St §7A-400...(Sp71)			
NORTH DAKOTA	JA	C,L,G	ND Cent Code §27-15-01(Sp73)	J	C	ND Cent Code §27-15-09(60)
OHIO	JAL	C,L	Ohio Rev Code Ann §105.51(71)	J	C,L,G	Ohio Rev Code Ann §101.91...(71)
OKLAHOMA				J	C	Okla St Ann t 20,§104(Sp72-3)
OREGON *11				J	G	Ore Rev St §1.810...(Repl71)
PENNSYLVANIA	JAL	C,L	Pa Rules of Ct,R of JA,R 301...			

RHODE ISLAND	A	C,G	RI Gen L Ann §8-13-1...(70)	J	C	RI Gen L Ann §8-1-9(70);Sup R 24
SOUTH CAROLINA	JALP	C,L	SC Code Ann §15-2101...(62)	J	C	SC Code Ann §10-16(62)
SOUTH DAKOTA *12				J	C	SD Comp L Ann §16-14-1...(67)
TENNESSEE	JALP	C,L,G	Tenn Code Ann §16-901...(Sp72)	J	C	Tenn Code Ann §17-401...(Sp72)
TEXAS	JALP	C,L,G	Tex Rev Civ St art 2328(71)			
UTAH *13	JALP	C,L,G	Utah Code Ann §63-25-1...(68)	J	C	Utah Code Ann §55-10-71(Sp)
VERMONT	JAP	C,L	Vt St Ann t 4,§561..(72)			
VIRGINIA *14	JAL	C,L	Va Code Ann §17-222...(60;Sp73)	JALC		Va Code Ann §17-228...(Sp73)
WASHINGTON	JAL	C,L,G	Wash Rev Code Ann §2.52.010(Sp72)	JC		Wash Rev Code Ann §2.56.060(61)
WEST VIRGINIA	JA	C,L,G	W Va Code Ann §56-11-1...(66)			
WISCONSIN	JALP	C,L	Wisc St Ann §257.13(Sp73)	J	C	Wisc St Ann §257.17(Sp73)
WYOMING *15						

KEY: mem=members
J=judges
A=attorneys
L=legislators
P=public (laymen)

rpt ag=reporting agencies (to whom the bodies report)
C=state's high court
L=Legislature
G=Governor

sources
Sp=Supplement
73,etc.=the year 1973

*indicates a footnote

*1:Statutory law provides for an advisory board to the Supreme Court to assist in rule-making. Ariz. Rev. Stat. Ann. §12-110 (1956).
*2:Connecticut also has provided for meetings of the chief court administrator and the state's chief justices, Conn. Gen. Stat. Ann. §51-6 (Supp 1973), and for meetings of any or all judges and the court administrator called by the high court chief justice or by the court administrator, Conn. Gen. Stat. Ann. §51-6A (Supp 1973).
*3:Delaware also has conferences of will registers and justices of the peace. Del Sup Ct Rules, R 36.
*4:Statutory law provides for a board of family court judges. Hawaii Rev. Stat. §571-5 (1968).
*5:Illinois allows Judicial Advisory Councils for every county with over 5000 people. Ill. Ann. Stat. ch. 34, §5651 (Smith-Hurd 1960).
*6:Statute provides for an advisory committee to the judicial council. Ky. Rev. Stat. Ann. §447.153 (73)
*7:Statutory law provides for year-end meetings of probate judges. Mich. Comp. Laws Ann. §701.53 (1968).
*8:Statutes also provide for an advisory committee to the Supreme Court to aid in preparing procedural rules, Minn. Stat. Ann. §480.052 (1971); and for annual conferences of juvenile court judges, Minn. Stat. Ann. §260.103 (1971).
*9:The Court has also provided for an annual conference of judges. N.J. R. of Gen App., R. 1:35-2.
*10:Besides the Council, N.C. also has a Courts Commission. N.C. Gen. Stat. §7A-500...(repl 69;Supp 73).
*11:A minor court rules committee is authorized by statute to aid the Court. Ore. Rev. Stat. §1.730(71).
*12:Annual conferences are provided for in each circuit. S.D. Comp. L. Ann. §16-12-6.1 (Supp 1973).
*13:The Utah Judicial Council deals only in criminal justice, while the Conference is only of Juv. Judges
*14:A Judicial Conference is also provided for courts not of record. Va. Code Ann. §16.1-218...(Supp 73)
*15:Statutory law allows for an advisory committee to the Supreme Court. Wyo. Stat. Ann. §5-21 (1957).

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