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Howard C. Bratton

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STANDARDS FOR THE ADMINISTRATION
OF CRIMINAL JUSTICE

HOWARD C. BRATTON†

The purposes of this article are to discuss the history and current status of the American Bar Association's Project on Standards of Criminal Justice, to give a general description of the development of the standards, to furnish its readers with an idea of the objectives underlying the project and, by using specific standards from several of the topical areas covered by the project, to illustrate both the scope of the project and its intent.

This article will therefore not be the usual type of law review article which deals with a relatively narrow facet of the law. Rather, it will take a broad approach to its subject matter with the hope that each of its readers will be interested in pursuing for himself further study of the standards for the administration of criminal justice.1

The idea that such a project should be undertaken was first proposed to the A.B.A. in 1963 by the Institute of Judicial Administration located at New York University. The proposal was made against the background of a nation-wide increasing crime rate, the problems and confusion created by the judicial development of the rights of accused persons and the realization by the legal profession that the machinery for administering criminal justice was no longer adequate to properly and efficiently handle the overwhelming load of criminal work.

The following year, a pilot study of the problems involved was conducted under the auspices of an A.B.A. committee headed by Chief Judge J. Edward Lumbard of the United States Court of Appeals for the Second Circuit. On the basis of this committee’s report, the 1964 annual convention of the A.B.A. voted to authorize the undertaking of a three year project to develop minimum standards for the administration of criminal justice.

By the close of 1964, the project was funded and the organizational structure necessary to undertake the proposed comprehensive study was established. Since that time, the life-span of the project

† United States District Court judge, District of New Mexico; B.A., University of New Mexico; L.L.B., Yale University. Appreciation is expressed to Frances Freedle for her assistance in drafting this article, and to Professor Samuel Dash, Richard A. Green and Louis B. Nichols for reading the manuscript.

1. Copies of those standards now in published form may be purchased at $2.00 per volume or $1.00 per volume for ten or more copies from the American Bar Association, 1155 East 60th, Chicago, Illinois 60637.
has been enlarged, so that, at the present, several areas are still being considered, with an eye to the promulgation of further appropriate standards by 1970.

Initially, six advisory committees were established to study and formulate standards relating to police functions, pretrial proceedings, criminal trials, fair trials and free press, prosecution and defense functions and sentencing and review. Recently a seventh advisory committee was created to deal with the functions of the trial judge in the criminal justice process.

Charged with the overall coordination of the project is a Special Committee on Standards for the Administration of Criminal Justice. This committee was chaired by Judge Lumbard until 1968, when he was succeeded by then United States Circuit Judge Warren E. Burger. He, in turn, was succeeded by the present chairman, Senior United States District Court Judge William J. Jameson. This committee maintains liaison with the A.B.A.'s Sections of Criminal Law and of Judicial Administration, and it is ultimately responsible for recommending the standards to those sections, to the A.B.A.'s Board of Governors and to its House of Delegates for their consideration and approval.

The advisory committees and the Special Committee are composed of federal and state trial and appellate judges, prosecutors, public defenders, criminal law professors, private attorneys and law enforcement and correction officials. Aiding them are reporters and consultants drawn from law school faculties.

With the exception of the Committees on Fair Trial and Free Press and the Judge's Function, each of the advisory committees has been preparing standards on more than one topic within its assigned area of study, and the standards on each such topic have been or are being reported and published separately.

Each advisory committee assigns one or more topics to a reporter or a drafting committee for the initial development of black-letter standards and accompanying commentary. To avoid duplication of effort, the work of other interested organizations is utilized where possible. The resulting drafts are extensively considered by the appropriate committee and, when completed, are reported to the Special Committee for its approval for publication in tentative draft form. The drafts are then distributed to the Sections of Judicial Administration and of Criminal Law and other interested persons for comments and criticism.

Any comments or criticisms offered on a given draft are reviewed by the proper advisory committee and by the Special Committee, and the standards on a given topic are put in final form
for submission to the Board of Governors and the House of Delegates of the A.B.A.

The organizational structure and procedural methodology employed in implementing the project are thus designed to achieve a maximum exposure to critical scrutiny of each proposed set of standards, hopefully with the result that the standards will be found acceptable by both the bench and bar.

Notably, implementation of the standards has not been left entirely to chance. The A.B.A. assigned this task to its Criminal Law Section, which has set up, under the chairmanship of the Honorable Tom C. Clark, a Special Committee to Implement the Standards. Except for the standards relating to fair trial and free press, which are being implemented by a special committee set up for that purpose, it is the job of Justice Clark's committee to undertake a wide educational effort designed to publicize the existence and content of the standards.

Further, the 1969 Judicial Conference for the Tenth Circuit was devoted to a seminar on the standards, and reports on the progress of the project have been made to A.B.A. conventions since its inception.

Nevertheless, the project is an exercise in futility unless its work product is known of and found acceptable to and utilized by law enforcement officials, the judiciary and practicing attorneys all across the nation. That they all would concur that its objectives—the promotion of effective law enforcement, the adequate protection of the public and the safeguarding and amplification of the constitutional rights of those suspected of crime—are salutary probably goes without saying. It is necessary therefore to view the standards in the proper perspective, i.e., to see that the end they are designed to accomplish is the proposal of rules, policies, criteria and perhaps model statutes to aid judges, prosecution and defense attorneys, law enforcement officials and all others responsible for and participating in the administration of criminal justice in performing their respective functions more efficiently and more adequately under present and future conditions.

That no effort has been spared to make the standards a comprehensive and therefore meaningful aid to those persons involved in the administration of criminal justice is best illustrated by the number and variety of standards that are at present published in either approved or tentative form as well as by the fact that the committees on the judge's function, the police function, prosecution and defense functions, pretrial proceedings and sentencing and review are still engaged in the study and promulgation of further standards.
To date, standards relating to post-conviction remedies, appellate review of sentences and sentencing alternatives and procedures have been published in approved form. Standards relating to pleas of guilty, speedy trial, joinder and severance and trial by jury, as well as standards for providing defense services and pre-trial release, have also been approved and published by the A.B.A. Also published in approved form are the standards pertaining to a fair trial and free press.

Standards not yet approved by the A.B.A. but published in tentative draft form for study and comment are those relating to criminal appeals, electronic surveillance, pretrial discovery and procedures, the prosecution and defense functions and probation.

Several of the published standards have been amended, and all such amendments have been subjected to the same rigorous procedure in their promulgation and approval as were the original standards before receiving A.B.A. approval.

The published standards listed above give some indication of the broad scope of the project. But a mere listing of topics covered does not reveal how the standards promulgated depart from the status quo and up-date the machinery of criminal justice. The limitations of a law review article permit no exhaustive exposition or analysis of all the innovative features of the various sets of standards nor of the procedures already in effect in some jurisdictions that are recommended in certain standards. The following examples, albeit limited in number, should serve to illustrate the detailed handling of the problems confronted and resolved in each set of standards and the thoughtfulness with which modernization of each problem area has been approached.

The standards that have received the most judicial attention are those relating to pleas of guilty. Judges have found the sections

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2. Prepared by the Advisory Committee on Sentencing and Review.
3. Prepared by the Advisory Committee on the Criminal Trial.
4. Prepared by the Advisory Committee on the Prosecution and Defense Functions.
5. Prepared by the Advisory Committee on Pretrial Proceedings.
6. Prepared by the Advisory Committee on Fair Trial and Free Press.
7. Prepared by the Advisory Committee on Sentencing and Review.
8. Prepared by the Advisory Committee on the Police Function.
11. Prepared by the Advisory Committee on Sentencing and Review.
dealing with plea discussions and agreements\textsuperscript{13} of particular interest, for these sections openly recognize the propriety and value of what has heretofore been a practice widely utilized but largely officially ignored for fear that there existed in it constitutional infirmities, the risk of corrupt influences and an intrusion upon society's interests by substituting private opinions vis-à-vis criminal penalties for the decisions of society. When it is considered that the great majority of criminal cases are disposed of by pleas of guilty, a substantial portion of which are the result of prior plea discussions, the importance of confronting and resolving the problems thought to be inherent in the practice is manifest.

The standards are geared to meet the problems first by making the practice of plea discussions and agreements visible and subject to systematic control, second by requiring equal plea agreement opportunities for defendants occupying similar positions and third by recommending their use only in cases where the public interest and the effective administration of justice will thereby be served.\textsuperscript{14}

The intent of the standards relating to plea discussions and agreements is to be comprehensive, and guidelines are therefore established not only for the prosecution and defense counsel but also for the trial judge.

First are delineated the circumstances under which a prosecuting attorney may enter into plea discussions, and the provision is made that he may agree to seek or not to oppose concessions or reductions in the charge or sentence if the defendant pleads guilty.

The second section provides that defense counsel should enter into such an agreement only with the consent of the defendant and only after the defendant has made his own decision to enter a guilty plea, based upon a full discussion between counsel and the defendant of the available alternatives and other considerations deemed important, e.g., the possible loss of civil rights.

While the third section takes the position that the trial judge should not participate in plea discussions, it does allow disclosure to him of proposed agreements in advance of the entry of a guilty plea and allows him to indicate tentative concurrence. If he later decides that the charge or sentence concessions should not be granted, he should so advise the defendant and give him a chance to withdraw or affirm his guilty plea. The fact that a plea agreement has been reached is in no way intended to bind the trial judge or

\textsuperscript{13} ABA Standards, Pleas of Guilty §§ 3.1-.4.
\textsuperscript{14} Id. §§ 1.8, 3.1.
impinge upon his functions, and the section ensures this by providing that, while a judge should give the agreement due consideration, he should independently decide whether to grant charge or sentence concessions by applying those criteria designed to serve the public interest and the effective administration of criminal justice.

The thrust of plea discussions and agreements is thus to give the defendant a method by which he may acknowledge guilt and assume responsibility for his act, hopefully with the result that he will be more rehabilitable. In addition, the process reserves trial proceedings for those cases in which there are disputes on the issue of guilt, thus conserving the time of all participants and substantial sums of public monies.

By making the process of plea discussion and agreement visible, the standards also serve to make it subject to appellate review to further guard against any possible abuse.

The standards relating to a speedy trial adopt the policies of the federal system and some state jurisdictions that criminal trials should take precedence over civil trials and that jailed defendants should be tried before those on bail are tried.\(^5\) Also recommended is the adoption of a rule or statute that will specify, in days or months, the amount of time which may elapse between an initial specified event, usually the date the charge was filed, and a defendant's trial,\(^6\) subject only to the exclusion in computing such time of certain periods of delay, e.g., delay resulting from docket congestion due to exceptional circumstances.\(^7\) However, it should be noted that delay arising out of chronic docket congestion is not contemplated as a delay that could be excluded in computing the time period.

Most importantly, the standards adopt the position that a defendant who is not brought to trial within such time period is entitled to absolute discharge, forever barring prosecution for the offense charged and for any other offense required to be joined with that offense.\(^8\) While this is not asserted to be the prevailing view, it is nevertheless considered to be the only way to avoid making the defendant's right to a speedy trial largely meaningless.

Basically, these standards recommend techniques that will expedite criminal trials, thus not only systematically delimiting the constitutional guarantee of a defendant to a speedy trial but also

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15. ABA Standards, Speedy Trial (Approved Draft 1968) § 1.1, and accompanying Commentary.
16. Id. §§ 2.1-2.
17. Id. § 2.3.
protecting the public's interest in prompt trials. For example, both
the public's interest and that of the defendant in preserving their
respective means of proof are intended to be served by these
standards, as is the public's interest in enhancing the deterrent ef-
fect of prosecution and conviction.

One of the most troublesome problems in criminal justice has
been trying to assure finality to criminal dispositions. For example,
post-conviction actions are increasingly common in both federal
and state courts. This problem is recognized not only in the de-
velopment of standards for plea discussions and agreements dis-
cussed above but also in the development of standards for expanded
post-conviction remedies.19

The best way to protect criminal dispositions from subsequent
collateral attack is to isolate and deal with potential constitutional
issues before criminal trial proceedings have been concluded. To
effectuate this goal, as well as to accelerate and simplify the process
disposition and to use resources economically while doing so,
the Advisory Committee on Pretrial Proceedings undertook to de-
velop a set of standards providing for pretrial discovery and
procedure.20

These standards represent a marked departure from the prevail-
ing practices in any jurisdiction in the nation. The discovery pro-
vided for is premised upon the view that broad pretrial disclosure
of the prosecution's case can best accomplish the goals desired, and
the onus is placed upon the prosecution to take the initiative in tell-
ing the defense counsel of and furnishing him with such things as
lists of witnesses and their statements, statements of the accused
or his co-defendant, relevant portions of grand jury minutes, reports
of experts, and real evidence,21 to name just a few of the items listed
as subject to disclosure.

The discovery provided for is not entirely unilateral, however,
for the defense is also required to make certain disclosures,22
although discovery of the prosecution's case is not made to depend
upon discovery of the defendant's case. Both sides have the con-
tinuing duty to disclose additional discoverable information as they
learn of its existence.23

The standards properly recognize, however, that the ultimate

20. ABA Standards, Discovery and Procedure Before Trial (Tentative Draft
1969).
21. Id. § 2.1.
22. Id. §§ 3.1-.2.
23. Id. § 4.2.
responsibility for the finality of convictions and the fairness and efficiency of the process lies with the trial judge. While the standards provide for an initial exploratory stage during which counsel investigate, confer, and perhaps enter into plea discussions without court supervision, they also provide for a second stage in which the court conducts an Omnibus Hearing and a third stage, consisting of trial planning and including, where necessary, pretrial conferences. In order to properly effectuate the procedures recommended, the trial judge must, of course, effectively control his calendar and must have to aid him the requirement that defendants be brought to trial or the charges against them otherwise disposed of within a specified time, as suggested above in the discussion of standards relating to speedy trials.

The most innovative aspect of this set of standards is the Omnibus Hearing provided for in the second stage of pretrial procedures. This procedure is designed both for defendants who will go to trial and for defendants who may subsequently plead guilty.

The date for an Omnibus Hearing is set by the court at the initial call for a plea or at the arraignment of a defendant who pleads not guilty, and, while the time set should allow for prior discovery of the prosecution’s case, the setting of an early date should be utilized to encourage counsel to get together as quickly as possible.

The Omnibus Hearing that follows is distinguished by the use of a check list designed to substitute for and orally handle in one hearing the usual variety of pretrial motions and other requests and to assist the court and counsel in discovering and considering those issues which, when ignored, form the basis for subsequent invalidation of convictions. Another distinctive feature of the Omnibus Hearing is that it makes possible the assertion and consideration of many claims without the filing of successive separate motions, briefs and responses.

The discovery and procedures proposed by these standards are now being used in various districts by the federal judiciary. They were first put to use experimentally in 1967 in the United States District Court for the Southern District of California. In that district, which has an extremely heavy criminal case load, the procedures have improved the efficiency of court and counsel, speeded up the criminal process and eliminated substantial amounts of paperwork, all without the sacrifice of the interests of either side.

24. Id. §§ 1.3-4.
25. Id. § 5.1(b).
26. Id. § 5.2.
27. Id. § 5.3.
On the basis of experience with these pretrial procedures so far, it can also be concluded that use of them has aided prosecutors in expediting disposition of criminal matters, both by obtaining early guilty pleas and in trial preparation.

The Omnibus Hearing procedure was very recently inaugurated in the District of New Mexico, and, as was found to be true in California, it has already been determined here that it is helpful particularly to less experienced defense counsel as a guide on what they should do in the proper preparation and presentation of all aspects of their client's defense.

It should be noted that it is the present practice of many prosecuting attorneys to make their files on cases available to defense counsel, and this practice, in an expanded form, has been incorporated into the standards. This fact, together with the current utilization of procedural techniques such as the Omnibus Hearings, form a core of experience from which can be made a tentative judgment as to the merits of broad pretrial discovery in a criminal case. As indicated above, the utilization of the recommended standards has so far resulted in a workable system that appears to be making a reality the goals intended to be realized.

To complement the other standards, provisions for defense services have also been promulgated. This set of standards does not advocate the adoption of either a public defender system or a system of assigned counsel. What it does advocate is that each jurisdiction should by statute require its local subdivisions to adopt plans that will provide defense counsel in a systematic manner. Whether the public defender system or an assigned counsel system or a combination of the two systems is best suited to a particular locale it leaves to local decision.

One important position advanced by the defense services standards is that the system adopted guarantee the integrity of the relationship between lawyer and client; it is proposed that a board of trustees (a standard feature in private defender systems) be established to govern the system.

Also included in the standards as an integral part of any plan adopted is the provision for investigatory, expert and other supporting services necessary to an adequate defense. Without furnishing these tools to defense counsel, it cannot be expected that he will be able to conduct thoroughly a proper defense at trial. In ad-

29. Id. § 1.3.
30. Id. § 1.4.
31. Id. § 1.5.
dition, if the attorney himself must conduct the investigation, the cost to the system will probably be greater. Thus, the supporting services not only provide for fairness to the defense but also present an economical method of preparing the defense.

The standards intend that counsel be provided in all proceedings arising from the initiation of criminal action against the accused, beginning with all pretrial proceedings and continuing through post-conviction proceedings and other proceedings which are adversary in nature\textsuperscript{32} e.g., parole revocation hearings, and, further, that the attorney initially appointed should represent the defendant through all such stages.\textsuperscript{33}

The thrust of these standards is that the best and fairest results are achieved when the system for providing defense services is as good as the system which society provides for the prosecution.

All the standards are intended to dovetail with one another, and each committee has made every effort to accomplish this end without duplication.

Moreover, the standards are intended to represent a consensus of opinion as to how best to solve the problems existing in each area rather than to express the opinions of one man or one group.

Certainly, no one would contend that the standards published thus far represent in all respects a permanent set of guidelines. It can assuredly be anticipated that additions will be contemplated and made as the passage of time reveals further needs.

At this point in time, the A.B.A. standards are the products of the best efforts of many of this country's finest legal minds. That the standards will have a major long-range impact on the field of criminal justice cannot be doubted, and those who participate or are interested in its administration should become conversant with them.

\textsuperscript{32} Id. §§ 4.1-.2.

\textsuperscript{33} Id. § 5.2.