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A COMPARATIVE STUDY

OF

THE AMERICAN BAR ASSOCIATION'S STANDARDS FOR CRIMINAL JUSTICE

WITH

PRESENT DELAWARE LAW

46706

Supreme Court Advisory Committee
on the ABA Standards for
Criminal Justice

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INTRODUCTION

This volume constitutes the report of the Supreme Court Advisory Committee on the ABA Standards for Criminal Justice appointed by the late Chief Justice Daniel F. Wolcott in March, 1973, under the chairmanship of H. Albert Young, Esquire, of Wilmington, Delaware.

Following the death of Chief Justice Wolcott, the Committee has received ongoing inspiration and guidance from Chief Justice Daniel L. Herrmann.

The Committee members are Delaware lawyers and judges who brought to bear to this undertaking their collective years of experience, their professional competency, and expertise as either defense counsel, prosecutors, or judges, withour compensation.

The members of the Committee are:

H. Albert Young, Chairman
John M. Bader, Esquire
Sidney Balick, Esquire
Victor F. Battaglia, Esquire
Michael N. Castle, Esquire
Honorable Arthur F. DiSabatino
Honorable Carl Goldstein
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Nicholas H. Rodriguez, Esquire
Bruce M. Stargatt, Esquire
Honorable Claud L. Tease
Robert W. Tunnell, Esquire
E. Norman Veasey, Esquire
Honorable Joseph T. Walsh

The Committee was ably assisted by its Reporter, Frank B. Baldwin, III, Esquire, of Philadelphia, who had previously served Delaware as a Reporter to the Governor's Committee for Revision of the Criminal Law and by student legal research assistants from the University of Pennsylvania Law School and the Villanova University School of Law.

The need for reform in the field of criminal law caused the American Bar Association to accept the challenge of preparing criminal justice standards relating to the proper method of handling a criminal case. The Standards were prepared for use in fifty states and in the Federal courts. The

objectives of the Standards are to promote effective law enforcement, to insure adequate protection of the public and to safequard and amplify the constitutional rights of those accused of the commission of crimes.

Eighteen Standards have been prepared which provide guidance at each stage of a criminal proceeding. The Standards cover the spectrum from the police function to post-conviction remedies. They were prepared and supervised by many of this country's leading professors, lawyers and judges. Chief Judge Edward Lumbard of the Second Circuit accepted the responsibility of overseeing the entire project which was later assumed by Judge Warren E. Burger and, thereafter, by Judge William Jameson, former President of the American Bar Association and Senior Judge for the United States District Court of Montana.

The outstanding leadership and dedication of Justice Tom Clark for the nationwide implementation of the Standards has been an inspiration for all who have undertaken this monumental task in the several states.

Since their promulgation, the Standards have been widely cited in the opinions of trial and appellate courts throughout the United States, including Delaware. Shepard's Citations, Inc. plans to provide citator service for the Standards and West Publishing Company has integrated the Standards into its key number classification.

The Standards set forth principles and guidelines, not a ready-made superstructure to be imposed upon existing criminal practice. Implementation of acceptable Standards in Delaware will undoubtedly require amendment and revision of our Constitution, statutes, rules of court and practices. The first step toward implementation is to compare the principles and guidelines set forth in the Standards with the provisions of the existing Delaware Constitution, statutes, rules of court and practices.

The Committee's principal purpose was the compilation and publication of these comparative analyses which point out where the existing Delaware Constitution, statutes, rules of court and practices are in accord with each of the Standards and where they deviate.

Each Standard approved by the American Bar Association is set forth in bold face type herein, followed by a comparative analysis of the Standard with the present Delaware constitution, laws, court rules and practices. In some instances, the Committee has also included a commentary.

As the Committee progressed in its deliberations, a secondary purpose emerged. In some instances where the Delaware Constitution, statutes, rules of court and practices have been determined not to be in accord with the Standards, recommendations have been made to take further steps to make Delaware conform with the Standard or, in other cases, to specifically reject the Standard. Such recommendations should be viewed as highly tentative and not expressing the personal view of many members of the Committee.

The Committee recognizes that considerable further study must be given to the question of revising the current Constitution, statutes, rules of court and practices and that such study must consider, among other things, the revised Federal Rules of Criminal Procedure and the newly adopted Uniform Rules of Criminal Procedure. Undoubtedly, in many cases further study will result in rejection of the Committee's tentative recommendations and in other instances, will underscore the Committee's position.

The comparative analyses and commentary were prepared in the first instances by Mr. Baldwin, subsequently revised after consultation with an individual committee member assigned to the particular Standard, reviewed by a subcommittee at a working session, again revised and submitted to the entire Committee sitting in a plenary session and, again, revised to incorporate suggestions by Committee members. Each comparative analysis and commentary in this report has been submitted to and approved by a majority of the Committee members; they do not reflect the opinion of each member of the Committee but rather a consensus of the whole.

At a minimum, this report will be a handbook for practitioners of the criminal law, both among the bench and among the bar. It is hoped that this report will stimulate the interest of these persons with ongoing responsibility for the application of the Standards in improving the effectiveness, efficiency and fairness of the administration of criminal justice.

It is hoped that the Standards and this report embody the best thought of those prosecutors, defense counsel, and judges who have devoted their labor of this task. But it hardly needs to be stated that the Standards must receive continuing scrutiny and elaboration. In the last analysis, the Standards will stand or fall on their clarity, consistency and appeal to the good sense of those who must implement them. They should be considered and applied with the awareness that they are a distillation of the hard experience of a host of seasoned practitioners, rather that abstract philosophical speculation.

In a legal sense tomorrow's law in the field of criminal law should be hinged to the Standards. Much more needs to be done but the Committee believes this report is a helpful first step.

The funds required for the preparation and publication of this report were furnished, as for other States, by the Law Enforcement Assistance Administration and the American Bar Association. Appreciation is hereby expressed for that financial assistance.

I want to thank each member of the Committee, and my Associate, Ricahrd A. Levine, who entertained divergent views and who were not all of the same mind, for their patience and understanding and their time-consuming effort in helping to bring to fruition this important task.

H. ALBERT YOUNG,
Chairman

PART I – INVESTIGATIONS AND PROCEEDINGS BEFORE TRIAL

CHAPTER 1

ELECTRONIC SURVEILLANCE

PART I. GENERAL PRINCIPLES

1.1 Objectives; prohibition; exception.

(a) Objectives; privacy, justice. The objectives of standards relating to the use of electronic surveillance techniques should be the maintenance of privacy and the promotion of justice.

(b) Prohibition; public; private. Except as otherwise expressly permitted, the use of electronic surveillance techniques for the overhearing or recording of wire or oral communications uttered in private without the consent of one of the parties should be expressly prohibited. Subject to limitations of constitutional power and considerations of federal-state comity, the prohibition should be enforced with appropriate criminal, civil, and evidentiary sanctions.

(c) Exception; public. Subject to strict statutory limitations conforming to constitutional requirements, the Attorney General of the United States, or the principal prosecuting attorney of a state or local government, or law enforcement attorneys or officers acting under his direction should be permitted to use electronic surveillance techniques for the overhearing or recording of wire or oral communications uttered in private without the consent of a party only in investigations of the kinds of criminal activity referred to in sections 3.1 and 5.5 of these standards. The limitations should be enforced through appropriate administrative and judicial processes.

COMMENT

Violations of privacy, including electronic surveillance, are prohibited by 11 Del. C. §1335, but this prohibition does not extend to peace officers who conduct electronic surveillance in accordance with §1336 (relating to judicially supervised surveillance). Delaware law is thus in accord with the Standard.

PART II. SANCTIONS

2.1 Criminal sanctions.

(a) Penalty. Except as otherwise permitted under these standards, conduct as specified in this section relating to the use of a mechanical, electronic or any other device for overhearing or recording of wire or oral communications uttered in private without the consent of a party should be made criminal or regulated.

(b) Scope; overhearing; recording; use; disclosure; devices. The legislation should include:

(i) prohibition of the intentional overhearing or recording of such communications by means of such a device;

(ii) prohibition of the intentional use or disclosure of such communications so overheard or recorded or evidence derived therefrom;

(iii) prohibition of the intentional unauthorized use or disclosure of such communications otherwise lawfully so overheard or recorded or evidence derived therefrom;

(iv) regulation, backed by criminal sanctions, of the possession, sale, distribution, advertisement or manufacture of a device the design or disguise of which makes it primarily useful for the surreptitious overhearing or recording of such communications;

(v) prohibition of the intentional promotion, whether by advertising or otherwise, of any device for unlawful use in overhearing or recording such communications; and

(vi) a provision for the confiscation of any overhearing or recording device possesed, used, sold, distributed or manufactured in violation of the prohibition or regulation.

(c) Enforcement; immunity. The prohibition, where necessary, should carry with it provision for the granting of immunity from prosecution in the investigation of violations of it.

DELAWARE LAW

11 Del. C. §1136(b) prohibits the willful interception of wire or oral communications. It also penalizes disclosure or use of the contents of any wire or oral communication by a person who is aware that such information was obtained through unlawful interception. This offense is a felony. Felony penalties are also provided in 11 Del. C. §1336(d) for possession, sale distribution, manufacture, assembly or advertising of a device primarily useful for surreptitious interception of wire or oral communications, and §1336(f) provides for the seizure as a nuisance of any such device. On the other hand, telephone conversations overheard by the police while answering a telephone located in a suspected gambling establishment are admissible as evidence. 11 Del. C. §1336(b). There is no specific provision granting immunity from prosecution for acts done in the course of investigating violations of the wiretapping statute, but a general immunity statute, 11 Del. C. §3506, is available in all cases.

COMMENT

Delaware law is in accord with the Standard. Consideration should be given as to whether a specific immunity provision is needed.

STANDARD

2.2 Civil sanctions.

(a) Cause of action. Except as otherwise expressly permitted, the use of electronic surveillance techniques for the overhearing or recording of wire or oral communications uttered in private without the consent of a party or the use or disclosure of such communications or evidence derived therefrom, knowing or having reason to know that such communication or evidence was so obtained, should give rise to a civil cause of action against any person or governmental agency who so overhears, records, or discloses or uses such communications or evidence derived therefrom, or procures or authorizes another to do so.

(b) Defense, court order. Good faith reliance on a court order or other legislative authorization should constitute a complete defense to civil recovery.

DELAWARE LAW

11 Del. C. §1336(w) provides:

> Any person whose wire or oral communication is intercepted, disclosed or used in violation of this section shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication, and shall be entitled to recover from any such person:
>
> (1) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation, or $1000, whichever is higher;
>
> (2) Punitive damages; and
>
> (3) A reasonable attorney's fee and other litigation costs reasonably incurred.
>
> A good-faith reliance on a court order authorizing the interception shall constitute a complete defense to a civil or criminal action brought under this section or to administrative proceedings brought against a law-enforcement officer.

COMMENT

Delaware law is substantially in accord with the Standard. Under §1336(w), reliance on a court order is a complete defense to a criminal prosecution or civil action, while the Standard allows reliance on a court order to be a complete defense to a civil action only. Delaware seems more desirable in this area.

STANDARD

2.3 Evidentiary sanctions.

(a) Suppression. Except as otherwise expressly permitted under these standards, no wire or oral communication uttered in private and overheard or recorded without the consent of a party, or evidence derived therefrom, should be received in evidence in any trial, hearing or proceeding in or before any court, grand jury, department, officer, agency, regulatory body or other authority.

(b) Pre-use notice in criminal cases. The standards set forth in ABA Standards relating to discovery, and procedure before trial should apply to disclosure by the prosecution in a criminal case of information relating to use of electronic surveillance techniques and to evidence derived therefrom.

(c) Motion to suppress; time, appealability. Any party aggrieved by the overhearing, recording, use or disclosure of such communications or evidence derived therefrom so overheard, recorded, used or disclosed otherwise than as expressly permitted should be permitted to move to suppress such communications or evidence derived therfrom. The motion should be made prior to the trial, hearing or other proceeding unless there was no opportunity to make the motion or the party was unaware of the grounds on which the motion could be made. Where such a motion is made and granted, prior to the attaching of jeopardy during the course of a criminal prosecution, the prosecutor, where necessary, should be afforded a right of appeal provided that the appeal is not taken for the purpose of delay and is diligently prosecuted.

DELAWARE LAW

11 Del. C. §1336(t) provides:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court or other authority of this State or political subdivision thereof may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that:
>
> (1) The communication was unlawfully intercepted;
>
> (2) The order of authorization is insufficient on its face;
>
> (3) The interception was not made in conformity with the order of authorization.
>
> The motion shall be made at least 10 days before the trial, hearing or proceeding unless there was no opportunity to make the motion or the moving party was not aware of the grounds for the motion. The court, upon the filing of such motion by the aggrieved

person, may in its discretion make available to the aggreived person or his counsel for inspection such portions of the intercepted communication, or evidence derived therefrom, as the court determines to be in the interests of justice. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall not be received in evidence in the trial, hearing or proceeding, and shall be treated as having been obtained in violation of this section.

In addition to any other right to appeal, the State shall have the right to appeal from an order granting a motion to suppress if the official to whom the order authorizing the intercept was granted shall certify to the court that the appeal is not taken for purposes of delay. The appeal shall be taken within the time specified by the rules of court and shall be diligently prosecuted.

11 Del. C. §1336(s) provides:

The contents of any wire or oral communication intercepted in accordance with the provisions of this section, or evidence derived therfrom, shall not be disclosed in any trial, hearing or proceeding before any court of this State unless not less than 10 days before the trial, hearing or proceeding the parties to the action have been served with a copy of the order and accompanying application under which the interception was authorized. This 10 day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information 10 days before the trial, hearing or proceeding, and that the party will not be prejudiced by the failure to make the service.

COMMENT

While both the Standard and present Delaware law agree on the suppression of unlawfully intercepted material, Delaware law is not in accord with the Standard with respect to the pretrial availability of material intercepted in accordance with the statute. The Standard would make such material available on a basis consistent with other pretrial disclosure (see Comparative Study on Discovery and Procedure Before Trial), whereas Delaware makes it available only if required in the "interests of justice" as determined by the court in each case, and then only in connection with a motion to suppress. Delaware does provide for delivery to the defense of the court order and the application under which the interception was authorized, but this does not amount to a disclosure of the contents of the intercepted communication.

The Committee recommends amendment of Superior Court Criminal Rule 16 to provide for routine disclosure of intercepted materials in advance of trial, on the same basis as other material is subject to routine pretrial

disclosure. The Committee recognizes, however, that there may be occasions in which judicial safeguards will be required to preserve the identity of confidential sources of information.

PARTIII. NATIONAL SECURITY

3.1 Counter intelligence; supervision.

The use of electronic surveillance techniques by appropriate federal officers for the overhearing or recording of wire or oral communications to protect the nation from attack by or other hostile acts of a foreign power or to protect military or other national security information against foreign intelligence activities should be permitted subject to appropriate Presidential and Congressional standards and supervision.

COMMENT

Delaware law contains no provisions on the subject matter of Standard 3.1, nor does there appear to be any need for such provisions. Such matters are more appropriately regulated by federal statute.

STANDARD

3.2 Use; disclosure.

Such communications so overheard or recorded, or evidence derived therefrom, should be received in evidence in any federal or state trial, hearing or proceeding in or before any federal or state court, grand jury, department, officer, agency, regulatory body or other authority where the overhearing or recording was reasonable. Other use or disclosure of such communciations or evidence derived therefrom should be limited to the use or disclosure necessary to achieve the purpose of the overhearing or recording or on a showing of good cause before a judicial officer.

COMMENT

Delaware law makes no specific provision for the matters covered by the Standard. Consideration should be given to whether a rule of court is needed in this area.

PART IV. OVERHEARING OR RECORDING WITH CONSENT

4.1 Overhearing or recording.

The surreptitious overhearing or recording of a wire or oral communication with the consent of, or by one of the parties to the communication should be permitted, unless such communication is overheard or recorded for

the purpose of committing a crime or other unlawful harm.

DELAWARE LAW

11Del. C. §1336(c) provides:

It shall not be unlawful under this section for:

(1) . . .

(2) A person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception unless such communciation is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State or for the purpose of committing any other injurious act.

11 Del. C. §1335 also prohibits violations of privacy by electronic surveillance.

COMMENT

Delaware law complies with the Standard.

STANDARD

4.2 Authenticity.

When law enforcement officers engage in a recording practice permitted under section 4.1, they should employ devices and techniques which will insure that the recording will be insofar as practicable, complete, accurate and intelligible. Administrative procedures should be followed under the supervision of the principal prosecuting attorney similar to those set forth in sections 5.13, 5.14 and 5.18.

DELAWARE LAW

11 Del. C. §1336(m) (1) provides in part:

The contents of any wire or oral communication intercepted in accordance with this section shall, if practicable, be recorded by tape, wire or other comparable method. The recording shall be done in such a way as will protect it from editing or other alteration.

COMMENT

Delaware law is substantially in accord with Standard.

PART V. OVERHEARING OR RECORDING WITHOUT CONSENT

5.1 Overhearing or recording; judicial order; authorized application.

The use of electronic surveillance techniques by law enforcement officers for the overhearing or recording of wire or oral communications uttered in private without the consent of a party should be permitted upon a judicial order of the highest court of general trial jurisdiction based on an application in compliance with section 5.3 and authorized by the appropriate prosecuting officer, as described in section 1.3(c).

DELAWARE LAW

11 Del. C. §1336(g) permits an application by the Attorney General "to a judge designated to receive the same for an order" approving the interception of a wire or oral communication. Applications of this type are within the jurisdiction of the superior court.

COMMENT

Delaware law is in accord with the Standard.

STANDARD

5.2 Emergency situation.

The use of such techniques to so overhear or record such communications without a judicial order should be permitted where the law enforcement officer, specially designated by the appropriate prosecuting officer, as described in section 1.1(c):

(i) is confronted with an emergency situation which requires such an overhearing or recording to be made within such time that it is not practicable to make an application and the emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime;

(ii) determines that there are grounds consistent with these standards upon which an order could be obtained authorizing such an overhearing; and

(iii) makes an application setting out the facts constituting the emergency for an order of approval of the overhearing to a judicial officer within a reasonable period of time but not more than forty-eight hours after the overhearing has occurred or has begun to occur.

Where an application for approval is denied, all overheard or recorded communications should be treated as provided in 2.3(a) and an inventory

filed as provided in 5.15. The denial of an order of approval should be made appealable.

DELAWARE LAW

11 Del. C. §1336(l) provides:

Whenever, upon informal application by an authorized applicant, any Judge of the Superior Court determines there are grounds upon which an order could be issued pursuant to this section and that an emergency situation exists with respect to the investigation of conspiratorial activities of organized crime, related to an offense designated in subsection (g) of this section, dictating authorization for immediate interception of wire or oral communication before an application for an order could with due diligence be submitted to him and acted upon, the Judge may grant written approval for such interception without an order, conditioned upon the filing with him, within 48 hours thereafter, of an application for an order which, if granted, shall recite the written approval and be retroactive to the time of such written apprival. Such interception shall immediately terminate when the communication sought is obtained or when the application for an order is denied. In the event no application for an order is made, the content of any wire or oral communication intercepted shall be treated as having been obtained in violation of this section.

In the event no application is made or an application made pursuant to this section is denied, the Court shall require the wire, tape or other recording of the intercepted communication to be delivered to, and sealed by, the Court and such evidence shall be retained by the Court in accordance with subsection (m) and the same shall not be used or disclosed in any legal proceeding except in a civil action brought by an aggrieved person pursuant to subsection (w) or a otherwise authorized by court order. Failure to effect delivery of any such wire, tape or other recording shall be punishable as contempt by the Court directing such delivery. Evidence of written authorization to intercept an oral or wire communication shall be a defense to any charge against the investigating or law-enforcement officer for engaging in unlawful interception.

COMMENT

The Standard is more liberal than Delaware law in permitting emergency surveillance. Delaware law prohibits all such emergency surveillance unless it relates to organized crime, and even then, there must be prior, though informal, judicial approval. The Standard permits a law officer to conduct electronic surveillance without any prior judicial authorization at all, provided an emergency situation exists and the other delineated safeguards are met. Delaware law provides penalties where no subsequent application is

made at all and the Standard is silent on this issue.

The Committee favors retention of present Delaware law.

STANDARD

5.3 Application; form; contents; additional facts.

An application for an order authorizing or approving the use of such techniques for the overhearing or recording of such communications should be made in writing upon an oath or affirmation and contain the following information:

(i) the identity of the prosecuting officer authorizing the application;

(ii) the identity of the law enforcement officer making the application;

(iii) The identity of the person, if known, whose communications are to be or were overheard or recorded;

(iv) a specification of the particular offense which is or was under investigation;

(v) a particular description of the type of communications sought to be or which were overheard or recorded;

(vi) a particular description and the location of the facilities, if any, over which or the place where the communications are to be or were overheard or recorded;

(vii) the expected or actual period of time of the overhearing or recording, and if the nature of the investigation is such that the authorization should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(viii) a complete statement of the facts relied upon by the applicant warranting the issuance of an order of authorization or approval; and

(ix) a recitation of all facts concerning previous applications or overhearing or recording, known to the individuals authorizing and making the application, made in reference to the person whose communications are to be or were overheard or recorded and the facilities over which or the place where such communications are to be or were so overheard or recorded, including, where the application is for the extension of an order, a statement setting forth the results thus far obtained from the overhearing or recording or a reasonable explanation of the failure to obtain such results.

The judicial officer to whom the application is submitted should be

permitted to require the applicant to furnish additional facts under oath or affirmation, which should be duly recorded.

DELAWARE LAW

11 Del. C. §1336(h) provides:

Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation and shall state:

(1) The authority of the applicant to make such application;

(2) The identity of the investigative or law enforcement officers or agency for whom the authority to intercept a wire or oral communication is sought and the identity of whoever authorized the application;

(3) A particular statement of the facts relied upon by the applicant, including:

a. The identity of the particular person, if known, commiting the offense and whose communications are to be intercepted;

b. The details as to the particular offense that has been, is being, or is about to be committed;

c. The particular type of communication to be intercepted;

d. The nature and location of the particular wire communication facilities involved or the particular place where the oral communication is to be intercepted;

e. A statement of the period of time for which the interception is required to be maintained, and if the character of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular statement of facts establishing probable cause to believe that addtional communications of the same type will occur thereafter;

f. A full and complete statement as to whether or not other normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ;

(4) Where the application is for the renewal or extension of an order, a particular statement of facts showing the results thus far obtained from the interception or a reasonable explanation of the failure to obtain such results;

(5) A statement of all previous applications, known to the individual authorizing and to the individual making the application, made to any court for authorization to intercept a wire or oral communication involving any of the same facilities or places specified in the application or involving any person whose communication is to be intercepted, and the action taken by the Court on each such application; and

(6) Such additional testimony or documentary evidence in support of the application as the Judge may require.

COMMENT

Delaware law is in accord with the Standard.

STANDARD

5.4 Probable cause; kinds of showings.

The statements of facts relied upon and submitted by the applicant should establish probable cause for belief that:

(i) (A)where the applicant expects or expected an extended period of overhearing or recording, the person is presently or was then engaged over a period of time in the commission of a particular offense with two or more close associates as part of a continuing criminal activity; or

(B) where the applicant expects or expected a brief period of overhearing or recording, the person is or was commiting, has or had commited, or is or was about to commit a particular offense at a specific time;

(ii) facts concerning that particular offense could have been or may be obtained through an overhearing or recording from the facilities over which or at the place where such communications are to be or were overheard or recorded;

(iii) other investigative procedures have or had been tried and have or had failed or reasonably appear or appeared to be unlikely to succeed if tried or to have been or to be too dangerous.

DELAWARE LAW

11 Del. C. §1336(i) provides:

Upon consideration of an application, the Judge may enter an ex parte order, as requested or as modified, authorizing or approving the interception of wire or oral communications, if the Court determines on the basis of the facts submitted by the applicant that there is or was probable cause for belief that:

(1) The person whose communication is to be intercepted is engaging or was engaged over a period of time as a part of a continuing criminal activity or is committing, has or had committed or is about to commit an offense as provided in subsection (g) of this section;

(2) Particular communications concerning such offense may be obtained through such interception;

(3) Normal investigative procedures with respect to such offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ; and

(4) The facilities from which, or the place where, the wire or oral communications are to be intercepted, are or have been used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by, such person.

COMMENT

Delaware law is similar to the Standard, but the Standard makes one distinction that Delaware law does not. Standard 5.4 contains two separate standards of probable cause depending on the type of situation confronting law enforcement personnel, while Delaware law has only one general standard of probable cause. The Standard seems desirable since such a differentiation will insure that no greater invasion of privacy is made than is absolutely necessary.

STANDARD

5.5 Designated offenses; criteria.

An application for authorization or approval should be permitted only in the investigation of designated offenses. The offenses should be serious in themselves or characteristic of group criminal activity.

DELAWARE LAW

11 Del. C. §1336(g) provides for an application in cases of "murder, kidnapping, gambling, robbery, bribery, extortion, dealing in narcotic drugs . . . or any felony or any conspiracy to commit any of the foregoing offenses or which may provide envidence aiding in the apprehension of the perpetrator or any of the foregoing offenses."

COMMENT

Delaware law is in accord with the Standard.

STANDARD

5.6 Other offenses; use or disclosure; time.

The use or disclosure of facts contained in an overheard or recorded communication relating to an offense other than the offense under investigation should be permitted where an application for an order of approval is duly made as provided in 5.3 which includes an additional showing that the overhearing or recording was or could have been otherwise authorized. An application for approval should, however, be permitted for the use or disclosure of facts relating to other than designated offenses. Where the application concerns an overhearing or recording made during a period of authorized overhearing or recording, the application should be made as soon as practicable. Where the application concerns an overhearing or recording made in an emergency situation, the application should be made within the period of time otherwise required by 5.2. The denial of an application for an order of approval should be made appealable.

DELAWARE LAW

11 Del. C. §1336(q) provides:

> When an investigative or law-enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herin, intercepts wire or oral communications relating of offenses other than those specified in the order or authorization, the contents therof, and evidence derived therefrom, may be disclosed or used as provided in subsection (o). Such contents and any evidence derived therefrom may be used under subsection (p) when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this section. Such application shall be made as soon as practicable.

COMMENT

Delaware law is in accord with the Standard. It does not specifically cover electronic surveillance in emergency situations.

STANDARD

5.7 Judicial discretion and determination.

The judicial officer to whom an application for authorization or approval is submitted should be permitted in the exercise of should discretion to deny the application, and should be authorized to grant the order as requested or with appropriate modifications only if he determines that there is probable cause as provided in section 5.4.

DELAWARE LAW

11 Del. C. §1336(i) provides: "Upon consideration of an application, the Judge may enter an ex parte order, as requested or as modified . . . if the Court determines . . . there is or was probable cause . . ."

COMMENT

By implication, §1336(i) would permit the judge to deny an application if a showing of probable cause is not made. Thus, Delaware law is in accord with the Standard.

STANDARD

5.8 Order; form; contents.

The order should be issued in writing signed by the judicial officer and contain the following information:

(i) the identity of the prosecuting officer authorizing the application;

(ii) the identity of the agency to which authority to overhear or record or to which approval of overhearing or recording is granted;

(iii) the identity of the person, if known, whose communications are to be or were overheard or recorded;

(iv) a specification of the particular offense as to which overhearing or recording is authorized or was approved;

(v) a particular description of the type of communications sought to be or which was overheard or recorded;

(vi) a particular description of and the location of the facilities from which or the place where the communications are to be or were overheard or recorded;

(vii) the period of time of authorized or approved overhearing as provided in section 5.9;

(viii) a requirement, where appropriate, for progress and need report as provided in section 5.9.

DELAWARE LAW

11 Del. C. §1336(k) provides:

Each order authorizing or approving the interception of any wire or oral communication shall state:

(1) The judge is authorized to issue the order;

(2) The identity of, or a particular description of, the person, if known, whose communications are to be intercepted;

(3) The nature and location of the communication facilities as to which, or the place of the communication as to which, authority to intercept is granted;

(4) A particular description of the type of the communication to be intercepted and a statement of the particular offense to which it relates;

(5) The indentity of the investigative or law enforcement officers or agency to whom the authority to intercept a wire or oral communication is given and the identity of whoever authorized the application; and

(6) The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

COMMENT

Delaware law is in accord with the Standard.

STANDARD

5.9 Time; termination; extensions.

No order should authorize or approve the overhearing or recording of communications for a period of time beyond that necessary to achieve the objective of the overhearing or recording warranted by the showing of probable cause as provided in 5.4(i). An order of authorization should require that overhearing or recording begin as soon as practicable and terminate when the objective is achieved or, in any event, after fifteen days from the date specified in the order. Extensions of the order should be granted for periods of not longer than thirty days only upon proper showings of probable cuase as provided in 5.4. No limit should be placed on the number of extensions which can be granted; but the court should be authorized to require progress reports showing need for extended overhearing or recording at such intervals as it deems appropriate and, where appropriate, to terminate the order in the exercise of sound discretion.

DELAWARE LAW

11 De. C. §1336(k) provides:

No order entered under this section shall authorize the interception of any wire or oral communication for a period of time longer than is necessary to achieve the objective of the authorization, nor in any event longer than 30 days. Every order entered under this section shall require that such interception begin and terminate as soon as practicable and may be conducted in such a manner as to minimize or eliminate the interception of such communications not otherwise subject to interception under this section. In no case shall an order entered under this section authorize the interception of wire or oral communications beyond the attainment of the authorized objective or in any event for any period exceeding 30 days. Extensions or renewals of such an order may not be granted unless an application for it is made in accordance with this section, and the Court makes the findings required by subsections (i), (j) and this subsection.

Whenever an order authorizing an interception is entered, the order may require reports to be made to the Judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made as such intervals as the Judge may require.

COMMENT

While both Delaware law and the Standard agree on the philosophy of limiting the time allowed for surveillance, the 15 day period allowed by the Standard is shorter than the initial 30 day period allowed by Delaware law, but this difference does not appear significant to the Committee. In other respects, Delaware law is in accord with the Standard.

STANDARD

5.10 Public Facilities.

No order should be permitted authorizing or approving the overhearing or recording of communications over public facilities unless a showing in addition to that required under sections 5.3 and 5.4 is made establishing probable cause for belief that:

(i) the overhearing or recording will be or was made in such a manner so as to eliminate or minimize insofar as practicable the overhearing or recording of other communications whose overhearing or recording are not or would not be authorized, and

(ii) there is or was a special need for the overhearing or recording of communications over the facilities.

COMMENT

Delaware law contains no specific provisions on electronic surveillance in public facilities. Because of the intrusion on the rights of innocent persons involved in such surveillance, the Committee would favor adoption of the Standard, but feels that more thought should be given to the definition of the additional burden of showing probable cause under the Standard.

STANDARD

5.11 Privileged communications.

(a) Facilities and places. No order should be permitted authorizing or approving the overhearing or recording of communications over a facility or in a place primarily used by licensed physicians, licensed lawyers, or practicing clergymen or in a place used primarily for habitation by a husband and wife unless an additional showing as provided in 5.10 is made.

(b) Communications. No otherwise privileged wire or oral communication overheard in accordance with or in violation of these Standards should lose its privileged character.

DELAWARE LAW

11 Del. C. §1336 (j) provides:

> If the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, or are leased to, listed in the name of, or commonly used by an attorney-at-law, or practicing clergyman, or is a place used primarily for habitation by a husband and wife, no order shall be issued unless the Court, in addition to the matters provided in subsection (i) above, determines that there is a special need to intercept wire or oral communications over such facilities or in such places. No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this section shall lose its privileged character.

COMMENT

Delaware law and the Standard agree on the special sanctity of privileged communications, and the need for a higher standard of probable cause for intercepting such communciations. The Standard is preferable to Delaware law in articulating the standard of probable cause and in protecting communications in a place used by a licensed physician. At present, Delaware does not recognize the physician-patient communication privilege. The

general assembly has before it a proposed Medical Practice Act which would recognize the privilege.

STANDARD

5.12 Orders and applications; custody; destruction.

All orders and applications should be maintained for ten years in such places as the judicial officer directs. They should not be disclosed or destroyed except on judicial order.

COMMENT

11 Del. C. §1336(m) (2) is in accord with the Standard in providing for ten year protected custody of applications and orders under the electronic surveillance statute.

STANDARD

5.13 Authenticity.

(a) Electronic surveillance techniques employed by law enforcement officers for the recording of communications uttered in private without the consent of the parties should be so employed that a complete, accurate and intelligible record of the communication will be obtained.

(b) The contents of any wire or oral communication overheard by any means authorized by these standards should, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication authorized under these standards should be done in such way as will protect the recording from editing or other alterations.

COMMENT

For present Delaware law, see Standard 4.2. Delaware law is substantially in accord with the Standard.

STANDARD

5.14 Return; record; time; sealing; custody; destruction.

As soon as practicable but not later than thirty days after the termination of the overhearing or recording, a return on the order of authorization or approval should be made to the judicial officer. The recordings of overheard communications should be sealed until such time as the recordings or evidence derived therfrom are to be received into evidence as provided in

2.3(e), except that duplicate recordings may be made for use or disclosure for investigative purposes or trial preparation under appropriate safeguards. The presence of the seal provided for by this section, or a satisfactory explanation for the absence thereof, should be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therfrom. The recordings should be maintained in such places and in such custody as the judicial officer directs for at least ten years and should not be destroyed except on judicial order.

DELAWARE LAW

11 Del. C. §1336(m) (1) provides:

> Immediately upon the expiration of the order or extensions or renewals thereof, the tapes, wires or other recordings shall be transferred to the Judge issuing the order and sealed under his direction. Custody of the tapes, wires or other recordings shall be maintained wherever the Court directs. They shall not be destroyed except upon an order of such Court and in any event shall be kept for 10 years. Duplicate tapes, wires or other recordings may be made for disclosure or use pursuant to subsection (o) of this section. The presence of the seal provided by this section, or a satisfactory explanation for its absence, shall be a prerequisite for the disclosure of the contents of any wire or oral communication, or evidence derived therefrom, under subsection (p) of this section.

COMMENT

Delaware law is substantially in accord with the Standard.

STANDARD

5.15 Inventory; time; postponement.

As soon as practicable but no later than ninety days after the return is made to the judicial officer or the date of an application for approval provided for in 5.2, which was denied, the judicial officer should cause to be served on the person named in the order of authorization or approval or the application for such an approval and such other parties to the intercepted communication as the judicial officer may determine in his discretion that it is in the interest of justice to serve, an inventory which should include notice of:

(i) the entry of the order or the making of the application;

(ii) the date of the entry of the order or of the denial of the application;

(iii) the period of authorized, approved or disapporved overhearing or recording;

(iv) the overhearing or recording, if any, of communications; and

(v) the period, if any, of actual overhearing or recording.

Upon a showing of good cause made to the judicial officer, the serving of the inventory should be postponed.

DELAWARE LAW

11 Del. C. §1336(n) provides:

Within a reasonable time but not later than 90 days after the termination of the period of the order or of extensions or renewals thereof, or the date of the denial of an order applied for under subsection (1), the issuing or denying Judge shall cause to be served on the person named in the order or application, and such other parties to the intercepted communications as the application and such other parties to the intercepted communications as the Judge may in his discretion determine to be in the interest of justice, an inventory which shall include:

(1) Notice of the entry of the order or the application for an order denied under subsection (1);

(2) The date of the entry of the order or the denial of an order applied for under subsection (1);

(3) The period of authorized or disapproved interception; and

(4) The fact that during the period wire or oral communications were or were not intercepted.

The Court, upon the filing of a motion, may in its discretion make available to such person or his attorney for inspection such portions of the intercepted communications, applciations and orders as the Court determines to be in the interest of justice. On an ex parte showing of good cause to the Court the serving of the inventory required by this subsection may be postponed.

COMMENT

Delaware law is substantially in accord with the Standard.

STANDARD

5.16 Disclosure; use.

The disclosure or use by law enforcement officers of the contents of

wire or oral communications which have been obtained by means authorized by these standards, or evidence derived therefrom, should be permitted only to the extent it is in the proper performance of their official duties, provided that, when disclosure is involved, such disclosure is made only to law enforcement officers to the extent it is in the proper performance of their official duties to receive it. Any person, including law enforcement officers, should be permitted to make such disclosures while giving testimony under oath or affirmation in a criminal proceeding in any court or in a grand jury proceeding. Such communications or evidence derived therefrom should otherwise be disclosed or used only upon a showing of good cause before a judicial officer.

DELAWARE LAW

11 Del. C. §1336(o) provides:

(1) Any investigative or law-enforcement officer who, by any means authorized by this section, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents or evidence to another investigative or law-enforcement officer to the extent that such disclosure or use is appropriate to the proper performance of his official duties.

(2) Any investigative or law-enforcement officer who, by any means authorized by this section, has obtained knowledge of the contents of any wire or oral communications or evidence derived therefrom may use such contents to the extent such use is appropriate to the performance of his official duties.

COMMENT

Delaware law is in accord with the Standard.

STANDARD

5.17 Reports.

(a) Judicial reports; time; contents. Judicial officers should make annual reports to an appropriate agency which should contain:

(i) the number or orders applied for;

(ii) the kinds of orders applied for;

(iii) the number of orders denied or granted as applied for or as modified;

(iv) the periods of time over which overhearing was conducted or recordings were made;

(v) the offenses specified in the orders or the applications which were denied;

(vi) the indentity of the persons authorizing the applications; and

(vii) the identity of the law enforcement agency of the applicant.

(b) Prosecutive reports; time; contents. Prosecuting officers should make annual reports to the agency specified in (a) which should contain:

(i) the information required in (a) (i) (vii);

(ii) a general description of the overhearing or recording, separated by offense, including:

(1) the character and frequency of the incriminating communications overheard or recorded;

(2) the character and frequency of other communications overheard or recorded;

(3) the number of persons whose communications were overheard or recorded; and

(4) the character and amount of the manpower and other resources used in the overhearing or recording;

(iii) the number of arrests resulting from the overhearing or recording;

(iv) the offenses for which the arrests were made;

(v) the number of trials resulting from the overhearing or recording;

(vi) the number of motions to suppress made, granted, or denied based on the overhearing or recordings;

(vii) the number of convictions resulting from the overhearing or recording;

(viii) the offenses for which the convictions were obtained.

(c) Public reports; time; contents. The agency specified in (a) and (b) should make public a complete annual report based on the information required to be filed by (a) and (b).

COMMENT

A judge authorizing electronic surveillance is required to report such authorization to the President Judge of the superior court within five weeks after termination of the surveillance. The superior court reports annually

on electronic surveillance, and the Attorney General reports annually to the Administrative Office of the United States Courts.

STANDARD

5.18 Administrative regulations.

Law enforcement agencies should adopt administrative regulations, including standards, procedures and sanctions, dealing with the various aspects of the use of electronic surveillance techniques. The regulations, among other things, should:

(i) limit the number of agents authorized to employ the techniques;

(ii) specify the circumstances under which the techniques may be used, giving preference to those which invade privacy least;

(iii) set out the manner in which the techniques must be used to assure authenticity;

(iv) provide for the close supervision of agents authorized to employ the techniques;

(v) circumscribe the acquisition of, custody of, and access to electronic equipment by agents; and

(vi) restrict the transcription of, custody of, and access to overheard or recorded communications by agents.

Materials on the regulations should be incorporated into general and special training programs of the agency.

COMMENT

Delaware practice is generally in accord with the Standard. The Division of State Police has adopted standard operating procedures relating to electronic surveillance. Approval by the Chief of Police is required for electronic surveillance, and other procedural safeguards have been adopted.

CHAPTER 2

PRETRIAL RELEASE

PART I. GENERAL PRINCIPLES

1.1 Policy favoring release.

The law favors the release of defendants pending determination or guilt or innocence. Deprivation of liberty pending trial is harsh and oppressive in that it subjects persons whose guilt has not yet been judicially established to economic and psychological hardship, interferes with their ability to defend themselves and, in many cases, deprives their families of support. Moreover, the maintenance of jailed defendants and their families represents major public expenses.

DELAWARE LAW

The Delaware constitution in Article I, Section 12, provides that: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is positive or the presumption great; and when persons are confined on accusation for such offenses their friends and counsel may at proper seasons have access to them." The supreme court, in the case of *In re Steigler,* Del. Supr., 250 A. 2d 379 (1969) stated that the general rule requires admission to bail and that even in capital cases, the State must bear the burden of producing evidence to warrant the invocation of the exception. The constitutional rule is given further effect by 11 Del. C. § 2104 which states that any person arrested and charged with any crime other than a capital crime shall be released either on his own recognizance, upon the execution of an unsecured personal appearance bond, or upon the execution of a secured personal appearance bond.

COMMENT

Delaware law is accord with the Standard.

STANDARD

1.2 Conditions on release.

(a) Release on order to appear or on his own recognizance. Each jurisdiction should adopt procedures designed to increase the number of defendants released on an order to appear or on their own recognizance. Additional conditions should be imposed on release only where the need is demonstrated by the facts of the individual case. Methods for providing the appropriate judicial officer with a reliable statement of the facts relevant to the release decision should be developed.

(b) Non-monetary conditions. Such non-monetary conditions as constitutionally may be imposed should be employed to assure the defendant's appearance at court and to prevent the commission of criminal violations while the defendant is at liberty pending adjudication.

(c) Money bail. Reliance on money bail should be reduced to minimal proportions. It should be required only in cases in which no other condition will reasonably ensure the defendant's appearance. Compensated sureties should be abolished, and in those cases in which money bail is required the defendant should ordinarily be released uopn the deposit of cash or securities equal to 10 percent the amount of the bail.

DELAWARE LAW

11 Del. C. §2101 states a general policy of Delaware law in favor of a system of personal recognizance or an unsecured personal appearance bond "to be used wherever feasible consistent with a reasonable assurance of the appearance of the accused and the safety of the community in connection with the release of persons accused of crime pending a final determination of the court as to the guilt of such persons." 11 Del. C. §2104 provides three alternatives for release of persons charged with a bailable offense. These are release on the person's own recognizance, release upon execution of an unsecured personal appearance bond and release upon the execution of a secured personal appearance bond. The court may also impose such conditions on release as it deems appropriate. The permissible conditions are spelled out in 11 Del. C. §2108 as follows:

§2108. Conditions for release.

In connection with either a secured release or an unsecured release of any person the court may also impose one or more of the following conditions:

(1) Require the person to return to the court at any time upon notice and submit himself to the orders and processes of the court;

(2) Place the person in the custody of a designated person or organization agreeing to supervise him;

(3) Place the person under the supervision of a presentence or probation officer;

(4) Place restrictions on the travel, associations, activities, consumption of alcoholic beverages, drugs or barbiturates, or place of abode of the person during the period of release;

(5) Require periodic reports from the person to an appropriate agent or officer of the court including the attorney for the accused;

(6) Require psychiatric or medical treatment of the person;

(7) Require the person to provide suitable support for his family under supervision of an officer of the court or the Family Court, with the consent of the Family Court;

(8) Require a person who has been convicted to duly prosecute any post conviction remedies or appeals; and if the case is affirmed or reversed and remanded, such person shall forthwith surrender himself to the court;

(9) Imposed any other condition deemed reasonably necessary to assure appearance as required and to carry out the purpose of this chapter.

While the law states a preference in favor of non-monetary bail or release on the prisoner's own recognizance, §2104 still contemplates that release on a secured personal appearance bond would be possible. There is no provision for the abolition of compensated sureties or the deposit of cash or securities equal to 10 percent of the amount of the bail.

11 Del. C. §2105 (a) directs the court to release an accused person on his own recognizance or on an unsecured personal appearance bond if "it is reasonably likely that the accused will appear as required before or after conviction of the crime charged and that there is no substantial risk to the safety of the community in permitting such unsecured release." 11 Del. C. §2105(b) lists a number of factors which the court is required to consider in determining this issue, including the nature and circumstances of the crime, the family ties of the accused, his employment, his financial resources, his character and mental condition, the length of his residence in the community, his record of convictions and his previous record of appearances in court or failure to appear.

COMMENT

Except with respect to the recommendation of abolition of compensated sureties, Delaware law is in accord with the Standard. The Committee would favor the abolition of compensated sureites and the substitution of the 10 percent deposit concept.

STANDARD

1.3 Willful failure to appear.

Willful failure to appear in court in response to a citation or summons or when released on order to appear, on one's own recognizance or on bail should be made a criminal offense. Proof that the defendant failed to appear when required should constitute prima facie evidence that the failure was willful.

DELAWARE LAW

11 Del. C. §2113 provides for the issuance of a warrant in the event that an accused person fails to appear as required by his recognizanace or bond or if the person commits any material breach of the conditions of his

release. If the accused fails to appear, such failure is presumed to be willful, and such failure to appear constitutes a separate crime with a gradation of punishments depending upon the seriousness of the offense with which the accused is charged.

COMMENT

Delaware law is in accord with the Standard.

STANDARD

1.4 Definitions.

(a) Citation. A written order issued 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. The form should require the signature of the person to whom it is issued.

(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 at all appropriate times, sometimes referred to as "personal recognizance."

(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.

COMMENT

11 Del. C. §2102 provides defintions relating to the question of pretrial release. These are somewhat different from those definitions appearing in the Standard because different terms are used in the Delaware pretrial release statute.

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

2.1 Policy favoring issuance of citations.

It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. A law enforcement officer having grounds for making an arrest should take the accused into custody or, already having done so, detain him further only when such action is required by the need to carry out legitimate investigative functions, to protect the accused or others where his continued liberty would constitute a risk of immediate harm or when there are reasonable grounds to believe that the accused will refuse to respond to a citation.

DELAWARE LAW

Superior Court Criminal Rule 4 provides for the issuance of a summons or an arrest warrant in the discretion of the commiting magistrate. While the warrant provides for arrest of the accused, the summons simply summons the accused to appear before the magistrate without arrest. 11 Del. C. §1907 allows a police officer to issue a summons in lieu of arresting for a misdemeanor, but such issuance is entirely discretionary with the officer.

COMMENT

Delaware law is not in accord with the Standard, as it has no presumption in favor of the issuance of citations, in contrast with warrants or simmons, although it should be noted that the practice of issuing a summons in lieu of an arrest warrant is preferable in cases of non-serious offenses. The Committee would favor adoption of the Standard and believes that it would be possible to implement the Standard through a change in the Rules of the Superior Court.

STANDARD

2.2 Mandatory issuance of citation.

(a) Legislative or court rules should be adopted which enumerate the minor offenses for which citations must be issued. A police officer who has ground to charge a person with such a listed offense should be required to issue a citation in lieu of arrest or, if an arrest has been made, to issue a citation in lieu of taking the accused to the police station or to court.

(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 the total imprisionment may not exceed 6 months, the responsible officer should be required to issue a citation in lieu of continued custody.

(c) The requirement to issue a citation set forth in (a) and (b) of this section need not apply and a warrant may be issued:

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

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

(iii) where arrest or 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) When an officer makes an arrest pursuant to subsection (c) above, he should be required to indicate his reasons in writing.

COMMENT

Delaware does not provide for the mandatory issuance of a citation, and under Superior Court Criminal Rule 4, the issuance of a summons is discretionary with the committing magistrate. Under 11 Del. C. §1907, the issuance of a summons in a misdemeanor case is discretionary with the police officer. The Committee favors adoption of the Standard.

STANDARD

2.3 Permissive authority to issue citations in all cases.

(a) Authority. A law enforcement officer acting without a warrant who has reasonable cause to believe that a person has commited any offense should be authorized by law to issue a citation in lieu of arrest or continued custody. The authority to issue citations in serious crimes should not extend to the patrolman in the field but should be limited to the appropriate supervising officer in the police station. The statute authorizing such action should require that the appropriate judicial or administrative agency promulgate detailed rules to procedure governing the exercise of authority to issue citations.

(b) Implementation. Each law enforcement agency should promulgate regulations designed to increase the use of citations to the greatest degree consistent with public safety. Except where arrest or continued custody is patently necessary, the regulations should require such inquiry as is practicable into the accused's place and length of residence, his family relationships, references, present and past employment, his criminal record, and any other facts relevant to appearance in response to a citation.

COMMENT

Present Delaware law permits the issuance of a summons in the discretion of a police officer only in the case of a misdemeanor. 11 Del. C. §1907. There is no authority to issue a citation in case of a felony. The Committee favors adoption of the Standard.

STANDARD

2.4 Lawful searches.

Nothing in these standards should be construed to affect a law enforcement officer's authority to conduct an otherwise lawful search even though a citation is issued.

STANDARD

2.5 Persons in need of care.

Notwithstanding that a citation is issued, a law enforcement officer should be authorized to take a cited person to an appropriate medical facility if he appears mentally or physically unable to care for himself.

DELAWARE LAW

11 Del. C. §4210 provides authority for taking a person who is arrested for public intoxication to a detoxification center. 11 Del. C. §4213 provides for taking a person arrested for a drug offense who is under the influence of drugs to a drug detoxification center.

COMMENT

Delaware law is substantially in accord with the Standard. Consideration should be given to providing police officers with a wider range of treatment facilities to which persons in need of care may be taken.

PART III. ISSUANCE OF SUMMONS IN LIEU OR ARREST WARRANT

3.1 Authority to issue summons.

All judicial officers should be given statuatory authority to issue a summons rather than an arrest warrant in all cases in which a complaint, information, or indictment is filed or returned against a person not already in custody.

DELAWARE LAW

Superior Court Criminal Rule 4(a) permits a commiting magistrate to issue a summons in his discretion in any criminal case in which a complaint is brought before him. A similar provision is included in the Rules of the Court of Common Pleas and the Justices of the Peace.

COMMENT

Delaware law is in accord with the Standard.

STANDARD

3.2 Mandatory issuance of summons.

The issuance of a summons rather than an arrest warrant should be mandatory in all cases in which the maximum sentence for the offense charged does not exceed six months imprisonment, unless the judicial officer finds that:

(a) the defendant previously has failed to respond to a citation or summons for an offense other than a minor one such as a parking violation; or

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

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

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

COMMENT

Because issuance of a summons is entirely within the discretion of the committing magistrate, Delaware is not in accord with the Standard. The Committee favors an amendment to Superior Court Criminal Rule 4 which would comply with the Standard.

STANDARD

3.3 Application for an arrest warrant or summons.

(a) It should be the policy to issue a summons in any case except one in which 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.

(b) At the time of the presentation of an application for an arrest warrant or summons, the judicial officer should require the applicant to produce such information as reasonable investigation would reveal concerning the defendant's:

(i) residence,
(ii) employment,
(iii) family relationships,
(iv) past history of response to legal process, and
(v) past criminal record.

(c) The judicial officer should be required to issue a summons in lieu of an arrest warrant when the prosecuting attorney so requests.

(d) In any case in which the judicial officer issues a warrant he shall state his reasons for failing to issue a summons.

COMMENT

Delaware law does not now state a preference in favor of the issuance of a summons, the issuance thereof being solely within the discretion of the magistrate. The Committee favors an amendment to Superior Court Criminal Rule 4 to bring Delaware law into compliance with the Standard.

STANDARD

3.4 Service of summons.

Statutes prescribing the methods of service of criminal process should include authority to serve a summons by certified mail.

DELAWARE LAW

Superior Court Criminal Rule 4(c) provides for service of a summons "by any person authorized to serve a summons in a civil action." The summons is to "be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address."

COMMENT

Delaware law is substantially in accord with the Standard, but the Committee would favor an amendment to the Rule requiring that in the case of mailing, the summons be mailed by certified mail, return receipt requested. This procedure would give some reasonable assurance that the mailing had actually reached the person being summoned.

PART IV. RELEASE BY JUDICIAL OFFICER AT FIRST APPEARANCE OR ARRAIGNMENT

4.1 Prompt first appearance.

Except where he is released on citation or in some other lawful manner, every arrested person should be taken before a judicial officer without unnecessary delay.

DELAWARE LAW

11 Del. C. §1909 provides for an initial hearing without delay and if possible within 24 hours after arrest.

COMMENT

Delaware law is technically in accord with the Standard. The Committee believes that the 24-hour period stated in the statute is unnecessarily long and recommends deleting the specific time reference from the statute. The question of what delay is reasonable should be determined by the court on a case-by-case basis.

STANDARD

4.2 Appointment of counsel.

Where practicable, it should be determined prior to first appearance whether the defendant is financially unable to afford counsel and whether he desires representation. Counsel should be appointed no later than the time of first appearance and, if necessary, may be appointed for the limited purpose of representing the defendant only at first appearance or arraignment and at subsequent proceedings before the lower court.

COMMENT

As more fully discussed in the Comparative Study on Providing Defense Services, Delaware law clearly provides for the appointment of counsel at all stages of a criminal proceeding for a defendant who is financially unable to afford counsel. Unfortunatley, this rule is not uniformly observed at the level of the justices of the peace, despite the provision of Rule 26 of their Criminal Rules which provides for informing the accused of this right to counsel at the preliminary hearing. The Committee favors adoption of the Standard.

STANDARD

4.3 Nature of first appearance.

(a) The first appearance before a judicial officer should take place in such physicial surroundings and with such unhurried and quiet dignity as are appropriate to the administration of justice. Each case should receive individual treatment, and decisions should be based on the particular facts of that case. The proceedings should be conducted in clear and easily understandable language calculated to advise the defendant effectively of his rights and of the actions to be taken against him. The appearance should be conducted in such a way that other interested persons present may be informed of the proceedings.

(b) Upon the defendant's first appearance the judicial officer should inform him of the charge and provide him with a copy thereof. He also should take such steps as are reasonable necessary to ensure that the defendand is adequately advised of the following:

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

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

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

(iv) where applicable, that he has a right to a preliminary examination.

(c) An appropriate record of the proceedings should be made. The defendant also should be advised of the nature and approximate schedule of all further proceedings to be taken in his case.

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

(e) In every case not finally disposed of at first appearance, and except in those cases in which the prosecuting attorney has stipulated that the defendant may be released on order to appear or on his own recognizandce, the judicial officer should decide in accordance with the standards hereinafter set forth the question of the defendant's pretrial release.

(f) It should be the policy of prosecuting attorneys to encourage the release of defendants upon an order to appear or on their own recognizance. Special efforts should be made to enter into stipulations to that effect in order to avoid unnecessary pretrial release inquiries and to promote efficiency in the administration of justice.

DELAWARE LAW

Superior Court Criminal Rule 5 provides for an initial appearance before a committing magistrate "without unreasonable delay." This implements the provisions of 11 Del. C. §1909 which provides for an initial hearing without delay and, if possible, within 24 hours after the arrest. Under Superior Court Criminal Rule 5(b) the committing magistrate is required to inform the defendant of the complaint against him, of his right to retain counsel or to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary hearing. The defendant is not required to plead at this initial hearing.

COMMENT

While Delaware law is substantially in accord with the Standard, the Committee would favor a revision of Rule 5 in order to cover specifically the points made in the Standard. See also Comment to Standard 4.1. The Committee believes that §1909 should be repealed and the question should be left to court rule.

STANDARD

4.4 Release of defendants subject to one year maximum sentence.

A defendant charged with an offense subject to no more than one year's imprisonment should be released by a judicial officer on order to appear or on his own recognizance without the special inquiry prescribed hereafter, unless a law enforcement official gives notice to the judicial officer that he intends to oppose such release. If such a notice is given, the inquiry should be conducted.

COMMENT

11 Del. C. §2101 enunciates a preference for release on personal recognizance or unsecured personal appearance bond. In any event, 11 Del. C. §2105 requires the court to find "that it is reasonably likely that the accused will appear as required before or after conviction of the crime charged and that there is no substantial risk to the safety of the community in permitting such unsecured release." Thus, Delaware law is not in accord with the Standard, which would mandate release on personal recognizance without special inquiry unless a law enforcement officer gives notice that he intends to impose such release. The Committee favors retention of the discretionary feature of the present law.

STANDARD

4.5 Pre-first appearance inquiry.

(a) In all cases in which the defendant is in custody and the maxi-

mum penalty exceeds one year, an inquiry into the facts relevant to pretrial release should be conducted prior to or contemporaneous with the defendant's first appearance. However, no such inquiry need be conducted if the prosecution advises that it does not oppose release on order to appear or on his own recognizance.

(b) The inquiry should be undertaken by an independent agency or by an arm of the court although, if these means are impracticable, the duty may be assigned to the public or other defender agency, to the prosecuting attorney, or to a law enforcement agency.

(c) In appropriate cases, the inquiry may be conducted in open court. Inquiry of the defendant should carefully exclude questions concerning the details of the current charge.

(d) The inquiry should be exploratory and may include such factors as:

(i) the defendant's employment status and history and his 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 time;

(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.

(e) Where appropriate, the inquiring agency should make recommendations to the judicial officer concerning the conditions, if any, which should be imposed on the defendant's release. The results of the inquiry and the recommendations should be made known to all parties at the first appearance.

COMMENT

Delaware law is substantially in accord with the Standard in its articulation of the factors which should be considered by the committing magistrate in determining whether or not to release the defendant on personal recognizance. See 11 Del. C. §2105. As noted above under Standard 4.4, Delaware law is not in accord with the Standard in that it does not express a

strong preference for release on personal recognizance. The Committee does not favor adoption of the Standard, preferring the discretionary nature of the present law. The court should be encouraged to release the defendant, but should not be required to do so. It would be preferable for any necessary investigation concerning release to be conducted by an independent agency as suggested in 4.5 (b).

PART V. THE RELEASE DECISION

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

(a) It should be presumed that the defendant is entitled to be released on order to appear or on his own recognizance. The persumption may be overcome by a finding that there is substantial risk of non-appearance, or a need for conditions as provided in section 5.2 or for prohibitions as provided in section 5.5. In capital cases, the defendant may 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 or will flee if released.

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

(i) the length of his residence in the community;

(ii) his employment status and history and his 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;

(iv) 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 nonappearance; 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 should exercise care not to give inordinate weight to the nature of the present charge.

(d) In the event the judicial officer determines that release on order to appear or on his own recognizance is unwarranted, he should include in the record a statement of his reasons.

DELAWARE LAW

11 Del. C. §2105 provides that release on personal recognizance or an unsecured personal appearance bond is the proper procedure if the court is satisfied that the accused will appear and that there is no substantial risk to the safety of the community. 11 Del. C. §2105(b) provides the criteria for determining whether the defendant should be thus released. The court is to consider the nature and circumstances of the crime charged, the family ties of the accused, his employment record, financial resources, his character and mental condition, as well as the length of his residence in the community, his record of convictions, and his record of appearance in court in previous cases.

COMMENT

Delaware law is not in accord with the Standard in that it does not express a clear preference for release on personal recognizance. In other respects, Delaware law is in accord with the Standard. As noted under Standard 4.5, the Committee does not favor a revision of present Delaware law. The Committee does favor release, but believes that conditional release may often be preferable to personal recognizance. Of course, the unsecured personal appearance bond is substantially equivalent to a release on personal recognizance, but it seems unnecessarily cumbersome in light of the availability of release on personal recognizance.

STANDARD

5.2 Conditions of release.

(a) Upon a finding that release on order to appear or on defendant's own recognizance is unwarranted, the judicial officer should 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) release the defendant into the care of some qualified person or organization responsible for supervising the defendant and assisting him in appearing in court. Such supervisor should be expected to maintain close contact whith the defendant, to assist him in making arrangements to appear in court and, where appropriate, to accompany him to court. The supervisor should not be required to be financially responsible for the defendant, nor to forfeit money in the event he fails to appear 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) where permitted by law, 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.

DELAWARE LAW

11 Del. C. §2104 allows the court complete discretion in the imposition of conditions on release, regardless of the type of release. 11 Del. C. §2108 sets forth a number of conditions which the court may impose. This section is set forth in full under Standard 1.2 above.

COMMENT

Delaware law is substantially in accord with the Standard. One important difference between the wording of the Standard and that of the present Delaware Law is that the Standard requires that only the least onerous restrictions be imposed after the court has decided that it cannot release on personal recognizance.

STANDARD

5.3 Release on money bail.

(a) Money bail should be set only when it is found that no other conditions on release will reasonably assure the defendant's appearance in court.

(b) The sole purpose of money bail is to assure the defendant's appearance. Money bail should not be set to punish or frighten the defendant, to placate public opinion or to prevent anticipated criminal conduct.

(c) Upon finding that money bail should be set, the judicial officer should require one of the following:

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

(ii) the execution of an unsecured bond in an amount specified by the judicial officer, accompanied by the deposit of cash or securities equal to 10 percent of the face amount of the bond. The deposit, less a reasonable administrative fee, should 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 in cash or other property or by the obligation or qualified, uncompensated sureties.

(d) Money bail should be set no higher than that amount reasonably required to assure the defendant's appearnace in court. In setting the amount of bail the judicial officer should take into account all facts relevant to the risk of willful nonappearance, including:

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

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

(iii) his family ties and relationship;

(iv) his reputation, character and mental condition;

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

(vi) 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 nonappearance; and

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

(e) Money bail should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge but should be the result of an individualized decision, taking into account the special circumstances of each defendant.

(f) Money bail should be distinguished from the practice of allowing a defendant charged with a traffic or other minor offense to post a sum of money to be forfeited in lieu of any court appearance. This is in the nature of a stipulated fine and, where permitted, may be employed according to a predetermined schedule.

DELAWARE LAW

The present statutes contemplate release on money bail only if the court finds itself unable to release the accused on personal recognizance or on an unsecured personal appearance bond. Under such circumstances, the court is required to make a record of its findings and to permit the release of the accused only upon the furnishing of sureties satisfactory to the court in an amount determined by the court. 11 Del. C. §2106. Under 11 Del. C. §2107 the court must not require oppressive bail but must require such bail as will assure the appearance of the accused at trial, compliance with any conditions imposed on his release and the safety of the community. In setting the amount of bail the court may also consider the various factors enumerated in 11 Del. C. §2105. See also Superior Court Criminal Rule 46(c).

COMMENT

Delaware law is in substantial compliance with the Standard. The Committee suggests that a procedure for prompt review of the setting of bail should be considered.

STANDARD

5.4 Prohibition of compensated sureties.

No person should be allowed to act as a surety for compensation. In any action to enforce an indemnity agreement between a principal and a surety on a bail bond it should be a complete defense that the surety acted for compensation. No attorney should be permitted to act as surety on a bail bond.

COMMENT

There is no Delaware law equivalent to the Standard. The Committee recommends adoption of the Standard and implementation through appropriate rules of court, so long as the gap created by such prohibition is simultaneously filled.

STANDARD

5.5 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 should 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.

DELAWARE LAW

11 Del. C. §2108 gives the court power to impose conditions for

release. §2108 is set forth in full under Standard 1.2 above.

COMMENT

Although Delaware law permits essentially equivalent restrictions on the defendant as are proposed in Standard 5.5, the Standard would require a showing of danger that the defendant will commit a serious crime, will seek to intimidate witnesses or otherwise unlawfully interfere with the orderly administration of justice before the conditions mentioned therein are imposed. While, no doubt, a judge would normally make such a finding prior to imposing restrictions on the defendant's liberty, it would be helpful for the law relating to this matter to specify that such a finding must be made, as recommended by the Standard.

STANDARD

5.6 Violations of conditions on release.

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

DELAWARE LAW

Under 11 Del. C. §2113 the court may issue a warrant for the arrest of a person who is released on recognizance or bond if he commits any material breach of the conditions under which his release was granted.

COMMENT

Delaware law is partially in accord with the Standard. The procedures specified in the second sentence of the Standard are not clearly spelled out under Delaware law, and the Committee would recommend its adoption.

STANDARD

5.7 Sanctions for violation of conditions.

After hearing, and upon finding that the defendant has willfully violated reasonable condtions imposed on his release, the court should be

authorized to impose different or additional conditions upon defendant's release or revoke his release.

DELAWARE LAW

11 Del. C. §2113(b) provides that if an accused is arrested for violation of a condition of his release the court shall act with respect to forfeiture of any appearance bond "and shall redetermine the type of release, the amount of bail, if any, and conditions of the further release of the accused."

COMMENT

Delaware law is in accord with the Standard.

STANDARD

5.8 Commission of serious crime while awaiting trial.

Where 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 released pending adjudicating of a prior charge, the court which initially released him should be authorized, after appropriate hearing, to review and revise the conditions of his release or to revoke his release where indicated. In cases in which release is revoked, the case should be tried as soon as possible.

COMMENT

There is no Delaware statute on the subject matter of this Standard. The Committee favors adoption of the Standard.

STANDARD

5.9 Re-examination and review of the release decision.

(a) The release decision should be automatically re-examined by the releasing court within a reasonable time in the case of a defendant who has failed to secure his release.

(b) A defendant, whether or not in custody, should be able, on application, to obtain prompt review of the release decision.

(c) Frequent and periodic reports should be made to the court of general jurisdiction as to each defendant who has failed to secure his release within [two weeks] of arrest. The prosecuting attorney should be required to advise the court of the status of the case and why defendant has not been released or tried.

COMMENT

Under directives issued by Chief Justice Daniel L. Herrmann, regular reports are made on detentioners, and after specific periods of time detentioners are able to secure their release from custody while awaiting trial. The Committee would recommend that the commendable procedures set forth in these directives be embodied in rules of court.

STANDARD

5.10 Accelerated trial for detained defendants.

Every jurisdiction should adopt, by statute or court rule, a time limitation within which defendants in custody must be tried which is shorter than the limitation applicable to defendants at liberty pending trial. The failure to try a defendant held in custody within the prescribed period should result in his immediate release from custody pending trial.

COMMENT

Under directives issued by Chief Justice Daniel L. Herrmann, preference is given to the trial of defendants who are held in custody awaiting trial. For a further review of this subject, see the Comparative Study on Speedy Trial. Again, the Committee would recommend adoption of rules which would embody the principles set forth in such directives.

STANDARD

5.11 Trial.

The fact that a defendant has been detained pending trail should not be allowed to prejudice him at the time of trial or sentencing.

COMMENT

Delaware practice is in accord with the Standard.

STANDARD

5.12 Credit for pretrial detention.

Every convicted defendant should be given credit, against both a maximum and a minimum term, 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.

DELAWARE LAW

Credit for period of time served as a detentioner awaiting trial for an offense is granted upon conviction. 11 Del. C. §3901.

COMMENT

Delaware law is in accord with the Standard.

CHAPTER 3

DISCOVERY AND PROCEDURE BEFORE TRIAL

PART I. GENERAL PRINCIPLES

1.1 Procedural needs prior to trial.

(a) Procudures prior to trial should serve the following needs:

(i) to promote an expeditious as well as fair determination of the charges, whether by plea or trial;

(ii) to provide the accused sufficient information to make an informed plea;

(iii) to permit thorough preparation for trial and minimize surprise at trial;

(iv) to avoid unnecessary and repetitious trials by exposing any latent procedural or constitutional issues and affording remedies therefor prior to trial;

(v) to reduce interruptions and complications of trials by identifying issues collateral to guilt or innocence, and determining them prior to trial; and

(vi) to effect economies in time, money, and judicial and professional talents by minimizing paperwork, repetitious assertions of issues, and the number of separate hearings.

(b) These needs can be served by (i) fuller discovery, (ii) simpler and more efficient procedures, and (iii) procedural pressures for expediting the processing of cases.

1.2 Scope of discovery.

In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, the adversary system, and national security.

1.3 Procedural concept.

Effective procedure prior to trial should normally encompass three successive stages:

(a) meetings between defense counsel and the prosecuting attorney where, without court intervention, they will engage in required discovery, explore additional discretionary discovery, conduct investigation as needed, and enter upon plea discussions;

(b) court hearings with counsel to ensure the proper conduct of required discovery, rule on matters of discretionary discovery, expose and determine latent procedural or constitutional issues, and obviate cumbersome motion practices; and

(c) preparation for trial which, in cases where the trial is likely to be protracted or unusually complicated, should include a pretrial conference.

1.4 Responsibilities of the trial court and of counsel.

(a) Trial court. The trial court should, on its own initiative, provide for the exercise of discovery automatically, without the filing of formal requests or supporting documents. The court should supervise the exercise of discovery to the extent necessary to ensure that it proceeds properly, expeditiously and with a minimum of imposition on the time and energies of the court, counsel, and prosepective witnesses. In any event, the court should encourage effective and timely discovery conducted voluntarily and informally between counsel. The court should take the initiative at appropriate times in ensuring that any latent procedural or constitutional issues are exposed and determined prior to trial. To these ends, the court should provide appropriate check-list forms, time schedules, and hearings; and hearings should be consolidated, if possible, with any other hearings to be held in the case prior to the trial.

(b) Counsel. Prosecution and defense counsel should take the initiative and conduct required discovery willingly and expeditiously, with a minimum of imposition on the time and energies of the court, counsel, and prospective witnesses. Counsel should be astute and diligent in defining issues which can most efficiently be disposed of prior to trial, and should engage in plea discussions in an effective and timely manner. Only through the initiative and cooperation of counsel in effecting these standards can criminal cases be fairly and timely disposed of, as justice requires.

1.5 Applicability.

These standards should be applied in all serious criminal cases.

DELAWARE LAW

Superior Court Criminal Rule 2 provides as follows: "These Rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

COMMENT

Except for the vague principles outlined in Superior Court Criminal Rule 2, present Delaware law does not articulate general principles relating to discovery and procedure before trial. Indeed, it may not be necessary to have rules in the specific words of Part I, because the rules relating to actual disclosure, reviewed below, are intended to implement the principles outlined in Part I. It is not at all clear to the Committee why the applicability of dis-

covery procedure should be limited to "serious criminal cases." In any event, if the Standard were adopted for Delaware, it should be phrased in terms of the classifications of crimes set forth in the Delaware Criminal Code.

PART II. DISCLOSURE TO ACCUSED

2.1 Prosecutor's obligations.

(a) Except as is otherwise provided as to matters not subject to disclosure (section 2.6) and protective orders (section 4.4), the prosecuting attorney shall disclose to defense counsel the following material and information within his possession or control:

(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 grand 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.

DELAWARE LAW

Superior Court Criminal Rule 16 provides as follows:

(a) **Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.** The defendant may serve upon the Attorney General a request to permit the defendant or someone acting in his behalf to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or a co-defendant (whether or not charged as a principal, accomplice or accessory in the same or in a separate proceeding), or copies thereof, which are known by the Attorney General to be within the possession, custody or control of the State, (2) written reports of autopsies, ballistics tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, and written reports of physical or mental

examination of the defendant or the alleged victim by a physician, dentist or psychologist made in connection with the particular case, or copies therof, which are known by the Attorney General to be within the possession, custody or control of the State, and (3) recorded testimony of the defendant before a grand jury.

(b) **Other Books, Papers, Documents or Tangible Objects.** The defendant may serve upon the Attorney General a request to permit the defendant or someone acting on his behalf to inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, copies or portions thereof which are within the possession, custody or control of the State, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal State documents made by agents in connection with the investigation or prosecution of the case, except as provided in subdivision (a) of this rule, or of statements made by State witnesses or prospective State witnesses (other than the defendant or a codefendant) to agents of the State.

(c) . . .

(d) **Procedure.** The request under subdivisions (a) and (b) may, without leave of Court, be served after commencement of the action not later than ten days after arraignment, or at such reasonable later time as the Court may permit. The request under subdivision (c) may, without leave of Court, be served not later than ten days after service upon the Attorney General of a request by the defendant for materials designated in subsection (a)(2), or such reasonable later time as the Court may permit. The request shall set forth the items to be inspected either by individual items or by category, and shall describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the insepection and performing the related acts.

The party upon whom the request is served shall in turn serve a written response within 20 days after service of the request. The Court may fix a shorter or longer time for response. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. If objection be

made by the Attorney General to the time, place and manner of making inspection and performing the related acts, and that is the sole nature of his objection, Attorney General will specify an alternate time, place and manner in the course of objecting to the request, but in no event shall the response of the Attorney General suggest a time later than ten days prior to trial.

If a party fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling inspection in accordance with request. Any motion with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested, shall be made within ten days after the time for response to the request, or at such reasonable later time as the Court may permit.

Delaware law does not require disclosure of the names of prospective witnesses. See State v. Traenkner, Del. Super., 314 A.2d 202 (1973). No provision requires the disclosure of prior criminal records of witnesses.

COMMENT

Delaware law was recently amended (effective September 1, 1974) to improve upon the prior scheme under which all applications by the defense for discovery of material held by the prosecution were by motion to the court. Discovery of such material is now commenced by application to the Attorney General, and resort to the court is necessary only when the application is not timely or when it is opposed by the Attorney General. The wording of the Standard is much more definite with respect to the mandatory nature of such discovery. It does not require application, but mandates disclosure in every case. It also differs from the present Rule in that it requires disclosure of the witnesses which the prosecution intends to call and all other material evidence which the prosecution intends to use. While the recent revision to Rule 16 brings present Delaware practice much closer to the Standard, the Committee recomends adoption of the Standard in its full form.

STANDARD

2.1(b) The prosecuting attorney shall inform defense cousel:

(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.

DELAWARE LAW

There is no requirement that the Attorney General inform the defendant of the existence of any of the matters covered by Standard 2.1 (b)(i).

COMMENT

Delaware law is not in accord with the Standard. The Standard is consistent with the policy of full disclosure prior to trial, and the Committee favors adoption of the Standard.

STANDARD

2.1(c) Except as is otherwise provided as to protective orders (section 4.4), 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 his punishment therefor.

DELAWARE LAW

While there is no specific Delaware rule on the subject of the disclosure of exculpatory material, the United States Supreme Court has held that the Constitution requires disclosure of evidence "which, if made available, would tend to exculpate him [the accused] or reduce the penalty . . . ." Brady v. Maryland, 373 U.S. 83, 87-88 (1963). This constitutional rule, while binding on Delaware courts, does not require pretrial disclosure of such material. State v. Traenkner, Del. Super., 314 A2d 202 (1973). Traenkner, declining to adopt the A.B.A. position outlined in Standard 2.1(c), stated that, "these standards have not been adopted in Delaware, . . . and are, therefore, not controlling at this time."

COMMENT

Since present law does not require pretrial disclosure of exculpatory material, it is not in accord with the Standard. The Standard is consistent with the procedural objectives of permitting adequate preparation for, and minimizing interruptions of, a trial and providing for informed guilty pleas. It is arguable that the Standard should be expanded to require disclosure of all information favorable to the accused, including material of value for purposes of impeachment. The Committee favors adoption of the Standard.

STANDARD

2.1(d) The prosecuting attorney's obligations under this section extend

to material and information in the possession or control of members of his 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.

DELAWARE LAW

Under Superior Court Criminal Rule 16(a), the obligation to produce defendant's statements and reports of examinations and tests extends to those papers "known by the Attorney General to be within the possession, custody or control of the State. . . ." Under Rule 16(b) which relates to the discovery of documents or tangible objects, the obligation exists where the material is "within the possession, custody or control of the State. . . ."

COMMENT

Delaware law appears to be substantially in accord with the Standard (although the coverage of the Standard is much greater than present Delaware law in view of the fact that other Standards require substantially greater disclosure). The Standard places a heavy burden on the Attorney General to determine what material must be produced for the defendant. On the other hand, a pretrial determination of the existence of such material and its disclosure to the defendant would eliminate the need for a retrial when material is later discovered.

STANDARD

2.2 Prosecutor's performance of obligations.

(a) The prosecuting attorney should perform his obligations under section 2.1 as soon as practicable following the filing of charges against the accused.

(b) The prosecuting attorney may perform these obligations in any manner mutually agreeably 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.

DELAWARE LAW

Discovery under Superior Court Criminal Rules 16(a) and (b) must be

initiated by application of a defendant within a period of ten days after arraignment or at such reasonable later time as the court may permit. Rule 16(d) permits the Attorney General to specify an alternate time, place and manner of discovery as part of his objection to a defense discovery application.

COMMENT

If the Delaware rules are changed so as to require automatic disclosure by the prosecution, corresponding changes will have to be made in the provisions relating to the time limits for discovery. The Committee favors a rule which would set specific times for the commencement of discovery procedures.

STANDARD

2.2(c) The prosecuting attorney should ensure that a flow of information is 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.

COMMENT

There is no corresponding provision to Standard 2.2(c) in the present Delaware rules. Some such provision would be required if disclosures of all material evidence by the prosecution is made mandatory.

STANDARD

2.3 Additional disclosures upon request and specification.

Except as is otherwise provided as to matters not subject to disclosure (section 2.6) and protective orders (section 4.4), the prosecuting attorney shall, upon request of 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.

COMMENT

There is no comparable provision in present Delaware law. This Standard expands current Delaware discovery procedure and the procedures set

forth in the preceding Standards, in that it provides for discovery of material, including material relating to collateral issues, specified by the defense. Subsection (c) is evidently intended to disclose a situation in which the relationship is such that the specified person may be regarded as a police or other law enforcement agent. This may be the basis for a valid claim of entrapment.

STANDARD

2.4 Material held by other governmental personnel.

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; and if the prosecuting attorney's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel.

COMMENT

There is no comparable provision in present Delaware law. This Standard is designed to enforce the earlier Standards requiring disclosure of all materials in the hands of any governmental agency. It requires diligent efforts on the part of the Attorney General to secure such information and provides for subpoenas or orders to cause such material to be made available to the defense counsel.

STANDARD

2.5 Discretionary disclosures.

(a) Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to defense counsel of relevant material and information not covered by sections 2.1, 2.3 and 2.4.

(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.

DELAWARE LAW

Under present Delaware law, the court may order the discovery of

items material to the preparation of the defense if the request is reasonable and within the scope of Superior Court Criminal Rule 16. State v. Winsett, Del. Super., 200 A.2d 237 (1964). Under Rule 16(e) the court may also issue protective orders to deny, restrict or defer discovery as it may deem appropriate.

COMMENT

The Standard expands present Delaware practice and provides the procedure both for making available material information not covered by the preceding Standards and also for restricting disclosure in the event of certain factors which may outweigh the desirability of discovery. In the event that Standard 2.5(b) is adopted, it should be worded in such a way as to make clear that it applies only to exceptional cases and cannot be used to subvert the policy of full disclosure.

STANDARD

2.6 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 of an informant's identity shall not be required 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 of national security and a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not thus be denied hereunder regarding witnesses or material to be produced at a hearing or trial.

DELAWARE LAW

There are no specific provisions of present Delaware law covering the matters dealt with in Standard 2.6, and no cases have been found on the subject, except in regard to informants. In State v. Flowers, Del. Super., 316 A.2d 564 (1973), the Superior court ruled that a post-trial in camera examination of the secret informer was appropriate and that his identity would be disclosed if his anonymity was not essential or if his disclosure "would materially aid the defense." The decision would not seem to preclude a pre-trial in camera examination since the purpose is to secure a fair trial for the defendant.

COMMENT

While there is no doubt that the matters covered by Standard 2.6 should not ordinarily be subject to discovery, the Committee would prefer that the Attorney General be required formally to invoke the privilege set forth in Standard 2.6, followed by a court determination as to the validity of the asserted privilege. The Standard apparently contemplates that the determination of the existence of the privilege would be made by the Attorney General. There would appear to be very limited applicability of the "national security" standard in a State case.

PART III. DISCLOSURE TO PROSECUTION

3.1 The person of the accused.

(a) Notwithstanding the initiation of judicial proceedings, and subject to consititutional 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 a 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 which involve no unreasonable intrusion thereof;**
- **(viii) provide specimens of his handwriting; and**
- **(xi) 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 appearances for such purposes in an order admitting the accused to bail or providing for his release.

COMMENT

There are no formal Delaware rules on the subject matter of Standard 3.1 except 21 Del. C. §2740 which states that, "Any person arrested for driving a motor vehicle while under the influence of intoxicating liquor upon the public highways in this State shall be deemed to have given his consent to submit to a chemical test of his breath, blood, or urine for the purpose of determining the alcoholic content of his blood." It would appear to be desirable to adopt a rule of court which would formalize procedures for criminal

investigations involving the accused. The Standard's formulation appears particularly desirable in that it calls for judicial supervision of the investigative process and requires reasonable notice of any required appearance on the part of the accused to be given to him and his attorney.

STANDARD

3.2 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.

DELAWARE LAW

Under Superior Court Criminal Rule 16(c), the Attorney General may request the defendant to permit the State discovery of written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, and written reports of physical or mental examinations of the defendant or the alleged victim by a physician, dentist or psychologist made in connection with the particular case, but only if a similar request is made by the defendant under Rule 16(a) (2). Any such "condition" may be imposed only if the court is satisfied that the Attorney General has made a showing of good cause, that the items sought are material, that the imposition of any such condition is reasonable and that the best interests of justice will be served thereby.

COMMENT

Delaware law differs in important ways from the Standard. Under the present law, discovery by the State is conditioned upon discovery by the defendant and the discovery available to the State relates to a wider range of materials than is covered by the Standard. The Committee believes that the existing rule is preferable to the Standard, both because of the Standard's lack of reciprocity and because the granting of discovery to the State is apparently discretionary with the court. More preferable, in the Committee's view, would be completely reciprocal discovery, limited only by the privilege against self-incrimination and any due process obligations which the State may have under Brady v. Maryland, 373 U.S. 83 (1963).

STANDARD

3.3 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.

DELAWARE LAW

Delaware law does not at present require that defense counsel disclose the nature of any defense which may be used at trial (other than insanity under Superior Court Criminal Rule 12.1) or the names and addresses of potential defense witnesses, nor does it permit the court discretionary authority to require such disclosure.

COMMENT

The Standard substantially increases the discovery presently available to the State. Certainly the availability of such information to the prosecution would greatly aid in preparation for trial, and there appears to be no defensible basis for perpetuating a system in which the defendant has the benefit of surprise in any context in which the State has a heavy burden of proof. However, the Committee favors a rule requiring mandatory discovery.

PART IV. REGULATION OF DISCOVERY

4.1 Investigations not to be impeded.

Except as is otherwise provided as to matters not subject to disclosure (section 2.6) and protective others (section 4.4), neither the counsel for the parties 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 opposing counsel's investigation of the case.

DELAWARE LAW

Under constitutional principles enunciated by the Supreme Court, witnesses may not deliberately conceal from the judge, jury and defense counsel evidence which is favorable to the defendant in impeaching the credibility of prosecution witnesses. Giles v. Maryland, 386 U.S. 66 (1967). Code of Professional Responsibility D.R. 7-109 forbids counsel to advise witnesses to withhold information from, or make themselves unavailable to, opposing counsel.

COMMENT

Delaware law is in accord with the Standard, but its adoption as a rule of court would be a helpful restatement of the general principle.

STANDARD

4.2 Continuing duty to disclose.

If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, he shall promptly notify the other party or his counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

DELAWARE LAW

Superior Court Criminal Rule 16(f) provides that:

> If, subsequent to disposition of a motion filed under this Rule, and prior to or during trial, a party discovers additional material previously requested, or [ordered] . . . which is subject to discovery or inspection under the Rule, he shall promptly notify the other party or his attorney or the Court of the existence of the additional material. 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, or prohibit the party from introducing in evidence material not disclosed, or it may enter such other order as it deems just under the circumstances.

COMMENT

Delaware law is in accord with the Standard.

STANDARD

4.3 Custody of materials.

Any materials furnished to an attorney pursuant to these standards shall remain in his exclusive custody and be used only for the purposes of conducting his side of the case, and shall be subject to such other terms and conditions as the court may provide.

DELAWARE LAW

There is no comparable provision in Delaware law relating to custody of material furnished. Superior Court Criminal Rule 16(d) permits intervention by the court to set standards for discovery, and permits the Attorney General to specify an alternate time, place or method of discovery in the course of objecting to an application for discovery.

COMMENT

The formulation of the Standard appears preferable to the present Rule. Some prosecution objections to broader discovery will be met by limiting the use of discovered materials. The Standard should not, however, be construed to restrict disclosure by counsel to his client, his staff and other witnesses when such disclosure is necessary for the preparation of the case.

STANDARD

4.4 Protective orders.

Upon a showing of cause, the court may at any time 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 must be disclosed in time to permit his counsel to make beneficial use thereof.

DELAWARE LAW

Superior Court Criminal Rule 16(e) states that "Upon a sufficient showing the Court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate." The Rule also provides that the State may be permitted by the court to make the "showing" in the form of a written statement to be inspected by the court in camera. If the court enters an order granting relief following a showing in camera, the entire text of the State's statement must be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

COMMENT

Delaware law is not in accord with the Standard, because present Rule 16(e) would permit the denial of discovery which may be otherwise required. The Committee favors adoption of the Standard.

STANDARD

4.5 Excision.

When some parts of certain material are discoverable under these standards, and other parts not discoverable, as much of the material should be disclosed as is consistent with standards. Excision of certain material and disclosure of the balance is preferable to withholding the whole. 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.

DELAWARE LAW

Superior Court Criminal Rule 16(e) permits excision of non-discoverable material, but only upon court order.

COMMENT

Present Delaware law appears preferable to the Standard because it requires a judicial review of the excision of material. The Standard would permit an ex parte excision of material and would permit a party determined to do so to defeat the purpose of discovery. The Committee favors a rule requiring notification to the court if requested material is excised.

STANDARD

4.6 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.

DELAWARE LAW

Superior Court Criminal Rule 16(e) permits in camera proceedings on the motion of the State.

COMMENT

The Standard differs from present Delaware law by permitting "any person" to request in camera proceedings. The Committee would favor a rule granting to any party and any person having an interest in the material to be discovered the right to request an in camera proceeding.

STANDARD

4.7 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 an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, 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.

DELAWARE LAW

Superior Court Criminal Rule 16(f) provides that "If, subsequent to disposition of a motion filed under this Rule, and prior to or during trial, a party discovers additional material previously requested, or [ordered] . . . which is subject to discovery or inspection under the Rule, he shall promptly notify the other party or his attorney or the Court of the existence of the additional material. 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, or prohibit the party from introducing in evidence material not disclosed, or it may enter such other order as it deems just under the circumstances."

COMMENT

The Standard differs from present Delaware law in that it does not contemplate that the court would normally have the power to prohibit a party from introducing in evidence the material not disclosed. Granting a continuance to allow compliance with a discovery order as provided by the Standard is a more desirable remedy than striking or excluding evidence for failure to comply. Under the Standard, the court would, in extraordinary cases, continue to have the power to exclude evidence as a sanction for non-compliance.

PART V. PROCEDURE

5.1 General procedural requirements.

(a) Procedure prior to trial should recognize the possible need for three successive stages: (i) an exploratory stage, initiated by counsel and conducted without court supervision (see section 5.2); (ii) an omnibus stage, supervised by the trial court and entailing court appearances as necessary (see section 5.3); and (iii) a trial planning stage, entailing pretrial conferences as necessary (see section 5.4). The various stages should be adapted to the needs of the particular case and eliminated or combined as appropriate.

(b) Essential to the proper expediting of proceedings prior to trial are (i) effective judicial calendar control, and (ii) a requirement (by rule or statute) that criminal charges be brought to trial or otherwise disposed of within a specific time period running from a specified event.

5.2 Exploratory stage and setting of Omnibus Hearing.

(a) Procedures prior to trial should not interfere with but should afford the opportunity for counsel to expedite a fair disposition of the case using, without court intervention, discovery, investigation and plea discussions, as appropriate in the particular case. Wherever such opportunity does not now exist, procedures should be adapted to encourage counsel to exercise their initiative in these matters.

(b) At such time as a plea is first called for in the court having jurisdiction to try the accused, if a plea of guilty is not entered, the court shall then set a time for an Omnibus Hearing.

(c) The time set for the Omnibus Hearing shall allow sufficient time for counsel to (i) initiate and complete discovery required by sections 2.1 and 2.3, and such additional discovery as in their judgment will expedite the proceedings; (ii) conduct further investigation of the case, as needed; and (iii) continue plea discussions.

5.3 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 provision of counsel have been complied with;

(ii) ascertain whether the parties have completed the discovery required in sections 2.1 and 2.3, and if not, make orders appropriate to expedite completion;

(iii) Ascertain whether there are requests for additional disclosures under sections 2.4, 2.5 and 3.2;

(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) All motions, demurrers and other requests prior to trial should ordinarily be reserved for and presented orally at the Omnibus Hearing unless the court otherwise directs. Failure to raise any prior-to-trial error or issue at this time constitutes waiver of such error or issue if the party concerned then has the information necessary to raise it. Check-list forms should be established and made available by the court and utilized at the hearing to assure that all requests, errors and issues are then considered.

(c) Any and all issues should be raised either by counsel or by the court without prior notice, and if appropriate, informally disposed of. If additional discovery, investigation or preparation, or evidentiary hearing, or formal presentation is necessary for a fair and orderly determination of any issue, the Omnibus Hearing should be continued from time to time until all matters raised are properly disposed of.

(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 record should be made of all proceedings at the hearing; such a record may be either a verbatim record, or a summary memorandum (dictated or written on an appropriate court-established form) indicating disclosures made, rulings and orders of the court, stipulations, and any other matters determined or pending.

COMMENT

There are no Delaware rules corresponding to Standards 5.1 through 5.3 although in practice the equivalent of the Omnibus Hearing is available on application by a party. Such rules should be adopted if the earlier Standards relating to mandatory discovery are adopted, so that there will be a vehicle for court supervision of the discovery process. The Committee believes that an Omnibus Hearing is not advisable at the lower court level.

STANDARD

5.4 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;

(xiii) temporary absence of defense counsel during trial.

(b) Conferences should be recorded. At the conclusion of a conference, a pretrial order, or memorandum of the matters agreed upon, should be signed by counsel, approved by the court and filed, which should 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.

DELAWARE LAW

Superior Court Criminal Rule 17.1 provides for pretrial conferences at any time after the filing of the indictment or information upon motion of any party or upon the court's own motion. At the conclusion of the conference, the court is required to prepare and file a memorandum of matters agreed upon. No admissions made by the defendant or his attorney at the conference may be used against the defendant unless the admissions are reduced to writing and signed by the defendant and his attorney. The Rule may not be invoked if the defendant is not represented by counsel.

COMMENT

Delaware law is substantially in accord with the Standard. Consideration should be given to the question of whether the presence of the defendant should be required at all pretrial proceedings. The ABA required such presence in a tentative draft, but deleted such requirement from the approved draft of 1970.

CHAPTER 4

PROVIDING DEFENSE SERVICES

PART I. GENERAL PRINICPLES

1.1 Objective.

The objective of the bar should be to ensure the provision of competent counsel to all persons who need representation in criminal proceedings and to educate the public to the importance of this objective.

DELAWARE LAW

The Delaware Public Defender Act, 29 Del. C. §4601 provides legal counsel for indigent persons accused of crime through the office of the public defender, a State official. The statute requires the public defender to counsel and defend indigent persons charged with "a criminal offense." The range of representation is, according to the statute, "at every stage of the proceedings following arrest."

Furthermore, the public defender is required to "prosecute any appeals or other remedies before or after conviction that he considers to be in the interest of justice." This has been interpreted to require public defender assistance at the appeal stage when, in the opinion of the particular public defender, an appeal is necessary, representation before the Board of Pardons in selected cases and also representation before administrative organs of the Department of Corrections where required in the interest of justice.

COMMENT

Delaware law meets the objective stated in the Standard.

STANDARD

1.2 Systems.

Counsel should be provided in a systematic manner in accordance with a widely publicized plan employing a defender or assigned counsel system or a combination of these.

COMMENT

The Delaware public defender scheme is not systematic because of the difference in the treatment of indigent defendants in Wilmington as contrasted with the remainder of the State. If the individual commits a felony and is arrested in Wilmington, he is arraigned pursuant to Superior Court Criminal Rule 5(c) in the municipal court before having a preliminary hearing scheduled and thereafter being forwarded for action by the grand jury. The

municipal court habitually makes known to the defendant his right to a public defender if he is indigent. If the defendant indicates he cannot afford counsel on his own, a written reference is made to the public defender's office by the particular judge before whom the request is made.

This is not the case, however, with respect to the larger bulk of cases in which the felony is committed outside the City of Wilmington. There, in accordance with Rule 5, the individual is taken before a justice of the peace and in some cases, specific reference is made to the public defender, but more often, there is no reference made to the public defender. The matter may go forward to preliminary hearing without a public defender having been assigned or the individual referred to the public defender's office. Most importantly, the individual coming through the justice of the peace court system may have high bail set and may be unaware of his right to free counsel and his right to have the question of bail reconsidered and may spend anywhere from a week to ten days in prison awaiting a preliminary hearing. Rule 5(c) as amended requires a preliminary hearing within ten days if the individual is incarcerated.

The Committee recommends, therefore, that the justices of the peace, through the Office of the Deputy Administrator for the Justice of the Peace system, provide each person who comes before the court with a written statement of his right to a public defender if he cannot afford counsel. If the individual requests counsel, written reference by name and case number should be made to the public defender's office. If the defendant is incarcerated, the justice of the peace should insure that the reference is made immediately so that the public defender can make immediate contact. If the defendant is released on bail, he should be provided with the address of the public defender's office and encouraged to seek counsel at the office at the earliest possible moment.

The public defender system is not adequately publicized. The Committee suggests, in addition to the written reference recommended above, that when a defendant is incarcerated in default of bail, as part of the intake procedure at the Delaware Correctional Center or other institution, he be advised of his right to free counsel, be provided with a phone number and access to a phone to call the public defender and provided with adequate stationery so he may write the public defender should he wish to initiate contact at an early stage.

STANDARD

1.3 Local Options.

By statute each jurisdiction should require the appropriate local subdivision to adopt a plan for the provision of counsel. The statute should permit the local subdivision to choose from the full range of systems a

method of providing counsel which is suited to its needs and consistent with these standards and should allow local subdivisions to act jointly in establishing such a plan.

COMMENT

The Public Defender Act provides a unitary public defender system for the entire State. Because of the compactness of the State in both demographic and geographic terms, the Committee believes that no local option is necessary.

STANDARD

1.4 Professional independence.

The plan should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. One means for assuring this independence, regardless of the type of system adopted, is to place the ultimate authority and responsibility for the operation of the plan in a board of trustees. Where an assigned counsel system is selected, it should be governed by such a board. The board should have the power to establish general policy for the operation of the plan, consistent with these standards and in keeping with the standards of professional conduct. The board should be precluded from interfering in the conduct of particular cases.

COMMENT

The public defender in the State of Delaware is selected by the Governor and is subject to the advice and consent of the State Senate. This has, not unnaturally, led to the appointment of a member of the Governor's own party as public defender. However, in practice, the public defenders have been consistent in selecting attorneys for the office without regard to party affiliation. Moreover, they have been competent administrators and because of their party affiliation, were able to deal effectively with the general assembly insofar as appropriations and other matters were concerned.

Thus, although the Standard suggests that the public defender be free from political influence, the Committee sees no need to change the existing system in Delaware. The political nature of the office actually appears to have been beneficial in securing funding. In other respects, Delaware practice is in accord with the Standard.

STANDARD

1.5 Supporting services.

The plan should provide for investigatory, expert and other services necessary to an adequate defense. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process, including determinations on pretrial release, competency to stand trial and disposition following convictions.

COMMENT

The Committee believes that present funding of the public defender's office has been adequate to provide supporting services which comply with the Standard. The present public defender's office has on its staff at least seven full-time investigators, many of whom have had extensive prior experience in the field of investigation. Moreover, the public defender employs an expert in the use of a polygraph and an up-to-date polygraph machine which is consistently used in office investigations.

The public defender also employs outside contractual experts, such as psychiatrists, psychologists, pathologists, and other forensic experts where required. A tradition has grown up in the public defender's office that where the case is serious enough, money will be found to provide experts necessary for the proper defense of a case. Consequently, the anomaly exists that in a serious case the public defender's office may be better able to provide experts than the private bar. The future existence of funding is unpredictable, but should funding continue at the present level, it is expected that the present level of expert services can be maintained.

PART II. ASSIGNED COUNSEL SYSTEMS

2.1 Systematic assignment.

An assigned counsel plan should provide for a systematic and publicized method of distributing assignments. Except where there is need for an immediate assignment for temporary representation, assignments should not be made to lawyers merely because they happen to be present in court at the time the assignment is made. A lawyer should never be assigned for reasons personal to the person making assignments. If the volume of assignments is substantial, the plan should be administered by a competent staff able to advise and assist assigned counsel.

STANDARD

2.2 Eligibility to serve.

Assignments should be distributed as widely as possible among the

qualified members of the bar. Every lawyer licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be included in the roster of attorneys from which assignments are made.

STANDARD

2.3 Rotation of assignments.

As nearly as possible assignments should be made in an orderly way to avoid the appearance of patronage and to ensure fair distribution of assignments among all whose names appear on the roster of eligible lawyers. Ordinarily assignments should be made in the sequence that the names appear on the roster of eligible lawyers. Where the nature of the charges or other circumstances require, a lawyer may be selected because of his special qualifications to serve in the case, without regard to the established sequence.

STANDARD

2.4 Compensation.

Assigned counsel should be compensated for time and service necessarily performed in the discretion of the court within limits specified by the applicable statute. In establishing the limits and in the exercise of discretion the objective should be to provide reasonable compensation in accordance with prevailing standards.

COMMENT

Although Delaware has a public defender system, assigned counsel will be appointed in cases where there is a conflict of interest among codefendants. See Lindh v. O'Hara, Del. Supr., 325 A.2d 84 (1974). In such cases, Lindh dictates that 29 Del. C. §4605 is controlling. This statutory provision provides that:

> For cause, the court may on its own motion or upon the application of the Public Defender or the indigent person, appoint an attorney other than the Public Defender to represent him at any stage of the proceedings or on appeal. The attorney shall be awarded reasonable compensation and reimbursement for expenses necessarily incurred to be fixed by the court and paid by the county.

Lindh also cited with approval Standard 2.4 in determining what is "reasonable compensation."

PART III. DEFENDER SYSTEMS

3.1 Career service.

A defender plan should be designed to create a career service. Selection of the chief defender and staff should be made on the basis of merit and should be free from political, racial, religious, ethnic and other considerations extraneous to professional competence. The tenure of the defender and his staff should be protected similarly. The defender and staff should be compensated at a rate commensurate with their experience and skill, sufficient to attract career personnel, and comparable to that provided for their counterparts in prosecutorial offices.

COMMENT

President Delaware practice is not in accord with the Standard. The public defender is appointed by the Governor and serves for a term of six years on a part-time basis. It has been the practice to select the public defender on the basis of chiefly political considerations. The tenure of six years seems to be adequate to enable the individual so selected to develop the necessary administrative expertise to run the office. The Committee recommends that the public defender be full-time with a commensurate improvement in the compensation.

The public defender selects assistant public defenders, some of whom are part-time and some of whom are full-time. The part-time public defenders are entitled under the unwritten law governing the internal affairs of the office to engage in all kinds of practices including competing criminal practices. The full-time defenders are expected to devote a normal work week to their office but are not precluded by statute from maintaining such other ancillary practice as they are able to perform in their off-duty hours.

The prospect of part-time public defenders doing other criminal work and full-time public defenders otherwise engaged in "moonlighting" is not totally attractive. The Committee recommends that all public defenders be full-time with no outside practice so that there could be no question about their availability and allegiance. At present levels of funding, this recommendation could not be achieved. Indeed, because of the current levels of funding, it is impossible to attract to either prosecutorial or defender positions individuals who would contemplate a career in government service. Because the public defender statute does not contain a prohibition against private practice, either as to part-time or full-time public defenders, the public defender is able to attract considerably more qualified people than otherwise would be the case. For example, the former chief assistant public defender is an attorney with thirteen years experience, eight of which have been in the public defender's office, and is the oldest career prosecutor or defender in the State of Delaware. It would be impossible at present funding levels to

compensate him in a manner so as to exclude him from maintaining some kind of private practice. He, and others in the office, have found it necessary to engage in some limited private practice on the side in order to stretch the relatively low rate of compensation that they have received.

The ideal, of course, would be to fund both the Attorney General and public defender at a rate high enough with ancillary benefits sufficient to attract individuals to career government service. However, because of the present state of the economy, and because of the relatively higher rate of pay attorneys in private practice receive, it is unlikely that the general assembly would in the foreseeable future appropriate sufficient funds to make either office an attractive career possibility in the long-run.

STANDARD

3.2 Restrictions on private practice.

Insofar as local conditions permit, the defender office should be staffed with full-time personnel. All full-time personnel should be prohibited from engaging in the private practice of law, and part-time personnel should be prohibited from engaging in the private practice of law in criminal cases.

COMMENT

As stated in the Comment to Standard 3.1, Delaware practice is not in accord with the Standard.

STANDARD

3.3 Facilities; library.

Every defender office should be located in a place convenient to the courts and be furnished in a manner appropriate to the dignity of the legal profession. A library of sufficient size, considering the needs of the office and the accessibility of other libraries, and other necessary facilities and equipment should be provided.

COMMENT

Present Delaware practice is not in accord with the Standard. One of the critical problems in the present public defender office in Wilmington and elsewhere in the State is inadequate facilities. Again, the problem is funding. Insufficient money exists in each budget to provide, for example, a single office for each full-time public defender, and adequate library or adequate secretarial and paralegal assistance.

PART IV. TYPES OF PROCEEDINGS

4.1 Criminal cases.

Counsel should be provided in all criminal proceedings for offenses punishable by loss of liberty, except those types of offenses for which such punishment is not likely to be imposed, regardless of their denomination as felonies, misdemeanors or otherwise.

COMMENT

Delaware practice is in accord with the Standard. The public defender is required to represent all indigent persons charged "with a criminal offense." 29 Del. C. §4601. In practice, the public defender of the State of Delaware operates in every court in the State. As noted in the Comment to Standard 1.2, the justice of the peace courts are not uniform in advising indigent defendants of their right to counsel by the public defender.

STANDARD

4.2 Collateral proceedings.

Counsel should be provided in all proceedings arising from the initiation of a criminal action against the accused, including extradition, mental competency, post-conviction and other proceedings which are adversary in nature, regardless of the designation of the court in which they occur or classification of the proceedings as civil in nature.

COMMENT

Delaware practice is in accord with the Standard. The public defender has provided services wherever required throughout the State. This includes representation in habeas corpus proceedings and in proceedings pursuant to Superior Court Criminal Rule 35, which is the Delaware form of post-conviction review. Representation has also been provided in Board of Pardons proceedings where required, naturally throughout the appellate process, and before administrative organs of the Department of Corrections where required in order to insure against a manifest injustice.

PART V. STAGE OF PROCEEDINGS

5.1 Initial provision of counsel; notice.

Counsel should 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. The authorities

should have the responsibility to notify the defender or the official responsible for assigning counsel whenever a person is in custody and he requests counsel or he is without counsel.

COMMENT

As stated in the Comment to Standard 1.2, practice in Wilmington is in accord with the Standard, but practice in the justice of the peace courts often is not.

STANDARD

5.2 Duration of representation.

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

COMMENT

Delaware law is in accord with the Standard. Counsel is customarily provided at every stage of the proceedings where adequate notice is given to the public defender's office. Public defenders have appeared at proceedings pursuant to Superior Court Criminal Rule 5, at preliminary hearings, at arraignment, during motions, at trial, on appeal, and during the entire range of post-conviction remedies. The public defender presently does not provide representation for motions for collateral relief in the federal courts, but it has been the custom of the United States District Court for the District of Delaware where an individual makes application for post-conviction remedy to appoint the particular public defender who handled the matter up to that time.

STANDARD

5.3 Withdrawal of counsel.

Once appointed, counsel should 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 grounds asks that counsel be replaced, successor counsel should be appointed. Counsel should not seek to withdraw because he believes that the contentions of his client lack merit, but should present

for consideration such points as client desires to be raised provided he can do so without compromising professional standards.

COMMENT

Delaware practice is in accord with the Standard. The only grounds for which public defenders are habitually relieved of representation is a situation where two or more co-defendants have a clear conflict of interest. Under these circumstances, the public defender makes known the conflict to the court and other counsel is appointed. The Public Defender Act provides in 19 Del. C. §4605 for the appointment of other counsel in a situation where there is a conflict.

There have been a few situations in which the indigent person does not desire the public defender and wishes the court to appoint particular outside private counsel. Under these circumstances, the court rightfully takes the position that it need only appoint counsel, not counsel of the defendant's choice, and generally trial proceeds although the defendant may be somewhat unwilling.

A real problem insofar as the public defender is concerned is the multiplicity of frivolous appeals by the public defender clients. In practice, it has been difficult to avoid taking what may appear to be an unjustified appeal because of the difficulty in interpreting standards relating to withdrawal of counsel from unmeritorious appeals.

PART VI. ELIGIBILITY FOR ASSISTANCE

6.1 Eligibility.

Counsel should be provided to any person who is financially unable to obtain adequate representation without substantial hardship to himself or his family. Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel or because he has posted or is capable of posting bond.

COMMENT

The public defender statute contains no definition of "indigency." This has provided some difficulty in the administration of the public defender's office. The public defender errs more frequently on the side of accepting representation than declining it so that a person who claims he is financially unable to obtain private counsel almost invariably ends up with a public defender. Efforts have been made in the past to screen, but since there are no investigatory facilities available to check information given by a potential public defender client, it is really impossible to filter out the so-called free-loaders from the persons genuinely eligible. In many cases,

despite a determination of ineligibility by the public defender's office, the superior court appoints the public defender to represent a defendant who claims not to be able to afford counsel. The Committee recommends a termination of such appointments unless based on a factual determination of indigency based on facts not known to the public defender's office at the time of its determination.

STANDARD

6.2 Partial eligibility.

The ability to pay part of the cost of adequate representation should not preclude eligibility. The provision of counsel may be made on the condition that the funds available for the purpose be contributed to the system pursuant to an established method of collection.

COMMENT

Delaware law is not in accord with the Standard. One of the genuine deficiencies of the present system is that it is an "all or nothing" system. If the person cannot afford counsel for the particular offense, even though he may be able to afford part payment, he is accepted as a public defender client since he is, in the eyes of the public defender statute, indigent. The Committee suggests that the law be amended to allow the public defender to collect as much of a fee as the individual can pay even though he is unable to totally pay private counsel. In this manner, part of the costs of maintaining the public defender system could be paid by the clients themselves and substantial funds returned to the State.

STANDARD

6.3 Determination of eligibility.

A preliminary and tentative determination of eligibility should be made as soon as feasible after a person is taken into custody. The formal determination of eligibility should be made by the judge or an officer of the court selected by him. A questionnaire should 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 should be redetermined.

COMMENT

Delaware practice is in accord with the Standard.

STANDARD

6.4 Reimbursement.

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

COMMENT

Delaware practice is in accord with the Standard, except that there is at present no method of obtaining reimbursement in the case of fraud. As a practical matter, however, the time spent in obtaining such reimbursement would probably not be warranted.

PART VII. OFFER AND WAIVER

7.1 Explaining the availability of a lawyer.

When a person is taken into custody or otherwise deprived of his freedom he should immediately be warned of his right to the assistance of a lawyer. This warning should be followed at the earliest opportunity by the formal offer of counsel, preferably by a lawyer, but if that is not feasible, by a judge or magistrate. The offer should be made in words easily understood, and it should be stated expressly that one who is unable to pay for adequate representation is entitled to have it provided without cost to him. At the earliest opportunity a person in custody should be effectively placed in communication with a lawyer. For this purpose he should be provided access to a telephone, the telephone number of the defender or person responsible for assigning counsel, and any other means necessary to place him in communication with a lawyer.

COMMENT

As stated in the Comment to Standard 1.2, practice in Wilmington is in accord with the Standard, but practice in the justice of the peace courts often is not.

STANDARD

7.2 Waiver.

The accused's failure to request counsel or his announced intention to plead guilty should not of itself be construed to constitute a waiver. An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough

inquiry into the accused's comprehension of that offer and his capacity to make the choice intelligently and understandingly has been made. No waiver should be found to have been made where it appears that the accused is unable to make an intelligent and understanding choice because of his mental condition, age, education, experience, the nature or complexity of the case, or other factors.

COMMENT

Delaware practice is in accord with the Standard. The public defender has treated the question of waiver consistent with the decision in Johnson v. Zerbst 304 U.S. 458 (1938). Consequently, neither the public defender nor the court will permit waiver where the individual is otherwise qualified for public defender assistance. There is practically no case in which a person went to trial without counsel, having totally waived the public defender.

STANDARD

7.3 Acceptance of waiver.

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

COMMENT

Because of the superior court's readiness to appoint public defenders in either indigent or non-indigent cases when the individual appears without counsel, present Delaware practice goes beyond the Standard in that there are virtually no instances of a defendant's being unrepresented.

PART II – THE CRIMINAL TRIAL

CHAPTER 5
SPEEDY TRIAL

PART I. THE TRIAL CALENDAR

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 should be given preference over civil cases; and

(b) the trial of defendants in custody and defendants whose pre-trial liberty is reasonably believed to present unusual risks should be given preference over other criminal cases.

DELAWARE LAW

Superior Court Criminal Rule 50(a) provides that "Preference shall be given to criminal proceedings as far as practicable." There is no rule requiring preferential treatment for a defendant who is incarcerated while awaiting trial, but in practice regular reports are made to the superior court and other judiciary officials on the status of persons who are in jail awaiting trial and special preference is given to the trial of such persons.

COMMENT

Delaware law is in accord with the Standard as it relates to calendar preference for criminal over civil cases. As stated in connection with Standard 2.2, consideration should be given to the establishment by rule of time limits within which trial must commence. The Committee does not recommend special time limits for the trial of incarcerated persons.

STANDARD

1.2 Court control; prosecutor's duty to report.

Control over the trial calendar should be vested in the court. The prosecuting attorney should be required to file as a public record periodic reports with the court setting forth the reasons for delay as to each case for which he has not requested trial within a prescribed time following charging. The prosecuting attorney should also advise the court of facts relevant in determining the order of cases on the calendar.

DELAWARE LAW

Superior Court Criminal Rule 50(a) permits the court to place

criminal proceedings on appropriate calendars. There is no requirement of a periodic report by the Attorney General concerning cases in which trial has not been requested. Under the former practice, the Attorney General provided the court with a list of cases to be tried. Control of the calendar as it relates to cases which the Attorney General schedules for trial was vested in the Criminal Office Judge of the Superior Court, a rotating assignment amoung the judges. The Criminal Office Judge would entertain motions from defense counsel seeking trial of cases which have not been listed for trial by the Attorney General. Recently, the superior court has assumed control of its calendar. See the Comparative Study on The Function of the Trial Judge.

COMMENT

Delaware practice is in accord with the Standard. The required report by the prosecuting attorney on cases in which trial has not been requested appears to be a desirable innovation, and a rule should be adopted requiring such a report.

STANDARD

1.3 Continuances.

The court should grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecution or defense, but also the public interest in prompt disposition of the case.

DELAWARE LAW

While there is no rule embodying the Standard, current practice is in substantial accord with the Standard with respect to the granting of continuances.

COMMENT

No change in present law or rules is considered necessary.

PART II. DETERMINING WHAT IS A SPEEDY TRIAL

2.1 Speedy trial time limits.

A defendant's right to speedy trial should be expressed by rule or statute in terms of days or months running from a specified event. Certain periods of necessary delay should be excluded in computing the time for trial, and these should be specifically identified by rule or statute insofar as is practicable.

DELAWARE LAW

Delaware law is contrary to the Standard, in that there is no statute or rule which places a time limit on the commencement of trial following arrest or indictment (The Standard does not, of course, relate to statutes placing limits on the commencement of proceedings, a matter governed by 11 Del. C. §205). However, on May 21, 1973, the late Chief Justice Wolcott issued a directive for administrative purposes in which the courts of common Pleas and the municipal court were directed to process criminal cases so that they would be disposed of, from information through sentencing, within three months and the superior court was directed to process criminal cases, from indictment or information through sentencing, within six months. A system of quarterly reports was established with respect to the status of pending cases. Chief Justice Herrmann on January 4, 1974 announced a goal of reducing the six month trial limitation to four months and the three month limitation to one month. The Chief Justice also established a Speedy Trial Committee, consisting of judges appointed from each court, including the family court.

In practice, the Delaware courts do accord a fairly speedy trial of criminal cases. As of April 30, 1972, the following percentage of cases within the trial jurisdiction of the following courts had been pending less than four months:

Superior Court, New Castle County	62.8%
Court of Common Pleas	75.0%
Municipal Court	92.0%

However, as clearly revealed by the 1972 Annual Report of the Administrative Office of the Courts, the total case load of all of these courts has been increasing. For example, there were 4,011 cases filed in the superior court during the year 1972, compared with 2,489 cases during 1971 and 1,885 during 1968. The number of cases pending at the end of each year has risen from 835 in 1968 to 967 in 1971 and 1,075 in 1972. These statistics suggest that, if all other factors stay constant, the gradually increasing work load may result in longer trial delays.

COMMENT

In view of the Standard, and the increasing case load of the courts, it is recommended that a rule be adopted requiring the trial of all criminal cases within specific time limits. Such limits should be consistent with present practice, and the rule should allow for periods of necessary delay. No recommendation is made as to the length of the time limits, although if tolling provisions similar to those set forth in Standard 2.3 were adopted, the Committee would have no difficulty in recommending the current "goal" of four months for superior court cases and one month for lower court cases. Establishing such time limits appears to be desirable irrespective of the remedy which is available in the event that trial is not commenced within such limits. In State v. Fischer, Del. Supr., 285 A.2d 417(1971), the Supreme Court of Delaware, citing, inter alia, Standard 2.1, affirmed the dismissal of indictments where 2-½ months lapsed in the preliminary step of choosing a forum to try the misdemeanor charges in question.

STANDARD

2.2 When time commences to run.

The time for trial should commence running, without demand by the defendant, as follows:

(a) from the date the charge is filed, except that if the defendant has been continuously held in custody or on bail or recognizance untill that date to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, then the time for trial should commence running from the date he was held to answer;

(b) if the charge was dismissed upon motion of the defendant and thereafter the defendant was held to answer or charged with an offense, from the date the defendant was so held to answer or charged, as above; or

(c) if the defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, from the date of the mistrial, ordered granting a new trial, or remand.

DELAWARE LAW

Since Delaware law imposes no time limitations for the commencement of trial, there is no equivalent to the Standard in Delaware law.

COMMENT

If the suggestion in the Comment to Standard 2.1 is adopted, it will also be necessary to adopt the rules similar to Standard 2.2. The

Standard expressly rejects the "demand doctrine" in force in many jurisdictions which requires an express demand by the defendant in order to start the time for trial running. The Standard appears to embody a more desirable rule in light of the fact that the State has the sole power to bring the charge to trial.

Section 2.2(b) is in need of clarification. The ABA Commentary indicates that it is intended to apply to the situation in which the defendant is later charged with an offense arising out of the same conduct or criminal episode as a previously dismissed charge. This should be made clear in any rule which is adopted embodying the Standard.

STANDARD

2.3 Excluded periods.

The following periods should 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 competency and the period during which he is incompetent to stand trial, hearings on pretrial motions, interlocutory appeals, and trial of other charges.

(b) The period of delay resulting from congestion of the trial docket when the congestion is attributable to exceptional circumstances.

(c) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel. A defendant without counsel should not be deemed to have consented to a continuance unless he has been advised by the court of his right to a speedy trial and the effect of his consent.

(d) Ther period of delay resulting from a continuance granted at the 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 the later date; or

(ii) the continuance is granted to allow the prosecuting attorney additional time to prepare the state's case and additional time is justified because of the exceptional circumstances of the case.

(e) The period of delay resulting from the absence or unavailability of the defendant. A defendant should 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 should 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.

CONTINUED

1 OF 4

(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 required to be joined with that offense, 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 should 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.

DELAWARE LAW

Since Delaware law imposes no time limitations for the commencement of trial, there is no equivalent to the Standard in Delaware law. Such principles are, of course, relevant in determining whether there has been compliance with the Chief Justice's directive, previously cited.

PART III. SPECIAL PROCEDURES: PERSON SERVING TERM OF IMPRISONMENT

3.1 Prosecutor's obligations; notice to and availability to prisoner.

To protect the right to speedy trial of a person serving a term of imprisonment either within or without the jurisdiction, it should be provided by rule or statute and, where necessary, interstate compact, that:

(a) If the prosecuting attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a penal institution of that or another jurisdiction, he must promptly:

(i) undertake to obtain the presence of the prisoner for trial; or

(ii) cause a detainer to be filed with the official having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(b) If an official having custody of such a prisoner receives a detainer, he must promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs such official that he does demand trial, the official shall cause a certificate to that effect to be sent promptly to the prosecuting attorney who caused the detainer to be filed.

(c) Upon receipt of such certificate, the prosecuting attorney must promptly seek to obtain the presence of the prisoner for trial.

(d) When the official having custody of the prisoner receives from the

prosecuting attorney a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that prosecuting attorney (subject, in cases of interjurisdictional transfer, to the traditional right of the executive to refuse transfer and the right of the prisoner to contest the legality of his delivery).

DELAWARE LAW

Incarcerated persons have a right to speedy trial on other offenses with which they may be charged during their term of imprisonment. Dickey v. Florida, 398 U.S. 30 (1970). Delaware is a party to the Uniform Agreement on Detainers, 11 Del. C. §§2540-50. This provides a procedure by which an incarcerated defendant may obtain a trial on any matter as to which a detainer has been lodged against him. Under the Dickey case, a prosecutor has an affirmative duty to secure the presence for trial of an incarcerated person who has demanded trial.

COMMENT

Delaware law is partially in accord with the Standard by virtue of the Uniform Agreement on Detainers. However, a rule or statute should be adopted to impose the duties expressed in Section 3.1(a), since no such duties are imposed by the Agreement. The new rule or statute should require trial of a person incarcerated in Delaware on the same basis as trial of a non-incarcerated person. Given the compactness of the State, there is no reason for delaying trial of such persons until their existing term of imprisonment has ended.

STANDARD

3.2 Computation of time.

The time for trial of a prisoner whose presence for trial has been obtained while he is serving a term of imprisonment should commence running from the time his presence for trial has been obtained, subject to all the excluded periods listed in section 2.3. If the prosecuting attorney has unreasonably delayed (i) causing a detainer to be filed with the custodial official, or (ii) seeking to obtain the prisoner's presence for trial in lieu of filing a detainer or upon receipt of a certificate of demand, such periods of unreasonable delay should also be counted in ascertaining whether the time for trial has run.

DELAWARE LAW

Delaware is a party to the Uniform Agreement on Detainers.

11 Del. C. §2542(a) provides that trial of an incarcerated person must commence within 180 days after he delivers a request for final disposition of the matter to the responsible prosecuting attorney. 11 Del. C. §2543(c) requires that any trial made possible by the Uniform Agreement be commenced with 120 days after the arrival of the prisoner from his place of incarceration.

COMMENT

The Uniform Agreement provisions substantially comply with the first sentence of the Standard, but do not contain the recommended provision relating to excluded periods. It is recommended that trial of incarcerated persons be regulated on the same basis as trial of all other persons once their presence in the jurisdiction is obtained. Adoption of a rule or statute embodying the second sentence of the Standard is recommended.

PART IV. CONSEQUENCES OF DENIAL OF SPEEDY TRIAL

4.1 Absolute discharge.

If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, the consequence should be absolute discharge. Such discharge should forever bar prosecution for the offense charged and for any other offense required to be joined with that offense. Failure of the defendant or his counsel to move for discharge prior to trial or entry of a plea of guilty should constitute waiver of the right to speedy trial.

DELAWARE LAW

There is no equivalent provision of Delaware law, nor is adoption of the Standard mandated by any constitutional provisions or court decisions. In practice, the superior court has granted motions to dismiss cases where there has been an unreasonably and unjustifiably long delay in placing the defendant on trial.

COMMENT

The Committee recommends adoption of the Standard by court rule. It is recognized that dismissal of a case for lack of a speedy trial is an extreme remedy and that certain defendants may thereby receive a dismissal which is unjustified on the merits of the case. On the other hand, when consideration is given to the factors listed in Standard 2.3 which would toll the running of the limitation period, it seems clear

that no case in which delay is even remotely justifiable would be subject to dismissal under Standard 4.1.

STANDARD

4.2 Release on recognizance.

If a shorter time limitation is applicable to defendants held in custody, the running of this time should only require release of such a defendant on his own recognizance.

DELAWARE LAW

There is no equivalent provision in existing Delaware law. Superior Court Criminal Rule 7 provides that an incarcerated defendant may demand prosecution by information instead of waiting for indictment and may apply for release on bail if he is not tried within two months of the filing of the information or indictment. The superior court in practice has also granted release on an incarcerated defendant's own recognizance where trial delay has been unreasonable and unjustifiable.

COMMENT

The Committee favors retention of the present two-month rule stated in Rule 7, but would favor revision of that Rule to permit release on the incarcerated defendant's own recognizance in appropriate cases.

CHAPTER 6

PLEAS OF GUILTY

PART I. RECEIVING AND ACTING UPON THE PLEA

1.1 Pleading by defendant; alternatives.

(a) A defendant may plead not guilty, guilty, or (when allowed under the law of the jurisdiction) nolo contendere. A plea of guilty or nolo contendere should 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. Such a plea should be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

DELAWARE LAW

Pursuant to Superior Court Criminal Rule 11, "A defendant may plead not guilty, guilty or, with the consent of the Court, nolo contendere. The Court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the Court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the Court shall enter a plea of not guilty. The Court shall not enter a judgment upon a plea unless it is satisfied that there is a factual basis for the plea." Under present Delaware practice, the defendant's attorney may enter a plea of nolo contendere for him, with the court's approval.

COMMENT

Delaware law is in accord with the Standard. However, no standards exist to assist the court in determining whether the plea of nolo contendere should be accepted. The Committee believes that standards governing its acceptance should be adopted by revisions of Rule 11.

STANDARD

1.2 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's counsel may request permission for the defendant to enter a plea of guilty or nolo contendere as to other crimes he has committed which are within the jurisdiction of coordinate courts of that state. Upon written approval of the prosecuting attorney of the governmental unit in which these crimes are charged or could be charged, the de-

fendant should be allowed to enter the plea (subject to the court's discretion to refuse a nolo contendere plea). Entry of such a plea constitutes a waiver of the following: (i) venue, as to crimes committed in other governmental units of the state; and (ii) formal charge, as to offenses not yet charged.

COMMENT

There is no present Delaware rule on this point. The Committee favors adoption of the Standard, in view of the safeguard inherent in the requirement of written approval by the prosecuting attorney.

STANDARD

1.3 Aid of counsel; time for deliberation.

(a) A defendant should 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 serious offense until a reasonable time, set by rule or statute, following the date he was held to answer. When a defendant without counsel tenders a plea of guilty or nolo contendere to a serious offense, the court should not accept the plea unless it is reaffirmed by the defendant after a reasonable time for deliberation, set by rule or statute, following the date the defendant received the advice from the court required in section 1.4.

DELAWARE LAW

Superior Court Criminal Rule 10 requires that arraignments be conducted in open court and consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He is given a copy of the indictment or information before he is called upon to plead.

A guilty plea to a felony charge entered without counsel and without a waiver of counsel in invalid. Brady v. United States, 397 U.S. 742, 749 n. 6 (1970); Moore v. Michigan, 355 U.S. 155, 159 (1957). Presuming a waiver of counsel from a silent record is impermissible; the record must show or there must be an allegation and evidence to show that the accused was offered counsel, but intelligently and understandingly rejected the offer. Boykin v. Alabama, 395 U.S. 238 (1969).

COMMENT

Delaware law is generally in accord with the Standard. Counsel is appointed before arraignment in both misdemeanors and felonies. While

additional time for preparation is possible, pleas of not guilty are generally made at this stage. Subsequently, after counsel becomes more familiar with the case, the plea may be changed. As discussed in the Comparative Study on Providing Defense Services, the practice in some lower courts is defective in failing to apprise an indigent defendant of his right to counsel at the arraignment stage.

Currently, no special rules exist regarding the acceptance of pleas from uncounselled defendants. The Committee believes that the procedure recommended by the A.B.A. Advisory Committee appears adequate to insure that the plea is entered intelligently.

STANDARD

1.4 Defendant to be advised by court.

The court should not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally and

(a) determining that he understands the nature of the charge;

(b) informing him that by his plea of guilty or nolo contendere he waives his right to trial by jury; and

(c) informing him:

(i) of the maximum possible sentence on the charge, including that possible from consecutive sentences;

(ii) of the mandatory minimum sentence, if any, on the charge; and

(iii) when the offense charged is one for which a different or additional punishment is authorized by reason of the fact that the defendant has previously been convicted of an offense, that this fact may be established after his plea in the present action if he has been previously convicted, thereby subjecting him to such different or additional punishment.

DELAWARE

Superior Court Criminal Rule 11 as well as Machibroda v. United States, 368 U.S. 487 (1962), provide that the court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere, without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.

A silent record is not permissible; defendant must have personally answered. Brady v. United States, 397 U.S. 742 (1970); McCarthy v. United States, 394 U.S. 459 (1969); Boykin v. Alabama, 395 U.S. 238 (1969); Brown v. State, Del. Supr., 250 A. 2d 503 (1969).

COMMENT

Delaware practice is generally in accord with the Standard, but the Committee recommends the adoption of a rule which would establish formal procedures for complying with the Standard. The Brown case does not focus on the duty of the trial judge to advise the defendant of the possible sentences which he is facing and those courts which use an instruction which is strictly based on Brown may not, in fact, advise the defendant on this matter. Such information would have to be given in order to comply with the Standard.

STANDARD

1.5 Determining voluntariness of plea.

The court should not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary. By inquiry of the prosecuting attorney and defense counsel, the court should determine whether the tendered plea is the result of prior plea discussions and a plea agreement, and, if it is, what agreement has been reached. If the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court. The court should then address the defendant personally and determine whether any other promises or any force or threats were used to obtain the plea.

DELAWARE LAW

As required by Brown v. State, Del. Supr., 250 A. 2d 503 (1969), Delaware courts make a determination of the voluntariness of a guilty plea prior to accepting it. The defendant is specifically advised that the court is not bound by any recommendation by the State as to the sentence.

A guilty plea, if induced by promises or threats which deprive it of the character or a voluntary act, is void and open to collateral attack. Machibroda v. United States, 368 U.S. 487 (1962); Kercheval v. United States, 274 U.S. 220 (1927); Santobello v. New York, 404 U.S. 257 (1971). A plea of guilty must stand when entered by one fully aware of its direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel; unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or improper promises (made by bribe). Brady v. United States, 397 U.S. 742 (1970); Santobello, supra. A plea of guilty is not invalid because induced by desire for lesser penalty. Parker v. North Carolina, 397 U.S. 790 (1970); Brady, supra.

In cases in which there is a possibility of death penalty after conviction by jury, the court must look to the circumstances to determine whether the fear of death coerced the defendant to plead guilty so as to result in a "chilling effect" on his right not to plead guilty; however, the plea will be held valid where, although fear of death was a factor, there were other independent reasons for the decision to plead guilty. United States v. Jackson, 390 U.S. 570 (1968); Brady, supra.

COMMENT

Delaware law is in accord with the Standard, but the Committee recommends the adoption of a rule which would formalize the procedures now in use in accordance with the Standard.

STANDARD

1.6 Determining accuracy of plea.

Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as may satisfy it that there is a factual basis for the plea.

DELAWARE LAW

Superior Court Criminal Rule 11 requires a factual basis for the plea of guilty. There is no constitutional error in accepting a guilty plea which contained a protest of innocence when the defendant intelligently concluded that his interest required entry of a guilty plea and the record showed strong evidence of guilt.

The court may properly accept a plea of guilty only when satisfied that there is significant evidence that defendant was involved or implicated in the offense, but it is not required to obtain from the accused an unequivocal confession of guilt. North Carolina v. Alford, 400 U.S. 25 (1970). In Robinson v. State, Del. Supr., 291 A. 2d 279 (1972), the Delaware Supreme Court, citing Alford, eliminated "the requirement that a defendant must admit his actual commission of the offense charged in order for the trial judge to accept his plea . . . ."

COMMENT

Delaware law is in accord with the Standard.

STANDARD

1.7 Record of proceedings.

A verbatim record of the proceedings of which the defendant enters a plea of guilty or nolo contendere should be made and preserved. The record should include (i) the court's advice to the defendant (as required in section

1.4), (ii) the inquiry into the voluntariness of the plea (as required in section 1.5), and (iii) the inquiry into the accuracy of the plea (as required in section 1.6).

COMMENT

Delaware practice is in accord with the Standard. All guilty plea proceedings in superior court are recorded by a court reporter.

STANDARD

1.8 Consideration of plea in final disposition.

(a) It is proper for the court to grant charge and sentence concessions to defendants who enter a plea of guilty or nolo contendere when the interest of the public in the effective administration of criminal justice would thereby be served. Among the considerations which are appropriate in determining this question are:

(i) that the defendant by his plea has aided in ensuring the prompt and certain application of correctional measures to him;

(ii) that the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct;

(iii) that the concessions will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;

(iv) that the defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial;

(v) 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 serious criminal conduct;

(vi) that the defendant by his plea has aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders.

(b) The court should 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.

COMMENT

The Committee recommends adoption of the Standard as regards sentencing by appropriate rule of court, but it does not disapprove the current practice under which the court reserves its decision on sentencing

until the actual sentencing proceeding. There is now no written requirement that trial judges act in accordance with the Standard, and the Committee believes that present Delaware practice is not in accord with the Standard. The Committee favors continuance of the present practice under which charge concessions are solely the responsibility of the Attorney General's office.

PART II. WITHDRAWAL OF THE PLEA

2.1 Plea withdrawal.

(a) The court should allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.

(i) A motion for withdrawal is timely if made with due diligence, considering the nature of the allegations therein, and is not necessarily barred because made subsequent to judgment or sentence.

(ii) Withdrawal is necessary to correct a manifest injustice whenever the defendant proves that:

(1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule;

(2) the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf;

(3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed;

(4) he did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement; or

(5) he did not receive the charge or sentence concessions contemplated by the plea agreement concurred in by the court, and he did not affirm his plea after being advised that the court no longer concurred and being called upon to either affirm or withdraw his plea.

(iii) The defendant may move for withdrawal of his plea without alleging that he is innocent of the charge to which the plea has been entered.

(b) In the absence of a showing 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 once the plea has been accepted by the court. Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.

DELAWARE LAW

Pursuant to Superior Court Criminal Rule 32(d) a motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended. However, to correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea. The defendant does not have an absolute right to withdraw a guilty plea once it is made, but the motion is addressed to the sound discretion of the court. See State v. Adair, Del. Ct. Gen. Sess., 117 A. 20 (1922).

COMMENT

Delaware law is in accord with the Standard.

STANDARD

2.2 Withdrawn plea not admissible.

A plea of guilty or nolo contendere which is not accepted or has been withdrawn should not be received against the defendant in any criminal proceedings.

DELAWARE LAW

A plea of guilty withdrawn by leave of the court is not admissible at the trial on the substituted plea of not guilty. Kercheval v. United States, 274 U.S. 220 (1927).

COMMENT

Delaware law is in accord with the Standard.

PART III. PLEA DISCUSSIONS AND PLEA AGREEMENTS

3.1 Propriety of plea discussions and plea agreements.

(a) In cases in which it appears that the interest of the public in the effective administration of criminal justice (as stated in section 1.8) would thereby be served, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He should engage in plea discussions or reach a plea agreement with the defendant only through defense counsel, except when the defendant is not eligible for or does not desire appointment of counsel and has not retained counsel.

(b) The prosecuting attorney, in reaching a plea agreement, may

agree to one or more of the following, as dictated by the circumstances of the individual case:

(i) 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 contenere;

(ii) to seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or nolo contendere to another offense reasonably related to defendant's conduct; or

(iii) to seek or not to oppose dismissal of other charges or potential charges against the defendant if the defendant enters a plea of guilty or nolo contendere.

(c) Similarly situated defendants should be afforded equal plea agreement opportunities.

COMMENT

The Committee considers plea bargaining appropriate as practiced in Delaware. Delaware practice is in accord with the Standard. Plea negotiations between the Attorney General's office and defense counsel are frequent. Such negotiations include reduction of the offense charged to a lesser included offense and agreements to recommend or not to oppose favorable recommendations as to sentence. Code of Professional Responsibility DR 7-104 prohibits an attorney to communicate or cause another to communicate on a subject with a party he knows is to be represented by a lawyer unless he has the prior consent of the lawyer representing the party. The subject matter of Standard 3.1 does not seem appropriate for embodiment in a rule of court, but trial judges should be sensitive to their responsibility to preserve the fairness of the bargaining process. For further comment see the Comparative Study on the Function of the Trial Judge.

STANDARD

3.2 Relationship between defense counsel and client.

(a) Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant.

(b) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and of considerations deemed important by him or the defendant in reaching a decision.

DELAWARE LAW

Code of Professional Responsibility EC 7-8 requires an attorney to

"exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."

COMMENT

Delaware practice is in accord with the Standard.

STANDARD

3.3 Responsibilities of the trial judge.

(a) The trial judge should not participate in plea discussions.

(b) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that other charges before that court will be dismissed or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate to the prosecuting attorney and defense counsel whether he will concur in the proposed disposition if the information in the presentence report is consistent with the representations made to him. If the trial judge concurs, but later decides that the final disposition should not include the charge or sentence concessions contemplated by the plea agreement, he shall so advise the defendant and then call upon the defendant to either affirm or withdraw his plea of guilty or nolo contendere.

(c) When a plea of guilty or nolo contendere is tendered or received as a result of a prior plea agreement, the trial judge should give the agreement due consideration, but notwithstanding its existence he should reach an independent decision on whether to grant charge or sentence concessions under the principles set forth in section 1.8.

COMMENT

In Delaware, sentencing is a totally different proceeding from that in

which the plea of guilty is received, and it is almost always the case that the court will refuse to make a commitment on sentencing at the pleading stage. Thus, while Delaware practice is in accord with subsections (a) and (c) of the Standard, it does not follow subsection (b).

STANDARD

3.4 Discussion and agreement not admissible.

Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

COMMENT

A plea of guilty withdrawn by leave of the court is not admissible at the trial on the substituted plea of not guilty. Kercheval v. United States, 274 U.S. 220 (1927). Delaware practice is in accord with the Standard.

CHAPTER 7

JOINDER AND SEVERANCE

PART I. JOINDER OF OFFENSES AND DEFENDANTS

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.

DELAWARE LAW

Superior Court Criminal Rule 8(a) provides: "Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan." Similar offenses may be joined in the same indictment or information even though they do not constitute part of a single scheme or plan. See Draper v. State, Del. Supr., 146 A. 2d 796 (1958), a case involving separate indictments relating to four different burglaries which were not part of the same scheme or plan. The court implies that, despite the fact that the burglaries were unrelated, it would have been permissible to join them in the same indictment. Such joinder would have been on the ground that the offenses were of the same or similar character.

COMMENT

Delaware law is in accord with the Standard.

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 included;

(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 charged from proof of the others.

DELAWARE LAW

Superior Court Criminal Rule 8(b) provides: "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count." In State v. Winsett, Del. Super., 205 A. 2d 510 (1964), the court held that a defendant charged with murder was properly joined for trial with two codefendants charged as accessories to the crime of murder.

Joinder of defendants is more liberally permitted by 11 Del. C. §522 which states that, subject to certain procedural safeguards, "2 or more persons charged with conspiracy to commit a crime may be prosecuted jointly if:

(1) They are charged with conspiring with one another; or

(2) The conspiracies alleged, whether they have the same or different parties, are so related that they constitute different aspects of a scheme of organized criminal conduct."

COMMENT

In general, Superior Court Criminal Rule 8(b) is in accord with the Standard. 11 Del. C. §522 goes beyond the Standard's recommended joinder in conspiracy cases. The ABA Advisory Committee responsible for the Standard expressly recommends against adoption of a provision similar to §522. It appears that the specific language of the Standard is preferable to the language of Rule 8(b). Therefore, the Committee recommends repeal of §522 and revision of Rule 8(b) to conform to the language to the Standard.

STANDARD

1.3 Failure to join related offenses.

(a) Two or more offenses are related offenses, for purposes of this standard, if they are within the jurisdiction 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 the time, or for some other reason, the ends of justice would be defeated if the motion were 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 section (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 of nolo contendere on the basis of a plea agreement in which the prosecuting attorney agreed to seek or not to oppose dismissal of other related charges or not to prosecute other potential related charges.

DELAWARE LAW

Delaware law does not grant to criminal defendants the right to have related offenses joined in the same trial. 11 Del. C. § 207 bars a new prosecution for a violation of the same statutory provision based upon the same facts as a former prosecution (a) when there is an acquital, (b) when there is an unreversed conviciton, (c) when there is a termination by final order or judgment for the defendant which is necessarily conclusive of a fact which must be established for conviction and (d) when there is an improper termination during trial. 11 Del. C. § 208 bars a subsequent prosecution for violation of a different statutory provision or for a violation of the same statutory provision based on different facts (a) where the former prosecution resulted in an acquittal or a conviction and the subsequent prosecution is (i) for any offense of which the defendant could have been convicted on the first prosecution or (ii) for the same conduct unless the offense for which the defendant is subsequently prosecuted requires proof of a fact not required by the former offense and the law defining each of the offenses is intended to prevent a substantially different harm or evil, (b) where the second offense was not consummated when the former trial began, (c) where the former prosecution was terminated by an acquittal, final order or judgment for the defendant which necessarily required a determination inconsistant with a fact which must be established for conviction of the second offense or (d) where the former prosecution was improperly terminated during trial and the subsequent prosecution is

for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated.

COMMENT

Present Delaware law does not conform with the Standard in that it does not permit the defendant to require joinder of related offenses and to avoid further prosecution for a related offense in the event that a motion for joinder has been made in a timely manner. The purpose of the Standard is "to protect defendants from 'successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a "hold" upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials.'" However, the Committee does not recommend the adoption of the Standard, believing that criminal trials would be unnecessarily complicated and the required number of witnesses unnecessarily increased if the defendant could compel the joinder of multiple related offenses. In addition, the Committee believes that the Standard would place the State at a disadvantage in plea bargaining. The Committee believes that 11 Del. C. §§207-08 provide sufficient safeguards against burdensome multiple trials.

PART II. SEVERANCE OF OFFENSES AND DEFENDANTS

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.

DELAWARE LAW

Under Superior Court Criminal Rule 12(b), a motion for severance must be made prior to trial. Failure to move for severance in accordance with the Rule constitutes a waiver unless the court grants relief from the waiver "for cause shown." Under 11 Del. C. §207, termination of the trial of an offense as the result of the granting of a motion for severance during the trial would not bar a further prosecution for such offense.

COMMENT

The Standard seems preferable to the current Delaware law in that it provides explicitly for a motion for severance during trial based upon discovery of facts not previously known. There also appears to be merit in the Standard's position that a pre-trial motion for severance which was overruled must be renewed at trial before or at the close of all the evidence, or severance is waived. This procedure would give the court which has heard the evidence an opportunity to judge whether the previous failure to grant the motion for severance has had a prejudicial effect on the trial of the case. On the other hand, the present Delaware Rule which permits the court, for cause shown, to grant relief from the implied waiver of severance arising out of failure to move therefor prior to trial seems preferable to the Standard which has no equivalent provision.

STANDARD

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 the offenses.

(b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), should grant a severance of offenses 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. The court should consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

DELAWARE LAW

Superior Court Criminal Rule 14 provides for relief from prejudicial joinder of offenses. "If it appears that a defendant or the State is prejudiced by a joinder of offenses . . . in an indictment or information or by such joinder for trial together, the Court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

COMMENT

Delaware law does not comply with the Standard which grants in subparagraph (a) an absolute right to severance of two or more offenses which have been joined for trial solely on the ground that they are of the same or similar character. Subparagraph (b) appears to be a more elaborate statement of the general principle embodied in Rule 14. As to subparagraph (a), the ABA concludes that a right to severance of similar offenses without any specific showing of prejudice is required to prevent undue limitations on the defendant's right to testify in his own behalf and because of the likelihood that a jury may be more ready to find guilt where the defendant is charged with multiple offenses.

The Committee recommends that no change be made in the current Delaware severance practice, believing that an absolute right to severance, without any showing of probable prejudice, would unduly delay the administration of criminal justice.

STANDARD

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 should determine whether the prosecution intends to offer the statement in evidence at the trial. If so, the court should 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), should 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.

DELAWARE LAW

Superior Court Criminal Rule 14 allows for relief from prejudicial joinder of defendants. "If it appears that a defendant or the State is prejudiced by a joinder of . . . defendants in an indictment or information or by such joinder for trial together, the Court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the Court may order the attorney for the State to deliver to the Court for inspection in camera any statements or confessions made by the defendants which the State intends to introduce in evidence at the trial."

COMMENT

The Standard, in outlining the various alternatives open to the court, both in cases where there is an out-of-court statement by a codefendant and in cases of other types of prejudice, seems preferable to the present Delaware Rule. Further, Delaware is not in compliance with the Standard in providing for "in camera" inspection of statements by a codefendant. The Standard would require that any such statements which the prosecution intends to use be made available to all defendants and to the court. The Committee recommends adoption of the Standard through a revision of Rule 14.

STANDARD

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 should 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.

DELAWARE LAW

A motion for severance at the conclusion of the prosecution's case on the ground that there is not sufficient evidence to support the joinder of defendants is not specifically contemplated by the present Delaware Rules. If there is prejudice resulting from such joinder, Superior Court Criminal Rule 14 would apparently contemplate granting of a motion for severance at this stage of the proceedings.

COMMENT

The Standard appears to strike a proper balance between a technical ground for severance and the necessity for protecting a defendant's rights. Granting of the renewed motion for severance is not a matter of right under the Standard once it is established that all allegations needed for joinder are not supported by the evidence. The Standard does permit severance when it is deemed necessary to achieve a fair determination of a defendant's guilt or innocence. The Committee recommends adoption of the Standard.

PART III. CONSOLIDATION OR SEVERANCE ON MOTION OF COURT

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.

DELAWARE LAW

Superior Court Criminal Rule 13 permits the court to order two or more indictments or informations to be tried together if the offenses and/or the defendants could have been joined in a single indictment or information. Superior Court Criminal Rule 14 apparently contemplates the possibility that the court may act on its own motion to order severance of offenses or defendants before trial.

COMMENT

Delaware law is in accord with the Standard.

CHAPTER 8

TRIAL BY JURY

PART I. WHEN TRIAL BY JURY: WAIVER

1.1 Right to jury trial.

Defendants in all criminal cases should have the right to be tried by a jury of twelve whose verdict must be unanimous, except that where not barred by applicable constitutional provisions, the right to jury trial may be limited 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.

DELAWARE LAW

The Delaware Constitution, Article I, Section 7, guarantees a "speedy and public trial by an impartial jury," in all criminal prosecutions. However, under Article XV, Section 7, certain election offenses can be tried as misdemeanors without a jury in the superior court. This is the only instance in which the superior court has exclusive original jurisdiction over misdemeanors in which the defendant is not entitled to trial by jury. The election offenses subject to trial in the superior court without jury are found in Article V, Section 7, with the procedure prescribed in Article V, Section 8. Article V, Section 7, limits the possible penalty to a fine of not less than $100 nor more than $5,000 or a term of imprisonment of one month to three years, or both, at the discretion of the court. That Section further provides that if the defendant is a male, he shall lose the right to vote for ten years following his sentence. However, in State v. Hollinger, Del. Super., 337 A. 2d 326 (1975), the superior court held, that despite Article V, Section 8, of the Delaware constitution, the defendants were entitled to a jury trial since the maximum penalty was three years imprisonment.

A jury trial may or may not be available in a prosecution for a misdemeanor, depending upon the court in which the offense is charged. A person charged with a misdemeanor in the Municipal Court for the City of Wilmington, where proceedings are had without trial by jury and which has original jurisdiction for misdeameanors committed within the City of Wilmington, becomes entitled to a jury trial only if he is entitled to an appeal to the superior court. He is entitled to such an appeal only if his sentence exceeds one month imprisonment or a fine of $100.00. Delaware Constitu-

tion, Article IV, Section 29. Motor vehicle violations are an exception to this rule, and the defendant is entitled to an appeal, and therefore, trial by jury in any case in which hs is charged with a violation of the Motor Vehicle Code. 21 Del. C. §708. Trial in justice of the peace courts is by a judge alone without a jury. Justice of the peace courts have concurrent jurisdiction with the superior court with respect to designated misdeameanors and violations alleged to have occurred in New Castle County, outside the City of Wilmington. Anyone brought before a justice of the peace has a right to make an application to have his case heard there or in the court of common pleas. 11 Del. C. §5303. If a defendant brought into the magistrate court elects to have his case transferred to the Court of Common Pleas of the State of Delaware, New Castle County, then he must make a further election. If he elects to have his case heard in the court of common pleas, he is required to waive his right to trial by jury. If, on the other hand, he elects to have his case heard in the superior court, he is required to waive his right to trial in the court of common pleas. In this situation, he will be entitled to trial by jury in the superior court. 11 Del. C. §5301. In Kent and Sussex Counties, the courts of commom pleas conduct jury trials, and once having transferred from the justice of the peace court to the court of common pleas in Kent or Sussex Counties, the defendant has the right to elect to trial with or without a jury, without obtaining the prior consent of the State. In Thomas v. State, Del. Supr., 331 A.2d 147 (1975), the Delaware Supreme Court, in a criminal contempt proceeding, held that the "federal six-month rule" is the appropriate "dividing line between petty and serious crimes."

In any instance, except the election offenses mentioned above, in which an individual is indicted by the grand jury and charged with a misdemeanor, he is subject to trial by jury in the superior court. Trial by jury can only be waived if the defendant, the State and the court consent.

Family court hears certain offenses involving adults. In such cases the court sits without a jury. Appeals from the family court go to the superior court where the defendant may be tried by a jury. 10 Del. C. §960, seems to indicate that all decisions of the family court are appealable without regard to jurisdictional penalty.

Delaware maintains a system of alderman or mayor trial courts. A person convicted before an alderman or mayor may appeal such conviction without regard to what the penalty may be. 11 Del. C. §4503. Such an appeal would entitle the person convicted to a jury trial in the superior court.

The proposed Delaware constitution which has been defeated in the general assembly, provides that every person charged with a criminal offense shall have the right to trial by petit jury as heretofore mentioned, except as to such misdemeanors as the general assembly may specify by a 2/3 vote. It further provides that the number of jurors in all criminal cases shall be six,

except in capital cases, when the number shall be twelve. (Art. I, Section 103).

Article IV, Section 411, provides that the general assembly may regulate the jurisdiction of misdemeanors in the statutory courts provided, however, that a right of appeal to a constitutional court shall be provided in all cases, including misdemeanors. Article IV, Section 413, of the proposed constitution would require, however, that all appeals be on the record with no trials de novo.

It is anticipated that all persons coming into the court system will in the first instance be given a choice of trial in the courts normally hearing misdemeanors or the right to transfer to the superior court for jury trial. In the event that trial is had in the superior court, there would be no further right to jury trial. On the other hand, all others coming into the court system, with the exception of those excluded as petty offenses by 2/3 vote of the general assembly would have the right to jury trial.

COMMENT

Present Delaware law is not in accord with the Standard as expressed in subparagraphs (a), (c) and (d). The Committee notes, with respect to subparagraph (c), that the ABA Commission on Judicial Administration in §2.10 (a) of its tentative Standards on Trial Courts, would permit a jury of less than 12 only where the possible penalty is less than six months confinement.

STANDARD

1.2 Waiver of trial by jury.

(a) Cases required to be tried by jury should be so tried unless jury trial is waived.

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

(c) A defendant may not withdraw a voluntary and knowing waiver as a matter of right, but the court, in its discretion, may permit withdrawal prior to the commencement of the trial.

DELAWARE LAW

Superior Court Criminal Rule 23(a) requires a trial by jury of "Cases required to be tried by jury" in the absence of a written waiver of jury trial by the defendant with the approval of the court and the consent of the State. There is no right to a non-jury trial in the absence of agreement by

both counsel and the court. Longoria v. State, Del. Supr., 168 A. 2d 695 (1961). No case has been found relating to withdrawal of a waiver of jury trial.

COMMENT

The Standard differs from present Delaware law in that it does not expressly provide for consent by the court and the State in the case of a waiver of jury trial. The ABA Advisory Committee commentary indicates that the Committee took no position one way or the other on this matter. The Standard also differs from the present Delaware Rule in its express requirement that the court advise the defendant of his right to a trial by jury prior to the waiver and expressly provides for discretion in the court to permit the withdrawal of a waiver of jury trial.

STANDARD

1.3 Waiver of full jury.

(a) The defendant may elect trial by a number of jurors (fixed by constitution, statute, or rule or court) less than the number to which he is entitled.

(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 should not permit such an election or accept such a stipulation unless the defendant, after being advised by the court of his right to trial by a full jury, personally waives his right to trial by a full jury either in writing or in open court for the record.

DELAWARE LAW

Superior Court Criminal Rule 23(b) permits the parties to stipulate in writing, with the approval of the court, at any time before the verdict that the jury shall consist of any number less than 12.

COMMENT

Subparagraph (b) of the Standard is substantially identical with the present Delaware law. Subsection (a) expands upon the present law in that it contemplates that a jury of less than 12 may be established by statute or rule and that a defendant may elect a trial by such a jury, presumably without approval by either the court or the prosecutor. The present Delaware Rule does not fully comply with subparagraph (c) which contemplates that a

waiver of a full jury would be made in open court after the judge has personally advised the defendant of his rights.

PART II. SELECTION OF THE JURY

2.1 Selection of prospective jurors.

The selection of prospective jurors should be governed by the following general principles:

(a) The names of those persons who may be called for jury service should be selected at random from sources which will furnish a representative cross-section of the community.

(b) Jury officials should determine the qualifications of prospective jurors by questionnaire or interview, and disqualify those who fail to meet specified minimum requirements. The grounds for disqualification should be clearly stated objective criteria, such as:

(i) inability to read, write, speak, and understand the English language;

(ii) incapacity, by reason of mental or physical infirmity, to render efficient jury serve;

(iii) failure to meet reasonable requirements concerning citizanship, residence, or age; and

(iv) pending charge or 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, such as:

(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.

DELAWARE LAW

Under 10 Del. C. §4504(a), all persons qualified to vote at the general election are liable to serve as jurors. This section also lists a number of occupations which are exempt from jury duty. §4504(b) provides for the submission of a questionnaire, approved by the superior court, to prospective jurors in order to determine their qualifications for jury service. There is no specification, however, of what such qualifications may be. The only qualification listed in the statute is that jurors be "sober and judicious persons." 10 Del. C. §4505. Persons who have served as jurors during the immediately proceding term of the court are exempt from jury service, 10 Del. C. §§4506 and 4509. Persons who have any matter of fact at issue pending for trial

are likewise exempt. 10 Del. C. §4509. In a second trial of same matter, persons who sat as jurors in the first trial are disqualified, absent the consent of both parties. 10 Del. C. §4523.

COMMENT

Delaware law substantially complies with the Standard, except for its failure to specify the grounds for disqualification of a juror. The Committee favors adoption of a list of grounds for disqualification. The Committee also believes that great improvements should be made in the quality of Delaware jurors. Random selection from the population as a whole is strongly recommended.

STANDARD

2.2 List of prospective jurors.

Upon request the parties should be furnished with a list of prospective jurors with their addresses.

DELAWARE LAW

Superior Court Criminal Rule 24(e) requires the prothonotary to obtain information from each member of a panel of jurors with respect to his name, address, date of birth, occupation (if a housewife is called as a juror, her husband's occupation must be given), name of employer and length of residence in the county and in the state. The Rule further provides that the information so obtained must be kept by the prothonotary and made available to the Attorney General or to the defendant or to this attorney upon request.

COMMENT

The present Delaware Rule appears to make more information available to defense and prosecution that the Standard. The additional information provided by the Delaware Rule is designed to aid in the determination of the existence of a cause which would disqualify a potential juror.

STANDARD

2.3 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.

DELAWARE LAW

Superior Court Criminal Rule 24(d) permits a challenge to the array of jurors on the ground that the jurors where not selected or summoned according to law. No challenge to the array is permitted after the jury is sworn.

COMMENT

Delaware law is substantially in accord with the Standard.

STANDARD

2.4 Voir dire examination.

A voir dire examination should 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 should initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge should then put to the prospective jurors any questions which he thinks necessary, touching their qualifications to serve as jurors in the cause on trial. The judge should also permit such additional questions by the defendant or his attorney and the prosecuting attorney as he deems reasonable and proper.

DELAWARE LAW

Superior Court Criminal Rule 24(a) permits the court to conduct voir dire itself or to allow counsel to examine prospective jurors. However, in practice voir dire examinations are almost universally conducted by court, without opportunity for questioning by counsel. In Parson v. State, Del. Supr., 275 A.2d 777, 784 (1971), the supreme court specifically approved this practice in the following words: "We are of the opinion that as a general rule, in the exercise of the discretion vested in him by Rule 24(a), the trial judge should reserve to himself the function of interrogating prospective jurors upon *voir dire* examination as heretofore; provided, however, that reasonable opportunity be accorded to counsel to submit to the trial judge requested questions to be asked the prospective jurors, to be accepted or rejected by the judge in the exercise of a sound judicial discretion."

COMMENT

The Standard expands upon the present Rule's description of the purpose of voir dire. It also differs from the present Rule, as interpreted by the

supreme court, in that it apparently contemplates a greater scope for questioning of prospective jurors by counsel. In the Committee's view, however, the present Delaware practice is so well established that any proposed change would be undesirable, particularly because the present system works well in practice.

STANDARD

2.5 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 juror 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.

2.6 Peremptory challenges.

The number of peremptory challenges and the procedure for their exercise should be governed by rule or statute.

DELAWARE LAW

Present Delaware practice permits challenge of a juror for cause, if such cause is developed during the course of the voir dire examination. Superior Court Criminal Rule 24(b) governs peremptory challenges. In capital cases, the State is entitled to 12 peremptory challenges and the defendant is entitled to 20 peremptory challenges; the defense is required to exercise its challenge with respect to each juror in advance of exercise of State's challenge. In non-capital cases the State and the defense each has six challenges exercisable after the jury is impanelled in alternate fashion with the defense proceeding first. If there is more than one defendant, the Rule permits the court to allow the defendants additional peremptory challenges and to permit them to be exercised separately or jointly.

COMMENT

While Delaware law is in accord with the Standards, the Committee believes that it would be desirable to promulgate a rule which would set forth, as does Standard 2.5, the rules relating to challenge for cause.

STANDARD

2.7 Alternate or additional jurors.

A trial judge may empanel one or more alternate or additional

jurors whenever, in his discretion, he believes it advisable to have such jurors available to 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. Such jurors should be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, and take the same oath and have the same functions, powers, facilities and privileges as the regular jurors.

DELAWARE LAW

Superior Court Criminal Rule 24(c) provides for the selection of not more than four alternate jurors. Alternate jurors have the same qualifications and duties as regular jurors, and are excused, if their services are not required, after the jury retires to consider its verdict.

COMMENT

The present Delaware Rule is in accord with the Standard except that it limits the number of alternate jurors while the Standard has no such limit. The Committee recommends no change in the present Rule.

PART III. JUROR ORIENTATION AND COMPENSATION

3.1 Juror orientation; use of handbooks.

Prospective jurors should 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. It is preferable that this orientation be accomplished by the use of juror handbooks, which may but need not be implemented by oral instructions.

COMMENT

Although there is no rule on the subject, the superior court follows the practice of holding an orientation session for members of the jury panel for the purpose of explaining the general nature of their duties and the cases which they will be likely to hear. In addition, the superior court provides each member of the panel with a booklet entitled "A Handbook for Petit Jurors" which covers such matters as proper conduct of jurors and information about the trial. Delaware practice is in accord with the Standard.

STANDARD

3.2 Compensation of jurors.

Jurors should receive reasonable compensation for their service. Such compensation should include:

(a) a per diem allowance which is sufficient to prevent undue hardship; and

(b) reimbursement for reasonable travel and subsistence expenses.

DELAWARE LAW

Provision is made in 10 Del. C. §4525 for payment of "the amount due to each juror for his service at such Court." The allowances presently provided for jurors is $15.00 per day plus 10¢ per mile travel allowance.

COMMENT

Present compensation of jurors in Delaware does not conform to the Standard.

PART IV. SPECIAL PROCEDURES DURING JURY TRIAL

4.1 Custody and restraint of defendants and witnesses.

(a) During trial the defendant should be seated where he can effectively consult with his counsel and can see and hear the proceedings.

(b) An incarcerated defendant or witness should not be required to appear in court in the distinctive attire of a prisoner or convict.

(c) Defendants and witnesses should 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 should 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 should instruct those jurors that such restraint is not to be considered in assessing the proof and determining guilt.

DELAWARE LAW

Superior Court Criminal Rule 43 provides that the defendant must be present at every stage of a proceeding within the original jurisdiction of the superior court. In cases within that court's appellate jurisdiction, the defendant need not be present at arraignment if counsel is present and enters a plea, but must be present at every other stage of the proceeding. In noncapital cases, the defendant's voluntary absence after the trial has been com-

menced in his presence does not prevent continuing the trial to and including the return of the verdict. The United States Supreme Court has held that a defendant can be removed by the court, after warning, if he engages in speech and conduct which is so noisy and disruptive that it makes continuance of an orderly trial difficult or impossible. Illinois v. Allen, 397 U.S. 337 (1970). The Supreme Court also indicated in dicta that court may order a defendant bound and gaged, cite him for contempt or remove him until he promises to conduct himself properly in order to preserve the decorum of the courtroom.

COMMENT

Present Delaware law is substantially in accord with the Standard, except that there is no rule explicitly recognizing the principle set forth in subparagraph (b).

4.2 Note taking by jurors.

Jurors may take notes regarding the evidence presented to them and keep these notes with them when they retire for their deliberations. Such notes should be treated as confidential between the juror making them and his fellow jurors.

COMMENT

There are no applicable Delaware rules or statutes on the subject of note taking by jurors, but the matter is believed to be within the discretion of the trial court. It would be appropriate to resolve the question of whether jurors may or may not take notes by appropriate court rules.

STANDARD

4.3 Substitution of judge.

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, another judge, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

DELAWARE LAW

Superior Court Criminal Rule 25(a) provides for a substitute judge if the judge before whom a jury trial has commenced is unable to proceed with the trial by reason of death, sickness or other disability. The substitute judge is required to certify that he has familiarized himself with the record of the trial or, in the alternative, the judge may proceed upon written stipulation of

the Attorney General, the attorney for the defendant and the defendant.

COMMENT

The Standard differs from the present Delaware Rule by eliminating the provision for stipulation of the parties and by requiring in all cases a certification by the new judge that he has familiarized himself with the record of trial.

STANDARD

4.4 Evidence of prior convictions.

When the defendant's prior convictions are admissible solely for the purpose of determining the sentence to be imposed, the jury should not be informed of them, either through allegations in the charge or by the introduction of evidence, until it has found the defendant guilty.

COMMENT

Present Delaware practice is in accord with the Standard.

STANDARD

4.5 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 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 may be made or renewed within a certain time, set by statute or rule, after discharge of the jury or within such further time as the court may fix. Such a motion is not barred by defendant's failure to make a similar motion prior to the submission of the case to the jury.

DELAWARE LAW

Superior Court Criminal Rule 29(a) provides that 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 in an indictment or information after the evidence of either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. The Rule expressly provides that a defendant's motion for judgment of acquittal at the close of the State's case does not prevent the defendant from offering evidence thereafter. Rule 29(b) provides that the court may reserve decision on a motion for judgment of acquittal made at the close of all the evidence, may 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. Rule 29(c) provides that a motion for judgment of acquittal may be made or renewed within ten days after the jury is discharged, having returned a verdict of guilty or without having returned a verdict. On such motion, the court may set aside the verdict and enter judgment of acquittal. Under such circumstances, it is not necessary that a similar motion has been made prior to the submission of the case to the jury.

COMMENT

Present Delaware law is in accord with the Standard.

STANDARD

4.6 Jury instructions.

(a) A collection of accurate, impartial, and understandable pattern jury instructions should be available for use in criminal cases in each jurisdiction. Counsel and the court should nonetheless remain responsible for ensuring that the jury is adequately instructed as dictated by the needs of the individual case, and to that end should modify and supplement the pattern instructions whenever necessary.

(b) At the close of the evidence or at such earlier time as the court reasonably directs, the court should 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 should be furnished the other parties.

(c) At a conference on instructions, which should be held out of the hearing of the jury, and, on request of any party, out of the presence of the jury, counsel should be afforded an opportunity to object to any insturction tendered by another party or prepared at the direction of the court. The court should advise counsel what instructions will be given prior to their

delivery and, in any event, before the arguments to the jury. No party should be permitted to raise on appeal the failure to give an instruction unless he shall have tendered it, and no party should be permitted to raise 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 their 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, should become a part of the record. All objections made to instructions and the rulings thereon should be included in the record.

DELAWARE LAW

Pattern jury instructions for use in Delaware criminal cases have recently been promulgated by a committee appointed by the Chief Justice of the Supreme Court of Delaware. These pattern instructions include general instructions to be used prior to the trial, certain instructions to be used during the trial, concluding general instructions, instructions relating to evidence and instructions defining various major crimes under the Delaware Criminal Code. Copies of the pattern instructions have been made available to all judges and law libraries as well as to the offices of the Attorney General and the Public Defender.

Superior Court Criminal Rule 30 allows parties to file written requests for instructions, with copies to adverse parties. The court is required to inform counsel of its proposed action upon requests prior to their arguments to the jury. Except with special permission of the court, no party may assign as error any portion of the court's charge or omission therefrom unless he objects thereto before or at a time set by the court immediately after the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Instructions are delivered by the court orally, but in capital cases the court is required to provide the jury foreman with a copy of the instructions for use by the jury during its deliberations.

COMMENT

With the promulgation of pattern jury instructions, Delaware law is substantially in accord with the Standard. It is possible, however, that the procedure for settling upon which of such pattern instructions will be used should be formalized by additions to Rule 30.

PART V. JURY DELIBERATIONS AND VERDICT

5.1 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 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.

DELAWARE LAW

Papers read in evidence to the jury, except depositions, may be taken to the jury room. 10 Del. C. §4528. In capital cases, the court is required to deliver to the jury foreman a copy of its instructions orally delivered for use by the jury during its deliberations. Superior Court Criminal Rule 30(b). There is no procedure for providing the jury with written instructions in any other case, but the matter is viewed as being withing the discretion of the court.

COMMENT

Present Delaware practice is substantially in accord with the Standard. However, it would be preferable to adopt a rule of court using language similar to that set forth in the Standard.

STANDARD

5.2 Jury request to review evidence.

(a) If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, they shall be conducted to the courtroom. Whenever the jury's requests 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 reexamine 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.

COMMENT

There are no Delaware cases or rules on the matters covered by Standard 5.2. Delaware practice is, however, believed to be in accord with the Standard.

STANDARD

5.3 Additional instructions.

(a) If the jury, after retiring for deliberation, desires to be informed on any point of law, they shall be conducted to the courtroom. The court shall give appropriate additional instructions in response to the jury's request unless: (i) the jury 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 requests 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 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.

(d) The provisions of section 4.6 (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.

COMMENT

Delaware law is substantially in accord with the Standard. In State v. Benton, Del. Ct. Oyer & Terminer, 187 A. 609 (1936), the court held that the trial court has the power and the duty to correct or withdraw its instructions, if upon reflection, the court considers that an erroneous instruction has been given.

STANDARD

5.4 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 reexamine 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 their 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.

DELAWARE LAW

Concluding general instructions are set forth in Chapter 3 of the Delaware Pattern Jury Instructions, including instructions on a number of the points raised in Standard 5.4(a). In the event of the inability of the jury to agree, the court may instruct the jury that a verdict is hoped for but that no juror should surrender his conscientious convictions. State v. Maclary, Del. Super., 193 A. 2d 195 (1963). If the court is satisfied that a verdict will not be reached, it may discharge the jury. State v. Gamble, Del. Ct. Gen. Sess., 45 A. 716 (1899).

COMMENT

Delaware law is generally in accord with the Standard, but it may be desirable to include some additional points in the pattern jury instructions on matters dealt with in Standard 5.4(a).

STANDARD

5.5 Polling the jury.

When a verdict has been returned and before the jury has dispersed, 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 clerk of 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.

DELAWARE LAW

Superior Court Criminal Rule 31(d) provides for polling the jury when a verdict has been returned and before the jury has been discharged at the request of any party or upon the court's own motion. If the poll discloses that there is not unanimous concurrence in the verdict, the jury may be directed to retire for further deliberations or may be discharged.

COMMENT

Delaware law is in accord with the Standard.

STANDARD

5.6 Judicial comment on verdict.

While it is appropriate for the court to thank jurors at the conclusion of a trial for their public service, such comments should not include praise or criticism of their verdict.

COMMENT

Present Delaware practice is in accord with the Standard. Critical or laudatory words with reference to a verdict may unduly influence jurors during the remainder of their term and are accordingly undesirable.

STANDARD

5.7 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.

COMMENT

Present Delaware law provides no statutes or rules relating to impeachment of the verdict. Occasionally matters come to the attention of the trial judge concerning the nature of the jury's deliberations, and the trial judge has discretion to take appropriate action in egregious cases. In general, however, a juror is not permitted to impeach his own verdict, and the Committee does not favor adoption of any rule which would expand the circumstances in which a verdict may be impeached.

CHAPTER 9

FAIR TRIAL AND FREE PRESS

PART I. RECOMMENDATIONS RELATING TO THE CONDUCT OF ATTORNEYS IN CRIMINAL CASES

1.1 Revisions of the Canons of Professional Ethics.

It is recommended that the substance of the following standards, relating to public discussion of pending or imminent criminal litigation, be embodied in the Code of Professional Responsibility:

It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the lawyer during this period, in the proper discharge of his official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case, from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.

After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement for dissemination by any means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

Nothing in this Canon is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to chages of misconduct that are publicly made against him.

DELAWARE LAW

The Delaware Supreme Court has adopted the American Bar Association's Code of Professional Responsibility, including DR 7-107, which provides as follows:

DR 7-107 Trial Publicity.

(A) A lawyer participating in or associated with the investigation of a

criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

(1) Information contained in a public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajucicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal of failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107 (B) does not preclude a lawyer during such period from announcing;

(1) The name, age, residence, occupation, and family status of the accused.

(2) If the accused has not been apprehanded, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) A request for assistance in obtaining evidence.

(4) The identity of the victim of the crime.

(5) The fact, time, and place of arrest, resistance, pursuit, and

use of weapons.

(6) The identity of investigating and arresting officers or agencies and the length of the investigation.

(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.

(8) The nature, substance, or text of the charge.

(9) Quotations from or references to public records of the court in the case.

(10) The scheduling or result of any step in the judicial proceedings.

(11) That the accused denies the charges made against him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable perosn would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

(F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotiation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:
(1) Evidence regarding the occurrence or transaction involved.
(2) The character, credibility, or criminal record of a party, witness, or prospective witness.
(3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.
(5) Any other matter reasonably likely to interfere with a fair hearing.

(I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

COMMENT

By virtue of DR 7-107, Delaware is in accord with the Standard. The Committee feels that Delaware newspapers have generally exhibited proper restraint in reporting on criminal cases.

STANDARD

1.2 Rule of court.

In any jurisdiction in which Canons of Professional Ethics have not been adopted by statute or court rule, it is recommended that the substance of the foregoing section be adopted as a rule of court governing the conduct of attorneys.

COMMENT

Because Delaware has adopted Canons of Professional Ethics, including DR 7-107, as discussed in connection with Standard 1.1, Standard 1.2 is not applicable to Delaware.

STANDARD

1.3 Enforcement.

It is recommended that violation of the standards set forth in section 1.1 shall be grounds for judicial and bar association reprimand or for suspension from practice and, in more serious cases, for disbarment. It is further recommended that any attorney or bar association be allowed to petition an appropriate court for the institution of disciplinary proceedings, and that the court have discretion to initiate such proceedings, either on the basis of such a petition or on its own motion.

DELAWARE LAW

Supreme Court Rule 32 establishes a Censor Committee, consisting of nine members of the bar, who are responsible for investigating alleged misconduct of attorneys admitted to practice in Delaware and, in appropriate cases, to hear evidence relating to such misconduct and file a report thereon with the court. The court may thereafter impose such discipline as the Committee may recommend or as the court may deem appropriate after hearing. The Committee may, alternatively, administer a private censure. Thus Rule 32 provides a procedure for discipline of attorneys who violate DR 7-107.

COMMENT

Delaware law is in accord with the Standard.

PART II. RECOMMENDATIONS RELATING TO THE CONDUCT OF LAW ENFORCEMENT OFFICERS, JUDGES, AND JUDICIAL EMPLOYEES IN CRIMINAL CASES

2.1 Departmental rules.

It is recommended that law enforcement agencies in each jurisdiction adopt the following internal regulations:

(a) A regulation governing the release of information, relating to the commission of crimes and to their investigation, prior to the making of an arrest, issuance of an arrest warrant, or the filing of formal charges. This regulation should establish appropriate procedures for the release of information. It should further provide that, when a crime is believed to have been committed, pertinent facts relating to the crime itself and to investigative procedures may properly be made available but the identity of a suspect prior to arrest and the results of investigative procedures shall not be disclosed except to the extent necessary to aid in the investigation, to assist in the apprehension of the suspect, or to warn the public of any dangers.

(b) A regulation prohibiting (i) the deliberate posing of a person in custody for photographing or televising by representatives of the news media and (ii) the interviewing by representatives of the news media of a person in custody unless, in writing, he requests or consents to an interview after being adequately informed of his right to consult with counsel and of his right to refuse to grant an interview.

(c) A regulation providing:

From the time of arrest, issuance of an arrest warrant, or the filing of any complaint, information, or indictment in any criminal matter, until the completion of trial or desposition without trial, no law enforcement officer within this agency shall release or authorize the release of any extrjudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the officer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement, except that the officer may announce without further comment that the accused denies the charges made against him;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the officer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

It shall be appropriate during this period for a law enforcement officer:

(1) to announce the fact and circumstances of arrest, including the time and place of arrest, resistance, pursuit, and use of weapons;

(2) to announce the identity of the investigating and arresting officer or agency and the length of the investigation;

(3) to make an announcement, at the time of seizure of any physical evidence other than a confession, admission, or statement, which is limited to a description of the evidence seized;

(4) to disclose the nature, substance, or text of the charge, in-

cluding a brief description of the offense charged;

(5) to quote from or refer without comment to public records or the court in the case;

(6) to announce the scheduling or result of any stage in the judicial process;

(7) to request assistance in obtaining evidence.

Nothing in this rule precludes any law enforcement officer from replying to charges of misconduct that are publicly made against him, precludes any law enforcement officer from participating in any legislative, administrative, or investigative hearing, or supersedes any more restrictive rule governing the release of information concerning juvenile or other offenders.

(d) A regulation providing for the enforcement of the foregoing by the imposition of appropriate disciplinary sanctions.

DELAWARE LAW

The only police department in Delaware which has adopted detailed guidelines relating to release of information to the news media is the Delaware State Police. Those guidelines are as follows:

NMR 12. RELEASE OF INFORMATION TO NEWS MEDIA, CONCERNING PRE-ARREST AND POST-ARREST SITUATIONS. Division policy on making releases of information to news media on pre-arrest and post-arrest situations is set out herein. There are limitations on what may be released. Adherence to these instructions will materially protect the Division in judicial review of cases and at the same time permit continuing cooperation with news media while fulfilling basic responsibilities.

I. PRE-ARREST PROCEDURE – WHAT CAN BE GIVEN OUT.

A. Information relative to criminal investigations which shall be released, if it is not otherwise restrained by the effects of these guidelines, shall include:

(1) The type of event or crime – when accurately known.

(2) The location, time, items, or amount taken, injuries sustained or damages incurred.

(3) The identity of the victim (except when release of identity would endanger life of victim).

(4) Whether or not there are suspects, without further comment.

(5) Numbers of officers or people involved in an event or investigation and the length of investigation, if such information is requested and would not hinder the investigation or performance of duty.

(6) Requests for aid in locating a suspect or evidence.

(7) The name, address, description, employment, and marital status of a person for whom a warrant has been issued.
(8) The exact offense charged – a brief description of the offense and method of complaint, i.e., officer, citizen, warrant, indictment, summons.

B. Items of evidence, which if disclosed would be prejudicial to the solution of the case, should not be made public. Photographs of a person accused by indictment or warrant, without police identification on them, may be furnished. Where the identity of a suspect has not been established, it may be desirable to publicize descriptions, artists' sketches, or other information which could lead to the identification and arrest of the subject.

(1) Suspects who are interviewed but not charged should not be identified.
(2) The finding of physical evidence, such as weapons or proceeds of the crime, the issuance and service of a search warrant, and the positive or negative results of the search, may be released. Information as to how a weapon or proceeds of the crime was located should be withheld if this involves information which is prejudicial.
(3) Fugitive cases may require wide publicity. While, as a general rule, prior records of conviction should not be publicized, it may be desirable in the public interest to disclose such records of fugitives when the pattern of their crimes indicates that the public may be the victims of fraud or personal injury. The circumstances and facts in each case will be the controlling factors in decisions. In some fugitive cases, it may be necessary to withhold information when its publication would be detrimental to the apprehension of the wanted person. Common sense should dictate the manner in which fugitive cases are handled with a positive view toward the public interest and safety and the protection of other law enforcement agencies.
(4) Fugitives, who have a past history of being armed or who have shown a propensity for violent acts, shall be characterized as being dangerous and why, so that an arresting officer will be well aware of dangerous aspects involved in the apprehension of such a subject.

2. POST-ARREST PROCEDURE – WHAT NOT TO GIVE OUT. To avoid jeopardizing prosecution of a criminal matter by prejudicing the right of the defendant to a fair trial, members shall not make statements to the news media in the period between arrest and trial relating to the following:

A. Character or reputation of a suspect or the existence, if any, of

a prior criminal record.

B. Existence of a confession, admission, or statement by an accused person, or the absence or failure of an accused to make the same.

C. Re-enactment of a crime, or the fact that a defendant may have shown investigators where a weapon, loot, or other evidence was located.

D. References to a defendant as (for example) "a sexcrazed maniac", a "depraved character", a "typical gangster", "professional burglar", "shakedown artist", etc.

E. The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement; and/or the performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(1) Information may be given out only if requested as to whether an individual arrested, refused or submitted to the normal test in DWI cases. No results of any such test shall be disclosed to the news media.

(2) Information may be given out concerning the general facts that physical evidence is being examined. However, the description of such evidence and the results of such examinations shall not be disclosed without the concurrence of the Attorney General's office.

F. Guilt or innocence of a defendant, or the possibility of a guilty plea to the offense charged, or to a lesser offense (i.e., plea bargaining) or possibilities of other dispositions such as "nolle prosequi".

G. Identity, credibility, or testimony of any prospective witness.

H. Testimony, credibility, or character of any victim witness.

I. Information of a purely speculative nature.

J. The merits of the case, such as evidence and arguments, whether or not it is anticipated to be used in court.

K. Transcripts, reports, or summaries of occurrences taking place during the course of judicial proceedings from which the public and press have been excluded.

3. POST-ARREST PROCEDURE -- WHAT CAN BE GIVEN OUT.

A. Personnel authorized to deal with the news media should supply any relevant information on the arrest, provided it cannot be construed as prejudicial to a fair trial. Information which may be given out includes the following:

(1) Defendant's name, age, residence, employment, marital status, and similar background infromation.

(2) Substance or text of the charge on which the arrest was made and the identity of the person preferring the charge (when such infromation does not constitute a danger to the complainant).

(a) Members, dealing with the press, shall withhold identfication of persons preferring charges when such persons are victims of a sex crime and publication of their identity would be a matter of serious embarrassment to them or jeopardize their security.

(3) Identity of the investigating and arresting agency, the duration of the investigation, and aspects of the investigation of a non-prejudicial nature.

(4) The facts and circumstances immediately surrounding an arrest – time, place, resistance, pursuit, possession or use of weapons, and a general description of contraband seized, if disclosure is not prejudicial.

(5) Pre-trial release or detention arrangements, i.e., amount of bond, location of detention.

(6) The scheduled dates or results of the various stages in the judicial process.

(7) Photographs of defendants (without police identification data on them) may be furnished to the news media. Members shall not assist in posing defendants for news or television cameramen, but the efforts of such cameramen should not be hindered during the course of any normal movements of members or defendants which expose defendants to public view.

B. When there is a question as to whether an item should be released, the decision may be made by the Troop Commander or officer in charge of the investigation on the general principle that information should be made available unless it reasonably could be construed as prejudicial to the defendant, harmful to prosecution, or endanger the lives of persons involved in the case.

NMR 13. SPECIAL CONSIDERATIONS.

1. Photographing or Television.

A. In public places, and places where the press may otherwise lawfully be, no member shall take any action to prevent or interfere with the news media in photographing or televising an event, a suspect, or an accused or any other person or thing except that the presence of cameramen and crews shall not be allowed to significantly interfere with the police mission at hand. A proper action for the officer in charge of the scene would be to make

allowances for the presence of cameramen and photographers and try to facilitate their job when appropriate.

(1) Troop Commanders may properly extend cooperation when departmental property is required for the recording of interviews, news releases, documentaries, or events of an unusual nature. In routine circumstances, public information programs and the press may be permitted by the Troop Commander to use their own equipment within police buildings or property.

B. Members shall not deliberately pose a suspect or accused in custody to be photographed, televised or interviewed.

C. Members shall not pose themselves with a suspect or accused, nor shall they enter into any agreement to have a suspect or accused in custody at a prearranged time or place to be photographed, televised, or interviewed.

D. Police department photographs or films of the following shall not be released, except by the Superintendent of the State Police or his designee:

(1) Crime scenes.
(2) Suspects or accused persons prior to actual arrest.
(3) The victims of any crime, accident, or suicide.
(4) Juveniles (under 18 years).
(5) Members of the department.

The Bureau of Police of the City of Wilmington has a two-page memorandum on its press relations policy which does not deal with the matters covered by the Standard.

COMMENT

The Delaware State Police guidelines are substantially in accord with the Standard. The Committee recommends that other police departments in the State adopt these or similar regulations to conform to the Standard.

STANDARD

2.2 Rules of court or legislation relating to law enforcement agencies.

It is recommended that if within a reasonable time a law enforcement agency in any jurisdiction fails to adopt and adhere to the substance of the regulation recommended in section 2.1 (c), as it relates to both proper and improper disclosures, the regulation be made effective with respect to that agency by rule of court or by legislative action, with appropriate sanctions for violation.

COMMENT

As is noted in the Comment to Standard 2.1, only the Delaware State Police have adopted regulations relating to publicity which conform to the Standard. No rule or statute is in effect at present which would comply with Standard 2.2. The Committee does not feel that there is a need for the adoption of such a rule or statute, both because police in Delaware have generally acted responsibly in the area of pretrial publicity and because it is believed that informal methods of encouraging local police forces to adopt rules on such publicity are preferable to adoption of a statute or rule.

STANDARD

2.3 Rule of court relating to disclosures by judicial employees.

It is recommended that a rule of court be adopted in each jurisdiction prohibiting any judicial employee from disclosing, to any unauthorized person, information relating to a pending criminal case that is not part of the public records of the court and that may tend to interfere with the right of the people or of the defendant to a fair trial. Particular reference should be made in this rule to the nature and result of any argument or hearing held in chambers or otherwise outside the presence of the public and not yet available to the public under the standards in section 3.1 and section 3.5(d) of these recommendations. Appropriate discipline, including proceedings for contempt, should be provided for infractions of this rule.

COMMENT

There is no present Delaware rule relating to disclosure by judicial employees. Although the Committee does not feel that there is at present any problem in this area, adoption of a rule in compliance with the Standard is recommended.

STANDARD

2.4 Recommendation relating to judges.

It is recommended that, with respect to pending criminal cases, judges should refrain from any conduct or the making of any statements that may tend to interfere with the right of the people or of the defendant to a fair trial.

COMMENT

The Committee supports the recommendation contained in Standard 2.4 and believes that the Delaware Judiciary complies therewith. The Code

of Judicial Ethics, Canon 3, adopted in Delaware, is in accord.

PART III. RECOMMENDATIONS RELATING TO THE CONDUCT OF JUDICIAL PROCEEDINGS IN CRIMINAL CASES

3.1 Pretrial hearings.

It is recommended that the following rule be adopted in each jurisdiction by the appropriate court:

Motion to exclude public from all or part of pretrial hearing.

In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public, including representatives of the news media, on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference. With the consent of the defendant, the presiding officer may take such action on his own motion or at the suggestion of the prosecution. Whenever under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings shall be kept and shall be made available to the public following the completion of trial or disposition of the case without trial. Nothing in this rule is intended to interfere with the power of the presiding officer in any pretrial hearing to caution those present that dissemination of certain information by any means of public communication may jeopardize the right to a fair trial by an impartial jury.

COMMENT

There is no present Delaware rule which would comply with Standard 3.1. The Committee recommends adoption of a rule which would comply with the Standard.

STANDARD

3.2 Change of venue or continuance.

It is recommended that the following standards be adopted in each jurisdiction to govern the consideration and disposition of a motion in a criminal case for change of venue or continuance based on a claim of threatened interference with the right to a fair trial.

(a) Who may request.

Except as federal or State constitutional provisions otherwise require, a change of venue or continuance may be granted on motion of either the

prosecution or the defense.

(b) Methods of proof.

In addition to the testimony or affidavits of individuals in the community, which shall not be required as a condition of the granting of a motion for change of venue or continuance, qualified public opinion surveys shall be admissible as well as other materials having probative value.

(c) Standards for granting motion.

A motion for change of venue or continuance shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. A showing of actual prejudice shall not be required.

(d) Same; time of disposition.

If a motion for change of venue or continuance is made prior to the impaneling of the jury, the motion shall be disposed of before impaneling. If such a motion is permitted to be made, or if reconsideration or review of a prior denial is sought, after the jury has been selected, the fact that a jury satisfying prevailing standards of acceptability has been selected shall not be controlling if the record shows that the criterion for the granting of relief set forth in subsection (c) has been met.

(e) Limitations; waiver.

It shall not be a ground for denial of a change of venue that one such change has already been granted. The claim that the venue should have been changed or a continuance granted shall not be considered to have been waived by the waiver of the right to trial by jury or by the failure to exercise all available peremptory challenges.

DELAWARE LAW

Superior Court Criminal Rule 21(a) provides as follows: "The Court upon motion of the defendant shall transfer the proceeding as to him to another county if the Court is satisfied that there exists in the county where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that county." The question of change of venue is within the discretion of the trial court and is reviewable only for abuse of discretion. Parson v. State, Del. Supr., 222 A. 2d 326 (1966). Superior Court Criminal Rule 22 permits a motion for transfer to be made at or before arraignment or at such other time as the court may prescribe.

COMMENT

Delaware law is not in accord with the Standard, which would require transfer where there is a "reasonable likelihood" that a fair trial cannot be had in the absence of such relief. In addition, the Standard would permit either the prosecution or the defense to move for change of venue. While change of venue is of limited applicability in Delaware, since there are only three counties and since the news media are of statewide circulation, the Committee recommends revision of Rule 21 to conform to the Standard. It appears to be desirable to spell out the procedures for granting the motion and the rules relating to proof as the Standard does. In addition, Rule 22 should be revised to conform with paragraph (d) of the Standard.

STANDARD

3.3 Waiver of jury.

In those jurisdictions in which the defendant does not have an absolute right to waive a jury in a criminal case, it is recommended that the defendant be permitted to waive whenever it is determined that (1) the waiver has been knowingly and voluntarily made, and (2) there is reason to believe that, as a result of the dissemination of potentially prejudicial material, the waiver is required to increase the likelihood of a fair trial.

DELAWARE LAW

Superior Court Criminal Rule 23(a) requires approval of the court and consent of the State for any waiver of a jury trial. It does not give the court power to permit waiver without State consent in a case of prejudicial pretrial publicity.

COMMENT

In its Report on the Trial By Jury Standards, the Committee does not recommend adoption of a Standard which would eliminate the necessity for State consent for waiver of a jury trial. Since there is no absolute right to such waiver, the Committee recommends adoption of Standard 3.3 to permit waiver without State consent where there is "reason to believe" that the waiver will increase the "likelihood" of a fair trial in a case of prejudicial publicity.

STANDARD

3.4 Selecting the jury.

It is recommended that the following standards be adopted in each

jurisdiction to govern the selection of a jury in those criminal cases in which questions of possible prejudice are raised.

(a) Method of examination.

Whenever there is believed to be a significant possibility that individual talesmen will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept, by court reporter or tape recording whenever possible. The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude towards the trial, not to convince him that he would be derelict in his duty if he could not cast aside any preconceptions he might have.

(b) Standard of acceptability.

Both the degree of exposure and the prospective juror's testimony as to his state of mind are relevant to the determination of acceptability. A prospective juror who states that he will be unable to overcome his preconceptions shall be subject to challenge for cause no matter how slight his exposure. If he has seen or heard and remembers information that will be developed in the course of trial, or that may be inadmissible but is not so prejudicial as to create a substantial risk that his judgment will be affected, his acceptability shall turn on whether his testimony as to impartiality is believed. If he admits to having formed an opinion, he shall be subject to challenge for cause unless the examination shows unequivocally that he can be impartial. A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to his testimony as to his state of mind.

(c) Source of the panel.

Whenever it is determined that potentially prejudicial news coverage of a given criminal matter has been intense and has been concentrated primarily in a given locality in a state (or federal district), the court shall have authority to draw jurors from other localities in that state (or district).

COMMENT

Superior Court Criminal Rule 24 would permit an examination of the panel of the sort recommended by Standard 3.4(a). The Committee believes that the principles set forth in paragraph (b) are currently applied in practice. The Committee does not believe it necessary to adopt a rule to conform to the Standard, but commends the Standard to the attention of the courts in their application of Rule 24. There is no existing statutory authority for selection of jurors from outside the county of trial, and the Committee does

not recommend adoption of such a statute, believing that the matter is better handled by change of venue.

STANDARD

3.5 Conduct of the trial.

It is recommended that the following standards be adopted in each jurisdiction to govern the conduct of a criminal trial when problems relating to the dissemination of potentially prejudicial material are raised.

(a) Use of the courtroom.

Whenever appropriate in view of the notoriety of the case or the number or conduct of news media representatives present at any judicial proceeding, the court shall ensure the preservation of decorum by instructing those representatives and others as to the permissible use of the courtroom and other facilities of the court, the assignment of seats to news media representatives on an equitable basis, and other matters that may affect the conduct of the proceeding.

(b) Sequestration of jury.

Either party shall be permitted to move for sequestration of the jury at the beginning of trial or at any time during the course of the trial, and, in appropriate circumstances, the court shall order sequestration on its own motion. Sequestration shall be ordered if it is determined that the case is of such notoriety or the issues are of such a nature that, in the absence of sequestration, highly prejudicial matters are likely to come to the attention of the jurors. Whenever sequestration is ordered, the court in advising the jury of the decision shall not disclose which party requested sequestration.

(c) Cautioning parties, witnesses, jurors, and judicial employees; insulating witnesses.

Whenever appropriate in light of the issues in the case or the notoriety of the case, the court shall instruct parties, witnesses, jurors, and employees and officers of the court not to make extrajudicial statements, relating to the case or the issues in the case, for dissemination by any means of public communication during the course of the trial. The court may also order sequestration of witnesses, prior to their appearance, when it appears likely that in the absence of sequestration they will be exposed to extrajudicial reports that may influence their testimony.

(d) Exclusion of the public from hearings or arguments outside the presence of the jury.

If the jury is not sequestered, the defendant shall be permitted to move that the public, including representatives of the news media, be excluded from any portion of the trial that takes place outside the presence of the jury on the ground that dissemination of evidence or argument adduced at the hearing is likely to interfere with the defendant's right to a fair trial by an impartial jury. The motion shall be granted unless it is determined that

there is no substantial likelihood of such interference. With the consent of the defendant, the court may take such action on its own motion or at the suggestion of the prosecution. Whenever such action is taken, a complete record of the proceedings from which the public has been excluded shall be kept and shall be made available to the public following the completion of the trial. Nothing in this recommendation is intended to interfere with the power of the court, in connection with any hearing held outside the presence of the jury, to caution those present that dissemination of specified information by any means of public communication, prior to the rendering of the verdict, may jeopardize the right to a fair trial by an impartial jury.

(e) Cautioning jurors.

In any case that appears likely to be of significant public interest, an admonition in substantially the following form shall be given before the end of the first day if the jury is not sequestered.

During the time you serve on this jury, there may appear in the newspaper or on radio or television reports concerning this case, and you may be tempted to read, listen to, or watch them. Please do not do so. Due process of law requires that the evidence to be considered by you in reaching your verdict meet certain standards – for example, a witness may testify about events he himself has seen or heard but not about matters of which he was told by others. Also, witnesses must be sworn to tell the truth and must be subject to cross-examination. News reports about the case are not subject to these standards, and if you read, listen to, or watch these reports, you may be exposed to misleading or inaccurate information which unduly favors one side and to which the other side is unable to respond. In fairness to both sides, therefore, it is essential that you comply with this instruction.

If the process of selecting a jury is a lengthy one, such an admonition shall also be given to each juror as he is selected. At the end of each subsequent day of the trial, and at other recess periods if the court deems necessary, an admonition in substantially the following form shall be given:

For the reasons stated earlier in the trial, I must remind you not to read, listen to, or watch any news reports concerning this case while you are serving on this jury.

(f) Questioning jurors about exposure to potentially prejudicial material in the course of the trial; standard for excusing a juror.

If it is determined that material disseminated during the trial goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material. The examination shall take place in the presence of counsel, and an accurate record of the examination shall be kept. The standard for excusing a juror who is challenged on the basis of such exposure shall be the same as the standard of acceptability recommended in section 3.4(b), above, except that a juror who has seen or heard

reports of potentially prejudical material shall be excused if reference to the material in question at the trial itself would have required a mistrial to be declared.

COMMENT

There are no rules or statutes in Delaware on the matters covered by Standard 3.5. The Pattern Jury Instructions contain a form of caution to jurors about publicity. The Committee believes that the superior court and other trial courts have the power to make appropriate orders in conformity with the Standard. No present need is felt for specific rules.

STANDARD

3.6 Setting aside the verdict.

It is recommended that, on motion of the defendant, a verdict of guilty in a criminal case be set aside and a new trial granted whenever, on the basis of competent evidence, the court finds a substantial likelihood that the vote of one or more jurors was influenced by exposure to an extrajudicial communication of any matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury. Nothing in this recommendation is intended to affect the rule in any jurisdiction as to whether and in what circumstances a juror may impeach his own verdict or as to what other evidence is competent for that purpose.

DELAWARE LAW

Superior Court Criminal Rule 29(c) broadly permits a motion for judgment of acquittal within ten days after discharge of the jury. Such a motion could be made on the ground that a juror's vote was influenced by an extrajudicial communication.

COMMENT

Delaware law is in accord with the Standard.

PART IV. RECOMMENDATIONS RELATING TO THE EXERCISE OF THE CONTEMPT POWER

4.1 Limited use of the contempt power.

It is recommended that the contempt power should be used only with considerable caution but should be exercised under the following circumstances:

(a) Against a person who, knowing that a criminal trial by jury is in progress or that a jury is being selected for such a trial:

(i) disseminates by any means of public communication an extrajudicial statement relating to the defendant or to the issues in the case that goes beyond the public record of the court in the case, that is wilfully designed by that person to affect the outcome of the trial, and that seriously threatens to have such an effect; or

(ii) makes such a statement intending that it be disseminated by any means of public communication.

(b) Against a person who knowingly violates a valid judicial order not to disseminate, until completion of the trial or disposition without trial, specified information referred to in the course of a judicial hearing closed pursuant to sections 3.1 or 3.5(d) of these recommendations.

COMMENT

The Committee believes that the philosophy of Delaware courts in their use of the contempt power is in accord with the Standard and that the contempt power of the courts is presently adequate to enable them to exercise it in the circumstances recommended by the Standard.

CHAPTER 10

SENTENCING ALTERNATIVES AND PROCEDURES

PART I. SENTENCING AUTHORITY

1.1 Who should sentence.

Authority to determine the sentence should be vested in the trial judge and not in the jury. This report does not deal with whether the death penalty should be an available sentencing alternative and, if so, who should participate in its imposition.

DELAWARE LAW

Delaware vests authority to determine sentences in the trial judge rather than in the jury. The relevant provision relating to felonies is 11 Del. C. §4205(b) which states, "The Term of imprisonment which the court may impose for a felony is fixed as follows . . . ." 11 Del. C. §4206 sets up four classes of misdemeanors and provides in each class that "The sentence . . . shall be fixed by the court . . ." See also Superior Court Criminal Rule 32 which contemplates sentencing by the court.

COMMENT

Delaware law is in compliance with the Standard.

PART II. STATUTORY STRUCTURE AND JUDICIAL DISCRETION – RANGE OF ALTERNATIVES

2.1 General principles: statutory structure.

(a) All crimes should be classified for the purpose of sentencing into categories which reflect substantial differences in gravity. The categories should be very few in number. Each should specify the sentencing alternatives available for offenses which fall within it. The penal codes of each jurisdiction should be revised where necessary to accomplish this result.

DELAWARE LAW

In the Delaware Criminal Code, which became effective in 1973, all crimes have been classified for the purpose of sentencing into categories which are relatively few in number. The statutes are reproduced here in full for reference. They are taken from Title 11 of the Code.

§4205. Sentence for felonies.

(a) A sentence of imprisonment for a felony shall be a definite sentence. The term of imprisonment shall be as provided in subsection

(b) of this section.

(b) The term of imprisonment which the court may impose for a felony is fixed as follows:

(1) For a class A felony, life imprisonment, except for conviction of first degree murder in which event the provisions of § 4209 shall apply; provided, however, that in the case of an attempt to commit any class A felony, the court shall impose a term of imprisonment and may impose life imprisonment, but may impose less than life imprisonment, except for conviction of any attempt to commit first degree murder, in which event the court shall impose life imprisonment;

(2) For a class B felony; from 3 to 30 years and such fine or other conditions as the court may order;

(3) For a class C felony, from 2 to 20 years and such fine or other conditions as the court may order;

(4) For a class D felony, 10 years and such fine or other conditions as the court may order;

(5) For a class E felony, 7 years and such fine or other conditions as the court may order.

(c) In the case of the conviction of any felony other than a class A felony, the court may impose the maximum term of imprisonment as stated in subsection (b) of this section or any part thereof, or it may impose any sentence authorized by §4204 of this Criminal Code.

§4206. Sentence for misdemeanors.

(a) The sentence for a class A misdemeanor shall be fixed by the court and shall not exceed 2 years imprisonment and such fine or other conditions as the court may order; provided, however, that the court shall require a person convicted of issuing a worthless check under §900 of this title to make restitution to the person to whom the worthless check was issued.

(b) The sentence for a class B misdemeanor shall be fixed by the court and shall not exceed 6 months imprisonment and such fine or other conditions as the court may order.

(c) The sentence for a class C misdemeanor shall be fixed by the court and shall not exceed 3 months imprisonment and such fine or other conditions as the court may order.

(d) The sentence of imprisonment for an unclassified misdemeanor shall be a definite sentence. The term shall be fixed by the court, and shall be in accordance with the sentence specified in the law defining the offense.

11 Del. C. §4204, which is referred to in 11 Del. C. §4205(c), specifies the sentencing alternatives that are available under present Delaware law. 11 Del.

C. §4204 (c) states:

> When a person is convicted of any offense other than a class A felony the court may take the following action:
>
> (1) Impose a fine as provided by law for the offense;
>
> (2) Impose a fine and place the offender upon probation;
>
> (3) Commit the offender to the Department of Hea'th and Social Services, with or without a fine, or with any other pu[illegible]ment provided by law for the offense;
>
> (4) Suspend the imposition or execution of sentence;
>
> (5) Place the offender upon probation;
>
> (6) Impose a period of imprisonment and place the offender upon probation to commence when he is released from prison.

In addition to the schedule of offenses and sentences which is set forth in the Criminal Code, Delaware has also passed the Uniform Controlled Substances Act. 16 Del. C. §4701 - 78. This Act defines and classifies drug offenses and assigns penalties to each class in much the same way as the Criminal Code. Each class has a specified maximum term of imprisonment and a fine.

COMMENT

The structure of the Delaware Criminal Code conforms to the recommendations of the Standard. Despite the recent adoption of the Criminal Code, there are anomalies in treatment of seemingly similar offenses.

For example, a person who has been convicted of rape can be sentenced to life imprisonment for rape in the first degree, a class A felony, if he harms the victim or if the victim was not his social companion at the time and had not previously permitted his sexual contact. 11 Del. C. §764. If the rapist has the foresight to make a date with his victim, the charge is rape in the second degree, a class B felony, for which he could be put on probation. 11 Del. C. §763.

Bribing a public official is a class D felony. 11 Del. C. §1201. However, bribing anyone else, regardless of the amount and purpose of the bribe, is a class A misdemeanor. 11 Del. C. §881. Patronizing a prostitute is a violation. 11 Del. C. §1343. However, engaging in prostitution is a class B misdemeanor. 11 Del. C §1342. Forging corporate documents is a class D felony. 11 Del. C. §861. But forging public documents is only a class E felony, a potential difference of 3 years in prison for the forger. Selling obscene literature is a class A misdemeanor. 11 Del. C. §1361. The vendor would risk less by selling firearms to a child under 18. 11 Del. C. §1445 (a class B misdeameanor).

It should also be noted that within each class of offenses, the legis-

lature has permitted wide variations in available sentences. For example, the available sentences for a class B felony range from suspended sentence to 30 years imprisonment.

STANDARD

2.1(b) The sentencing court should be provided in all cases with a wide range of alternatives, with gradations of supervisory, supportive and custodial facilities at its disposal so as to permit a sentence appropriate for each individual case.

DELAWARE LAW

11 Del. C. §4204(c), which is set forth above, provides the court with a wide range of alternatives except in the case of a class A felony where a term of imprisonment is mandatory. Some of the custodial and supportive facilities necessary for individualized dispositions are to be supplied by the Department of Corrections. 11 Del. C. §6524 deals with special problem groups. "The Department may establish facilities for the treatment of alcoholics, prostitutes, drug addicts and other such groups as the Department shall determine." Mentally ill and mentally defective inmates are provided for under 11 Del. C. §6525, which allocates resources for programs of treatment in separate facilities or existing institutions. There is another provision for the youthful offender. 11 Del. C. §6526(a) states, "Appropriate, separate custodial care and work and training facilities shall be provided for youthful offenders by the Department . . . ."

11 Del. C. §4204(c) (3) allows the court to commit the offender to the Department of Health and Social Services rather than to the Department of Corrections. The former also has provisions for criminally mentally ill adults and juveniles to be cared for in divisions of state hospitals 16 Del. C. §5151. The probation and parole services referred to in 11 Del. C. §4204 (c) are explained more fully in 11 Del. C. §4321:

> The counsellors shall keep informed of the conduct and condition of persons in their charge, shall aid them to secure employment, shall exercise supervision over them, shall see that they fulfill the conditions of their release, and shall use all suitable methods of aid and encourage them to bring about improvement in their conduct and conditions and to meet their probation or parole obligations.
>
> In the disposition of all juvenile offenders, commitment to the Department of Health and Social Services is for an indeterminate period.

COMMENT

Delaware law is substantially in accord with the Standard in granting a wide range of sentencing alternatives, the exception being a class A felony under 11 Del. C. §4204 (c) and certain crimes for which a prison sentence is mandatory, such as a second conviction of robbery in the first degree. See 11 Del. C §832. To this extent, it is not in accord with the Standard. The court apparently has adequate facilities at its disposal within the Department of Corrections and the Department of Health and Social Services to ensure that the appropriate sentence for each individual would be properly executed.

The indeterminate sentences applicable to juveniles should not exceed in practice the maximum period that would apply if the offense were an adult crime, or in cases where no comparable adult offense exists (such as in "uncontrolled" or truancy cases), a limited period such as six months.

STANDARD

2.1(c) The legislature should not specify a mandatory sentence for any sentencing category or for any particular offense.

DELAWARE LAW

11 Del. C. §4204 (d) is a caveat: "Notwithstanding anything in this Criminal Code to the contrary, probation or a suspended sentence shall not be substituted for imprisonment where the statute specifically indicates that a prison sentence is mandatory or may not be suspended." The legislature has specified mandatory sentences for particular offenses in several instances. Sodomy while an inmate of a prison requires an additional 3 years on the sentence being served. 11 Del. C. §766. A second conviction for robbery in the first degree results in a term of imprisonment for 10 to 30 years, with no suspension, probation or concurrent run. 11 Del. C. §832. Assault in a detention facility will increase the offender's stay by 3 more years. 11 Del. C. §1254(b). These statutes relate to cases where a second offense triggers the imposition of the mandatory sentence. There is also a general statute along the same lines which orders the court to impose a life sentence if the offender has been convicted three times of any of the specified felonies. 11 Del. C. §4214(b).

In addition to these second offense statutes, the Delaware Code fixes a mandatory life sentence upon conviction of an attempt to commit first degree murder. 11 Del. C. §4205(b) (1). The Uniform Controlled Substances Act also has provisions which mandate a certain sentence for some offenses. 16 Del. C. §4751(b) refers to prohibited acts A, ". . . upon conviction shall

be fined not less than $25,000 nor more than $100,000 and imprisoned for 30 years without eligibility for parole." One convicted under paragraph (c) of the same section, "shall be sentenced to imprisonment for life, and shall not be eligible for parole until after serving 45 years from the date of conviction. . . ." There is a mandatory three year minimum sentence for robbery in the first degree. 11 Del. C. §832(a).

COMMENT

All the sections cited above are in direct conflict with the Standard. Although Delaware has chosen to revoke the court's sentencing discretion in relatively few instances, the offenders under these statutes are none-the-less denied the opportunity to be sentenced as individuals. The fact that the judge will be able to make an informed decision suited to the case for the majority of offenders underscores the arbitrary and unjust dispositions that result under the mandatory sentence statutes.

STANDARD

2.1(d) It should be recognized that in many instances in this country the prison sentences which are now authorized, and sometimes required, are significantly higher than are needed in the vast majority of cases in order adequately to protect the interests of the public. Sentences of twenty-five years or longer should be reserved for particularly serious offenses or, under the circumstances set forth in section 2.5(b) and 3.1(c) (special term), for certain particularly dangerous offenders. For most offenses, on the other hand, the maximum authorized prison term ought not to exceed ten years except in unusual cases and normally should not exceed five years.

DELAWARE LAW

The sentences which are authorized for felonies under Delaware law (refer to Standard 2.1(a) above) are higher, in every instance, than the average term advised in the Standard. The court may, and in some cases must, impose life imprisonment for the most serious felonies. 11 Del. C. §4205 (b) (1); 11 Del. C. §4209(a). This holds true for certain drug offenses also. 16 Del. C. §4751(c). Although this Standard does not deal with the advisability of capital punishment, in order to present a complete overview of the Delaware sentencing structure it must be mentioned that the death penalty is authorized punishment following a conviction for first degree murder. 11 Del. C. §4209(a). The sentences available for offenses less serious than class A felonies and prohibited acts range from 30 to 99 years maximum, 11 Del. C. §4205(b) (1) and 16 Del. C. §4751 (b).

COMMENT

Delaware law is not in accord with the Standard. The Standard is operating within a framework that has 25 years as the outside limit. A sentence of life imprisonment, which is authorized for all class A felons and habitual offenders, is construed for parole purposes as a fixed term of 45 years. This is 20 years higher than the sentence recommended by the Standard for this class of offender. There is a proportionate disparity between the other sentences approved of by the Delaware Criminal Code and the averages proposed by the Standard.

STANDARD

2.2 General principle: judicial discretion.

The sentence imposed in each case should call for 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.

DELAWARE LAW

11 Del. C. §4301 provides:

> . . . the treatment of persons convicted of crime shall take into consideration their individual characteristics, circumstances, needs and potentialities as revealed by a case study, and that whenever it appears desirable in the light of the needs of public safety and their own welfare, such person shall be dealt with, at restricted liberty in the community, by a uniformly organized system of constructive rehabilitation, under probation or parole supervision instead of in a correctional institution.

COMMENT

Delaware law espouses the principles enunciated in Standard 2.2, though, in light of the statutes discussed under Standard 2.1(d), there may be some doubt as to whether the similarity between Delaware law and the Standard is retained when the principles are converted into practice.

STANDARD

2.3 Sentences not involving confinement.

(a) The legislature should authorize the sentencing court in every case to impose a sentence of probation or a similar sentence not involving con-

finement. It may be appropriate to provide for limited exceptions to this principle, but only for the most serious offenses.

DELAWARE LAW

Delaware law excludes an offender convicted of a class A felony from a disposition which does not involve confinement. 11 Del. C. §4204(c). The Delaware statutes analyzed under Standard 2.1(c) also require imprisonment.

COMMENT

Delaware law is basically reconcilable with the Standard. However, where the Standard would allow only limited exceptions to it principle, Delaware disqualifies a broader spectrum of offenders from the sentence not involving confinement. The specified prison term for particular offenses which was criticized under Standard 2.1(c) should be abrogated as it results in a sentence which is meaningless in relation to the person serving it. The exclusion of class A felons is closer to the spirit of Standard 2.3(a), though this class could be narrowed.

STANDARD

2.3(b) The following general principles should apply to such sentences:

(i) The court should specify at the time of sentencing the length of any term during which the defendant is to be supervised and during which the court will retain power to revoke the sentence for the violation of specified conditions;

(ii) Neither supervision nor the power to revoke should be permitted to extend beyond a legislatively fixed time, which should in no event exceed two years for a misdemeanor or five years for a felony;

(iii) The sentence to be imposed in the event of the violation of a condition should not be fixed prior to a finding that a violation has occurred.

Standards governing the procedures for revocation or modification of such a sentence are set forth in section 5.5. Standards governing the alternatives which should be available upon the violation of a condition are set forth in section 6.4. Detailed standards dealing with the types of sentences not involving confinement which should be authorized, as well as the terms and conditions which could appropriately accompany such a sentence, will be set forth in a separate report on probation.

DELAWARE LAW

11 Del. C. §4333 states, "The period of probation or suspension of

sentence shall be fixed by the court. . ." The court retains the power to revoke the sentence for violation of the conditions for a reasonable time after the expiration of this period, but only if the arrest warrant is issued during the probation time period. The court has no power to extend the period of probation once it has been imposed. Tiller v. State, Del. Supr. 257 A.2d 385 (1969).

The procedure for a hearing on the issue of a violation of conditions of probation or suspension of sentence is set forth in 11 Del. C. §4334(c):

> If the violation is established, the court may continue or revoke the probation or suspension of sentence, and may require the probation violator to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.

COMMENT

Delaware law is in accord with the general prinicples of the Standard, except with regard to the maximum length of the period of probation or suspension of sentence. For a class B felon, for example, suspension of sentence could last 30 years.

STANDARD

2.3(c) A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary.

DELAWARE LAW

This point is met in 11 Del. C. §4301, reproduced in full under Standard 2.2. Delaware states a preference for sentences not involving confinement whenever possible in accord with the factors enumerated in Standard 2.2.

COMMENT

Delaware law is in accord with the Standard.

STANDARD

2.4 Partial confinement.

(a) Attention should be directed to the development of a range of sentencing alternatives which provide an intermediate sanction between

supervised probation on the one hand and commitment to a total custody institution on the other and which permit the development of an individualized treatment program for each offender. Examples of the types of dispositions which might be authorized are:

(i) confinement for selected periods to a local facility designed to provide educational or other rehabilitative services;

(ii) commitment to a local facility which permits the offender to hold a regular job while subject to supervision or confinement on nights and weekends;

(iii) commitment to an institution for a short, fixed term, followed by automatic release under supervision.

(b) The following general principles should apply to such sentences:

(i) The court should specify at the time of sentencing the length of any term during which the defendant is to be supervised and during which the court will retain power to revoke the sentence for the violation of specified conditions;

(ii) Neither supervision, the power to revoke, nor the maximum length of time during which the offender should be subject to such a sentence should be permitted to extend beyond a legislatively fixed time, which should in no event exceed two years for a misdemeanor of five years for a felony;

(iii) The sentence to be imposed in the event of the violation of a condition should not be fixed prior to a finding that a violation has occurred.

Standards governing the procedures for revocation or modification of such a sentence are set forth in section 5.5. Standards governing the alternatives which should be available upon the violation of a condition are set forth in section 5.4.

(c) A sentence involving partial confinement is to be preferred to a sentence of total confinement in the absence of affirmative reasons to the contrary.

DELAWARE LAW

The court has a wide range of sentencing alternatives pursuant to 11 Del. C. §4204(c) which could include commitment to an institution, as well as probation. See the provision in full at Standard 2.1(a). Delaware has other provisions which measure up to the Standard's suggestions for confinement to a facility which provides a service necessary for the rehabilitation of the particular offender. Outside employment while in the custody of the Department of Corrections is a recognized, viable alternative to full time incarceration. 11 Del. C. §6533. See Gaskill v. State, Del. Super., 138 A. 2d 500 (1958).

11 Del. C. §4204(f) states that the court must fix a maximum term

when committing an offender to the Department of Health and Social Services.

The Parole Board's control over a parolee actually continues until the expiration of his maximum sentence. McCoy v. State, Del. Supr., 277 A. 2d 675 (1971). The limitation on power over the offender is his maximum term. There is no provision circumscribing the length of other dispositions.

Where an offender has been released on parole, any violation must be established at a hearing, whereupon the Parole Board may continue or revoke the parole or conditional release, or enter such other order as it may see fit. There is no judicial review of the findings of the Parole Board. Moore v. State, Del. Supr., 171 A. 2d 215 (1961).

11 Del. C. §4204 states a preference for partial confinement.

COMMENT

Delaware law is fundamentally in agreement with the Standard, although the ability to carry out effectively the concept of partial confinement (such as weekend commitments) is limited by lack of capacity and personnel. It would be helpful to the court and to the offender to enact a provision limiting the term of supervision, as suggested by Standard 2.4(b)(ii). This would prevent needless invasion of privacy and conserve judicial resources.

STANDARD

2.5 Total confinement.

(a) For each of the categories of offenses designated pursuant to section 2.1(a), the legislature should specify the term, if any, for which a sentence of commitment to a correctional institution can be imposed. Such sentences should be authorized in accordance with the structure detailed in Part III of this report.

DELAWARE LAW

The categories of offenses and applicable sentences are set forth in full under Standard 2.1(a).

COMMENT

Delaware law conforms to the Standard.

STANDARD

2.5(b) As stated in section 2.1(d), many sentences authorized by statute in this country are, by comparison to other countries and in terms of the needs of the public, excessively long for the vast majority of cases. Their length is undoubtedly the product of concern for protection against the most exceptional cases, most notably the particularly dangerous offender and the professional criminal. It would be more desirable for the penal code to differentiate explicitly between most offenders and such exceptional cases, by providing lower, more realistic sentences for the former and authorizing a special term for the latter. The Advisory Committee would endorse a special term in such a context, but only on the following assumptions:

(i) Provision for such a special term will be accompanied by a substantial and general reduction of the terms available for most offenders; and

(ii) Adequate criteria will be developed and stated in the enabling legislation which carefully delineate the type of offender on whom such a special term can be imposed; and

(iii) Precautions will be taken, such as by the requirement of procedures which assure the adequate development of information about the offender and by provision for appellate review of the sentence, to assure that such a special term will not be imposed in cases where it is not warranted; and

(iv) The sentence authorized in such cases will be structured in accordance with the principles reflected in section 3.1(c); and

(v) The necessary procedures will be developed in accordance with the principles reflected in section 5.5.

Such special terms should not be authorized for misdemeanors and other lesser offenses.

DELAWARE LAW

The Delaware Criminal Code authorizes a special term for one category of offenders, the habitual criminal. 11 Del. C. §4214. This statute describes the habitual criminal as (a) a person convicted of a felony 4 times in which case the court may impose a life sentence or (b) a person convicted 3 times of any among certain serious crimes specified by the legislature. These are burglary, murder, rape, manslaughter, kidnapping, assault, sodomy, and robbery. The court must impose life imprisonment on a type (b) felon unless it is imposing the death penalty.

COMMENT

Delaware law is not in accord with the Standard. Adoption of the habitual offender provisions as part of the Delaware Criminal Code did not lead to a corresponding general reduction in sentences for most offenders.

During the course of legislative consideration of the Code, all sentences recommended by the Governor's Committee responsible for drafting the Code were uniformly increased.

STANDARD

25(c) A sentence not involving total confinement is to be preferred in the absence of affirmative reasons to the contrary. Examples of legitimate reasons for the selection of total confinement in a given case are:

(i) Confinement is 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. On the other hand, community hostility to the defendant is not a legitimate basis for imposing a sentence of total confinement.

(d) It would be appropriate for the legislature to endorse in the penal code standards such as those specified in subsection (c). They are in any event commended to sentencing courts as guides to the exercise of discretion.

DELAWARE LAW

Refer to Standard 2.2 for the text of the applicable statute (11 Del. C. §4301) which endorses these principles.

COMMENT

Delaware law is in accord with the Standard.

STANDARD

2.6 Special facilities.

(a) It is desirable, both on a local and on a statewide, areawide or nationwide basis, that facilities be developed to provide special treatment for certain types of offenders, particularly the young, and that the court be authorized as a sentencing alternative to employ such facilities in appropriate cases.

(b) Employment of such facilities should not result in commitment or supervision for a period longer than would otherwise be authorized for the offenses involved. While it may be appropriate to except misdemeanors and other lesser offenses from this general principle, commitment or supervision for a longer period of time should not be authorized unless the following

conditions are met:

(i) a presentence report (sections 4.1-4.5) supplemented by a report of the examination of the defendant's mental, emotional and physical condition (section 4.6) has been obtained and considered; and

(ii) the court finds specifically that a proper treatment program is available and that the defendant will benefit from the program; and

(iii) the maximum period for which such commitment or supervision can extend is fixed by statute at no longer than two years; and

(iv) at the conclusion of one year the custodial or supervisory authorities are required to review the progress of the defendant and are required to 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; and

(v) as provided in section 6.3, the sentencing court has the authority at any time to terminate the commitment or supervision.

(c) Commitments or treatment programs other than as a part of the sentencing process following a criminal conviction are beyond the scope of this report.

DELAWARE LAW

Separate prison facilities are required for offenders under age 18. 11 Del. C. §6526; State ex rel. du Pont v. Ingram, Del. Supr. 293 A. 2d 289 (1972). If the sentence of the court extends beyond the time when a juvenile reaches 18, his detention after that time is treated in accordance with adult requirements and standards. State v. Nicholson, Del. Super. 334 A. 2d 230 (1975); see also Bartley v. Holden, Del. Super. 338 A. 2d 137 (1975).

Facilities to provide special services for certain types of offenders can be developed in accordance with 11 Del. C. §6524, §6525, and §6526, as set forth above under Standard 2.1(b).

There is no Delaware provision which is exactly equivalent to subparagraph (b). 11 Del. C. §4204(f) states that the court shall fix a maximum term of incarceration when committing an offender to the Department of Health and Social Services, but there is no legislatively mandated ceiling on this type of disposition.

Presentence reports and their effect on disposition are entirely within the court's discretion. 11 Del. C. §4331.

11 Del. C. §4333 is not in accord with subparagraph (b) as to length of supervision. It can extend as long as the maximum authorized for the offense.

[illegible] in the penal [illegible] (c). They are in any [illegible] of discretion.

[illegible] alternative sen[illegible] The effect of nonpayment [illegible] been paid and after [illegible] response to non[illegible] section 5.5.

(f) In fixing the maximum fine for some offenses, the legislature should consider the feasibility of employing an index other than a dollar amount in cases where it might be appropriate. For example, a fine relative to the amount of the gain might be appropriate in cases where the defendant has profited by his crime, or a fine relative to sales, profits, or net annual income might be appropriate in some cases, such as business or antitrust offenses, in order to assure a reasonably even impact of the fine on defendants of variant means.

(g) Legislative attention should also be devoted to the desirability of a special schedule of fines for offenses committed by corporations.

DELAWARE LAW

11 Del. C. §4207 allows the court to impose a fine for misdemeanors and violations. It states the maximum fine that can be fixed by the court for each class of misdemeanors and violations. It does not authorize the imposition of a fine for a felony.

The court may permit payment of a fine by installments under 11 Del. C. §4204(c). The decision to impose a fine, its amount and method of payment are all within the discretion of the court pursuant to the sections above mentioned.

Delaware has no provisions directing the court to consider any of the factors recommended by subparagraph (c) of the Standard in deciding whether to impose a fine.

The courts in Delaware are not authorized to impose a jail sentence in lieu of payment of a fine. 11 Del.C. §4105(a) provides that no person shall be imprisoned because of default of the payment of fines. In State v. Bender, Del. Super., 283 A. 2d 847 (1971), the court held that imposition at the time of sentence of a sentence extending the term of imprisonment in default of fine constitutes a violation of the equal protection clause of the Fourteenth Amendment. A fair alternative method of payment must be provided. The legislature provided this method in 11 Del. C. §4105(b) which sets up a system whereby an offender can pay off his fine by working for the Department of Health and Social Services.

The legislature has provided a special schedule of fines for offenses committed by a corporation. 11 Del. C. §4208.

COMMENT

Delaware law complies with the Standard in almost every respect. There are no provisions for employing an index of financial factors in imposing the fine or delineating the factors which the judge should consider

in deciding whether or not to impose one.

PART III. STATUTORY STRUCTURE AND JUDICIAL DISCRETION — TOTAL CONFINEMENT

3.1 Maximum term.

(a) For each of the categories of offenses designated pursuant to section 2.1(a), the legislature should specify the maximum period, if any, for which a sentence of commitment to a correctional institution may be imposed.

(b) If such a sentence is imposed, the court should be authorized to fix in the particular case any maximum period up to the legislative limit.

(c) If a special term is authorized for exceptional cases in accordance with the principles stated in section 2.5(b), it should be related in severity to the sentence otherwise provided for the offense. In addition, the following general principles should apply:

(i) The sentencing court should be authorized to fix a maximum term at any point from the maximum otherwise applicable up to a legislatively prescribed limit. As an outside limit for extreme cases, twenty-five years ought to be the maximum authorized prison term;

(ii) The court should be authorized to fix a minimum term in accordance with the principles stated in section 3.2;

(iii) Whether to sentence a particular offender to the normal term or to the special term should be a matter for the discretion of the sentencing court. Such discretion should be exercised in favor of imposing a special term only if application of the specified 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.

DELAWARE LAW

The legislature has specified a maximum term of imprisonment for each of the categories of offenses designated pursuant to Standard 2.1(a) (see that section for reproduction of the statute). The Uniform Controlled Substances Act has a similar schedule of offenses and maximum penalties. 16 Del. C. §§4751-78.

The court is given the power in the above cited statutes to authorize any maximum term up to the legislative limit, except in the offenses which carry a mandatory term as discussed under Standard 2.1(c).

A special term is authorized for habitual criminals under 11 Del. C.

§4214, though it is not in accord with the principles stated in Standard 2.5(b). The sentencing court is authorized, or in some cases required, to impose a sentence of life imprisonment. The court is not authorized to fix a minimum term for such an offender. Whether to sentence an offender to a special term is not a matter within the discretion of the court. It depends entirely on the number and types of felonies of which the offender has been convicted.

COMMENT

Delaware law is not in accord with the Standard's recommendations as to when and how a special term sentence should be implemented.

STANDARD

3.2 Minimum term.

(a) Because there are so many factors in an individual case which cannot be predicted in advance, it is unsound for the legislature to require that the court impose a minimum period of imprisonment which must be served before an offender becomes eligible for parole or for the legislature to prescribe such a minimum term itself. It is likewise unsound for the legislature to condition parol eligibility upon service of a specified portion of the maximum term.

(b) While recognizing that there are in addition substantial arguments against judicial authority to select and impose minimum sentences, a majority of the Advisory Committee would support a statute which authorizes but does not require the sentencing court to impose, within carefully prescribed legislative limits, a minimum sentence which must be served before an offender becomes eligible for parole.

(c) Minimum sentences are rarely appropriate, and should in all cases be reasonably short. Authority to impose a minimum term should be circumscribed by the following statutory limitations:

(i) The legislature should specify for each of the categories of offenses designated pursuant to section 2.1(a) the highest minimum period of imprisonment which can be imposed;

(ii) Minimum sentences as long as ten or fifteen years should be strictly confined to life sentences. Longer minimum sentences should not be authorized;

(iii) In order to preserve the principle of indeterminacy, the court should not be authorized to impose a minimum sentence which exceeds one-third of the maximum sentence actually imposed;

(iv) The court should not be authorized to impose a minimum sentence until a presentence report (sections 4.1-4.5), supplemented by a report of the examination of the defendant's mental, emotional and physical

condition (section 4.6), has been obtained and considered;

(v) The court should be directed to consider prior to the imposition of a minimum term whether making a non-binding recommendation to the parole authorities respecting when the offender should first be considered for parole will satisfy the factors which seem to call for a minimum term. Such a recommendation should be required to respect the limitations provided in subsections (ii) and (iii);

(vi) Imposition of a minimum sentence should require the affirmative action of the sentencing court. The court should be authorized to impose a minimum sentence only after a finding that confinement for a minimum term is necessary in order to protect the public from further criminal conduct by the defendant;

(vii) As provided in section 6.2, the court should be authorized to reduce an imposed minimum sentence to time seved upon motion of the corrections authorities made at any time.

DELAWARE LAW

There is a legislatively imposed minimum term only for certain offenses and categories of offenses. For a class B felony the minimum term is 3 years. For a class C, it is 2 years. 11 Del. C. §4205(b) (2) and (3). The offenses described under Standard 2.1(c) each have a minimum term. Parole eligibility is conditioned upon service of a specified portion, one-third of the term imposed by the court. 11 Del. C. §4346(a). The minimum term to be served before an offender is eligible for parole is not within the power of the judiciary. Minimum sentences of 15 years are limited to life sentences. 11 Del. C. §4346(c). The court must impose a definite sentence under 11 Del. C. §3901(a) and after the offender has served 120 days or one-third of the sentence imposed, whichever is greater, then he is eligible for parole. Stirparo v. State, Del. Super., 297 A. 2d 406 (1972), construing 11 Del. C. §4346(a). In 1975, the legislature enacted a mandatory three-year minimum sentence for robbery in the first degree. 11 Del. C. §832(c).

The court can make a recommendation to the Board of Parole to reduce the minimum term of eligibility. The Board has discretion in this matter. 11 Del. C. §4346(b). Imposition of a minimum sentence requires no affirmative action of the court. Affirmative action is required for the reduction of the legislatively imposed minimum. Where the court wishes to impose a term of imprisonment for a class B or class C felony, it must impose at least 3 years for the former and 2 years for the latter.

COMMENT

Delaware law is not in accord with the Standard in several particulars. The minimum sentences imposed are a result of legislative rather than judicial action. The court is afforded very little input into the process. According

to the Standard, in the few cases where a minimum sentence is necessary or appropriate, the court should have the power to impose it rather than the legislature or the Board of Parole.

STANDARD

3.3 Habitual offenders.

(a) Sentences authorized under present habitual offender legislation should be revised, where necessary, to conform to the following standards:

(i) Any increased term which can be imposed because of prior criminality should be related in severity to the sentence otherwise provided for the new offense;

(ii) The sentencing court should be authorized to fix a maximum term at any point from the maximum otherwise applicable up to a legislatively prescribed limit. As an outside limit for extreme cases, twenty-five years ought to be the maximum authorized prison term;

(iii) The court should be authorized to fix a minimum term in accordance with the principles stated in section 3.2.

(b) Whether to sentence a particular offender to the normal term or to a special term on grounds of habitual criminality should be a matter for the discretion of the sentencing court, and should be determined at the time of sentencing. An additional term should only be permitted if the court finds that such a 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 offender has previously been convicted of two felonies committed on different occasions, and the present offense is a third felony committed on an occasion different from the first two. A prior offense committed within another jurisdiction may be counted if it was punishable by confinement in excess of [one year]. A prior offense should not be counted if the offender has been pardoned on the ground of innocence, or if the conviction has been set aside in any 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 prison sentence or other commitment imposed as a result of a prior felony conviction; and

(iii) The offender was more than [21] years old at the time of the commission of the new offense. The court in addition should be required to comply with a procedure consistent with the principles reflected in section 5.5.

DELAWARE LAW

No accurate relation is established in the Delaware law between the

increased term which can be imposed and the sentence otherwise provided for the latest offense. An offender can receive a life sentence for conviction of any four felonies, whether they were all class A felonies for which he would be eligible for a life sentence anyway or class E felonies which carry a maximum of 7 years in prison. 11 Del. C. §4214. The Uniform Controlled Substances Act provides a table of additional maximum terms for each prohibited act on its schedule of offenses. 16 Del. C. §4763. The outside limit to the maximum authorized sentence for a habitual offender is life imprisonment in the Delaware Criminal Code. The Uniform Controlled Substances Act provides for a rising scale of additional penalties up to 99 years.

Whether to sentence an offender to an additional term on the basis of habitual criminality is not within the discretion of the court. It is mechanically triggered by the conviction of a legislatively determined number of felonies. In Gibbs v. State, Del. Supr.,208 A. 2d 306 (1965), the court defined habitual criminality as a status and not a separate offense under Delaware law.

COMMENT

Delaware law is not in accord with the Standard. The thrust of the recommendations of the Standard is toward individualized sentencing, whereas Delaware law requires legislatively mandated sentences for habitual offenders.

STANDARD

3.4 Multiple offenses: same state; concurrent and consecutive terms.

(a) After convictions of multiple offenses which are separately punishable or in cases where the defendant is serving a prison sentence at the time of conviction, the question of whether to impose concurrent or consecutive sentences should be a matter for the discretion of the sentencing court.

(b) Consecutive sentences are rarely appropriate. Authority to impose a consecutive sentence should be circumscribed by the following statutory limitations:

(i) The aggregate maximum of consecutive terms should not be permitted to exceed the term authorized for an habitual offender (section 3.3) for the most serious of the offenses involved. If there is no provision for an habitual offender for the offenses involved, there should be a ceiling on the aggregate of consecutive terms which is related to the severity of the offenses involved; and

(ii) The aggregate minimum of consecutive terms should be governed by the limitations stated section 3.2; and

(iii) The court should not be authorized to impose a consecutive sentence until a presentence report (sections 4.1-45.), supplemented by a report of the examination of the defendant's mental, emotional and physi-

cal condition (section 4.6), has been obtained and considered; and

(iv) Imposition of a consecutive sentence should require the affirmative action of the sentencing court. The court should be authorized to impose a consecutive sentence 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.

These limitations should also apply to any sentence for an offense committed prior to the imposition of sentence for another offense, whether the previous sentence for the other offense has been served or remains to be served.

(c) Corrections and parole authorities should be directed to consider an offender committed under multiple sentences as though he had been committed for a single term the limits of which were defined by the cumulative effect of the multiple sentences.

DELAWARE LAW

There is no Delaware statute which is precisely on point. 11 Del. C. §3901 (b) provides for a case in which an offender is already serving one prison term at the time of imposition of another. ". . . the said sentence shall begin to run and be computed, either from the date of imposition thereof or from the expiration of such other sentence or sentences, as the court, shall, in its discretion, direct." There is no provision for a simultaneous conviction of several felonies but the court would have discretion to sentence consecutively or concurrently. Several individual offenses state that the sentence imposed shall not run concurrently: escape, 11 Del. C. §1253; assault in a detention facility, 11 Del. C. §1254; a second conviction for robbery, Del. C. §832.

In State v. Honie, Del. Supr., 310 A. 2d 872 (1973), the court praised the "rule" of merger of sentences as appealing to reason. The rule was held to preserve the integrity of 11 Del. C. §1447, the statute on possession of a deadly weapon during the commission of a felony. Under this statute, the sentence cannot be suspended, and the offender is not eligible for parole or probation until serving five years, rather than the three years usually applicable to a class B felony. However, the sentence can be merged with the sentence for the principal felony and this gives the sentencing court some degree of flexibility in this type of case.

COMMENT

The Delaware law is substantially in accord with the Standard. Rather than having any mandatory consecutive terms the Standard would give the court the authority to decide the method that the sentence should run in all cases, but the A.B.A. commentary to this section recognizes that in instances where an offender is convicted of committing a crime while in prison

a consecutive sentence may sometimes be appropriate.

STANDARD

3.5 Multiple offenses: different states.

(a) The failure to integrate prison sentences for crimes committed in different states seriously inhibits a consistent, coherent treatement program during confinement. Similarly, detainers typically prevent the phasing of the individual back into the community at the optimal time. It is therefore highly desirable that multiple sentences of imprisonment imposed by different states be served at one time and under one correctional authority. It is also desirable that all outstanding charges of offenses committed in different states be disposed of promptly. Methods of implementing these principles by necessary interstate and federal-state agreements should be explored and effected.

(b) As a preliminary and immediate step towards the solution of these problems, the legislature should require that sentencing courts 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 should apply in such cases:

(i) The court should not be empowered to impose a sentence which when added to the out-of-state sentences would exceed any limitations (section 3.4) which would be in effect had all of the offenses occurred within the state of the sentencing court;

(ii) The court should be authorized to 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 to be served consecutively to an out-of-state sentence are rarely appropriate. Imposition of such a sentence should require the affirmative action of the sentencing court, and should be permitted 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.

(c) Subject to any permissible cumulation of sentences by the sentencing court (subsection [b]), the legislature should also direct that prison authorities automatically award credit against the maximum term and any minimum term of an in-state sentence for all time served in an out-of-state institution since the commission of the offense. In addition, the legislature should provide that in no event should detainers have the effect of impairing or postponing parole eligibility or in any way affecting the conditions of serving a sentence.

COMMENT

No Delaware statute has been found on this point. The Committee

favors adoption of the Standard.

STANDARD

3.6 Credit.

(a) Credit against the maximum term and any minimum term should be given to a 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 conduct on which such a charge is based. This should specifically include credit for 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 should 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 a re-prosecution, this should include credit 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 should be given for all time served since the commission of the offenses on which the sentences were based.

(d) If the defendant is arrested on one charge and later prosecuted on another charge 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 should 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 should be awarded by the procedure specified in section 5.8.

DELAWARE LAW

Credit is allowed against a sentence imposed on a defendant for any period of incarceration in a state institution before sentence. 11 Del. C. §3901(b). The constitutional guarantee against multiple punishments for the same offense requires that time already served be credited in imposing sentence upon a new conviction for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969).

COMMENT

Delaware law is in accord with the Standard, as far as it goes. The Committee favors adoption of more comprehensive rules governing credit in accord with the Standard.

STANDARD

3.7 Reduction of conviction.

If the defendant has been convicted of a felony, and if the court, considering the nature and circumstances of the offense 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 should be authorized to reduce the offense to a lower category of felony, or to a misdemeanor, and to impose sentence accordingly.

DELAWARE LAW

There is no rule which would give the court the power to reduce the class of offense for which an offender is about to be sentenced. 11 Del. C. §4204(a) would appear to prohibit the judge from taking this action. "Every person convicted of an offense shall be sentenced in accordance with this Criminal Code." This finality is softened considerably by the fact that plea bargaining is a recognized practice in the courts, giving a little flexibility to the system. See Hinckle v. State, Del. Supr., 189 A. 2d 432 (1963), in which the supreme court ordered the sentencing court to honor the plea arrangement made by the prosecutor. In accord, Hamilton v. State, Del. Supr., 285 A. 2d 807 (1971).

COMMENT

Delaware law is not in accord with the Standard.

STANDARD

3.8 Re-sentences.

Where a conviction or sentence has been set aside on direct or collateral attack, the legislature should prohibit a new sentence for the same offense or a different offense based on the same conduct which is more severe than the prior sentence less time already served.

DELAWARE LAW

The double jeopardy protection clause does not impose an absolute

bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded from imposing a new sentence, whether greater or less that the original sentence, in light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities. In order to insure the absence of a motivation of retaliation, the United States Supreme Court has concluded that, whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. North Carolina v. Pearce, 395 U.S. 711 (1969).

COMMENT

The Committee recommends adoption of the Standard. See the Comparative Study on Appellate Review of Sentences.

PART IV. INFORMATIONAL BASIS FOR SENTENCE

4.1 Presentence report; general principles.

(a) The legislature should supply all courts trying criminal cases with the resources and supporting staff to permit a presentence investigation and a written report of its results in every case.

(b) The court should explicitly be authorized by statute to call for such an investigation and report in every case. The statute should also provide that such an investigation and report should be made in every case where incarceration for a year or more is a possible disposition, where the defendant is less than [21] years old, or where the defendant is a first offender, unless the court specifically orders to the contrary in a particular case.

(c) Standards relating to the preparation and contents of the presentence report will be developed in a separate report on probation.

DELAWARE LAW

Superior Court Criminal Rule 32(c) provides for a presentence investigation and report prior to the imposition of sentence or the granting of probation upon the court's direction. The resources and staff to produce presentence reports for the superior court and the court of common pleas are provided for in 11 Del. C. §4335. The superior court is responsible for the appointment and administration of such staff. All other presentence reports are prepared by the probation and parole counsellors and the Department of Health and Social Services, pursuant to 11 Del. C. §4321.

The court may call for a presentence investigation and report in every case in accordance with 11 Del. C. §4331(a) and Rule 32(c). A presentence investigation is not mandatory for any case or class of cases.

COMMENT

Delaware law was recently changed to make the presentence report a creature of the sentencing court's discretion. Formerly, the Code required a presentence report in every case which could result in a sentence of 6 months or more. The Standard recommends that a presentence report be required where the potential incarceration is one year or more, the offender is less than 21 or a first offender. In these types of cases, the report may be invaluable. It should be required rather than merely authorized so that every offender will have the benefit of an informed disposition when the circumstances of his case make it especially important.

STANDARD

4.2 Presentence report: when prepared.

(a) Except as authorized in subsection(b), the presentence investigation should not be initiated until there has been an adjudication of guilt.

(b) It is appropriate to commence the presentence investigation prior to an adjudication of guilt only if:

(i) the defendant, with the 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 presentence investigation comes to the attention of the prosecution, the court, or the jury, prior to an adjudication of guilt. The court should be authorized, however, to examine the report prior to the entry of a plea on request of the defense and the prosecution.

DELAWARE LAW

According to 11 Del. C. §4331, a presentence investigation is only ordered after a conviction. However, under Superior Court Criminal Rule 32(c) the court can direct a presentence report to be made at any time "before the imposition of sentence or the granting of probation." This report is not submitted to the court until after a plea or verdict of guilty.

COMMENT

Delaware law is in accord with the Standard.

STANDARD

4.3 Presentence report: disclosure; general principles.

The presentence report should not be a public record. It should be

available only to the following persons or agencies under the conditions stated:

(i) The report should be available to the sentencing court for the purpose of assisting it in determining the sentence. The report should also be available to all judges who are to participate in a sentencing council discussion of the defendant (section 7.1);

(ii) The report should be available to persons or agencies having a legitimate professional interest in the information likely to be contained therein. Examples of such persons or agencies would be a physician or psychiatrist appointed to assist the court in sentencing, an examining facility, a correctional institution, or a probation or parole department;

(iii) The report should be available to reviewing courts where relevant to an issue on which an appeal has been taken;

(iv) The report should be available to the parties under the conditions stated in section 4.4.

DELAWARE LAW

11 Del. C. §4322(a) states that the presentence report "shall be privileged." It is available to the courts and also to the Board of Parole, Board of Pardons, and the Attorney General's office.

There is no language in 11 Del. C. §4322 which explicitly directs that the reviewing court should receive a copy of the presentence report. In Cannon v. State, Del. Supr., 196 A. 2d 399 (1963), the court specifically makes reference to the fact that it has the presentence report, while in Seoney v. State, Del. Supr., 211 A. 2d 908 (1965), the court regrets that it does not have a copy of the presentence report. Both cases were appeals from a sentence, and there was no explanation in the latter case for the failure to receive this important document.

The superior court and the court of common pleas each have their own rules as to the disclosure of the presentence reports. In the superior court there is no provision for disclosure to anyone except the judge. According to State v. Moore, Del. Supr., 108 A. 2d 675 (1954), the Attorney General's office also has access to the report. In practice, presentence reports are generally available, although the officer's recommendations are not disclosed.

Court of Common Pleas Criminal Rule 32(c) (3) states that the presentence report is not a public record. It enumerates the Department of Justice, the Department of Corrections and the Bureau of Probation as agencies which have a right to inspect the document. In addition, the court's discretion, the report may also be made available to persons or agencies having a legitimate professional interest therein.

COMMENT

Court of Common Pleas Criminal Rule 32(c) (3) and the 11 Del. C. §4322 provision for presentence reports other than those prepared for the superior court or court of common pleas are in compliance with the Standard. The superior court should modify its Rule 32 to conform with the Standard. As to 4.3 (iii) the rule should be amended to give the court reviewing a conviction or a sentence full access to the presentence report. This is especially crucial in the case where the sentence is being appealed. The reviewing court should have all of the information that was available to the sentencing court in order to properly evaluate the validity of the sentence. This would introduce uniformity into the reviewing procedure and aid the courts in reaching a just disposition in every case.

STANDARD

4.4 Presentence report: disclosure; parties.

(a) Fundamental fairness to the defendant requires that the substance of all derogatory information which adversely affects his interests and which has not otherwise been disclosed in open court should be called to the attention of the defendant, his attorney, and others who are acting on his behalf.

(b) This principle should be implemented by requiring that the sentencing court permit the defendant's attorney, or the defendant himself if he has no attorney, to inspect the report. The prosecution should also be shown the report if it is shown to the defense. In extraordinary cases, the court should be permitted to except from disclosure 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 should be required to state for the record the reasons for its action and to inform the defendant and his attorney that information has not been disclosed. The action of the court in excepting information from disclosure should be subject to appellate review.

(c) The resolution of any controversy as to the accuracy of the presentence report should be governed by the principles stated in sections 4.5(b), 5.3(d), 5.3(f), and 5.4(a).

DELAWARE LAW

The law in Delaware is somewhat fragmented in this area. As noted

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above, 11 Del. C. §4322 provides the general statutory scheme, while some of the individual courts have their own rules to follow. The general statute states:

> . . . the court may, in its discretion, permit the inspection of the report or parts thereof by the offender or his attorney or other persons who in the judgment of the court have a proper interest therein. . . .

The court of common pleas gives the presentence report to the defendant and his attorney for inspection as a matter of right in its Rule 32(c) (3). Family Court Rule 260(a) requires the court, upon request, to make known to the party in interest or to his attorney, the substance of all reports or other information upon which the judgment, sentence or disposition is based. The superior court has no rule permitting the defendant access to the presentence reports. The case law would indicate that it is not done in practice. State v. Moore, Del. Supr., 108 A. 2d 675 (1954), held that the presentence report cannot be disclosed to the defendant or to counsel because it would unduly delay the sentencing process and chill possible sources of information if it were to be revealed. The court stated, "the rule of non-disclosure should prevail generally unless there are unusual circumstances or reasons to justify an exception to the general rule." 108 A. 2d at 680.

COMMENT

Delaware is not entirely consistent in itself or with the Standard. There is no basis for having different positions on disclosure taken by each court. The Rule in the court of common pleas states the position of the Standard very well. The family court should allow access to the report itself in every case rather than revealing the substance of it on request. The Superior Court Rule should be changed to comply with the Standard.

STANDARD

4.5 Presentence report: time of disclosure; presentence conference.

(a) The information made available to the parties under section 4.4 should be disclosed sufficiently prior to the imposition of sentence as to afford a reasonable opportunity for verification.

(b) In cases where the presentence report has been open to inspection, each party should be required prior to the sentencing proceeding to notify the opposing party and the court of any part of the report which he intends to controvert by the production of evidence. It may then be advisable for the court and the parties to discuss the possibility of avoiding the reception of evidence by a stipulation as to the disputed part of the report. A record of the resolution of any issue at such a conference should be preserved for inclusion in the record of the sentencing proceeding (section

5.7[a] [iii]).

DELAWARE LAW

None of the provisions of disclosure specify a time table for communicating the presentence report of the offender. Only the family court, in Rule 260(c), affords the offender an opportunity to object to and refute information contained in the presentence report. There is no provision in any of the other court rules which allows the offender to controvert the statements and facts of the presentence report.

COMMENT

Delaware law is not in accord with the Standard. The Committee recommends its adoption. It would be rather a futile gesture to allow the offender to inspect his presentence report if he is not afforded an opportunity to dispute possible discrepancies which may be very weighty factors in the court's decision on sentencing. There should be a provision which ensures that the defendant will have notice of what information is at the court's disposal and an opportunity to produce evidence, however informally, to correct any errors.

STANDARD

4.6 Additional services.

(a) The sentencing decision is of such complexity that each sentencing court must have available to it a broad range of services and facilities from which it can obtain more complete information about the defendant's mental, emotional and physical condition than can be afforded in the presentence report. The court should be able to employ such services in any case in which more detailed information of this type is desired as the basis for a sentence.

(b) The need for such additional services can and should be met by a combination of local services or facilities, such as by authority to employ local physicians or clinics on a case-by-case basis, and of regional, statewide or nationwide services or facilities, such as a central reception and diagnostic center.

(c) There is an urgent need for the various disciplines which are in a position to provide such services to develop professional standards by which high quality can be assured.

(d) Reports which result from the use of such services or facilities should be subject to the same disclosure and verification provisions as those which govern presentence reports (sections 4.3 - 4.5, 5.4).

DELAWARE LAW

11 Del. C. §6523 sets up a diagnostic branch within the Department of Corrections consisting of social, medical, psychiatric and other appropriate services. The statute states:

> At the request of any sentencing court, the diagnostic service shall, to the extent possible, receive for study and report to the court concerning any person who has been convicted, is before the court for sentencing and is subject to commitment to the Department.

This section recognizes the value of interdisciplinary sentencing models. There is no provision on the disclosure of these reports other than those discussed under Standards 4.3 and 4.4.

COMMENT

Delaware law adheres, for the most part, to the principles enunciated in the Standard. Rules on disclosure should be developed in accordance with the conditions in 4.3 and 4.4.

PART V. SENTENCING PROCEDURES

5.1 Sentencing judge.

(a) If guilt was determined after a trial, the judge who presided at the trial should impose the sentence unless there are compelling reasons in a specific case to provide otherwise. To accommodate cases where it becomes necessary for another judge to impose the sentence, a system should be established to acquaint the new judge with what occurred at the trial.

(b) If guilt was determined by plea, it is still desirable that the same judge who accepted the plea impose the sentence. It is recognized, however, that the rotation practices of many courts make it impossible in many instances for the same judge to sit in both capacities. In any event, the judge who imposes sentence should ascertain the facts concerning the plea and the offense.

(c) Management of the docket should be controlled by the court and should not be subject to manipulation by either party. Where possible, it is desirable that the same judge sentence all defendants who were involved in the same offense.

DELAWARE LAW

As a general rule, the judge who presides at trial also sentences. This is not true of the judge who accepts a guilty plea. See the Comparative Study on The Function of the Trial Judge. The superior court and the court

of common pleas have identical rules which deal with the situation of a judge's disability after verdict or a finding of guilt. Rule 25(b) provides that where the judge before whom the trial took place becomes disabled, another judge can perform the sentencing function. If the new judge believes he cannot carry out the sentencing duties because he did not preside at the trial, he may grant a new trial.

COMMENT

Delaware law is partially in accord with the Standard. The chief justice on January 14, 1975 issued a directive requiring superior court control of its criminal trial docket beginning in June 1975. The Committee would recommend a change in present practice to provide for sentencing by the judge who accepts a guilty plea, as stated in the Standard.

STANDARD

5.2 Multiple offenses: consolidation for sentencing; pleading to prior offenses.

(a) To the extent possible, all outstanding convictions should be consolidated for sentencing at one time. All outstanding charges should be disposed of promptly and should likewise be consolidated for sentencing at one time. Charges filed after sentencing should be promptly prosecuted. Any sentence imposed on an offender already under sentence for another offense should be integrated with the prior sentence.

(b) After conviction and before sentence, the defendant should be permitted to plead guilty to other offenses he has committed which are within the jurisdiction of the sentencing court or any other court of coordinate or inferior jurisdiction in the same state. The plea should not be accepted without the written consent of the official responsible for prosecuting the charge. Submission of such a plea should constitute a waiver of any objections which the defendant otherwise 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 should sentence the defendant for all of the offenses in one proceeding, subject to the limitations on consecutive sentences stated in section 3.4.

DELAWARE LAW

Superior Court Criminal Rule 13 allows a defendant to be tried on two or more informations, if the offenses could have been joined in a single information. After conviction in such a case, the offender would be sentenced for each offense. There is no other provision which is relevant to consolidation for purposes of sentencing. The rule of merger of sentences set forth in State v. Honie, Del. Supr., 310 A. 2d 872 (1973), would be applicable in

this type of case.

COMMENT

The Committee recommends adoption of the Standard.

STANDARD

5.3 Duties of counsel.

(a) The duties of the prosecution and defense attorneys do not cease upon conviction. While it should be recognized that sentencing is the function of the court, the attorneys nevertheless have a duty of assisting the court in as helpful a manner as possible.

(b) The prosecutor should recognize that the severity of the sentence is not necessarily an indication of the effectiveness or the efficiency of his office. In addition, the prosecutor, no less than the judge, has the duty to resist public clamor or improper outside pressure of any sort.

(c) Although there will be occasions when sentencing recommendations by the prosecutor are appropriate, the prosecutor ordinarily should not make any specific recommendations as to the appropriate sentence.

(d) The duties of the prosecutor with respect to each specific sentnece should include the following steps:

(i) The prosecutor should satisfy himself that the factual basis for the sentence will be both adequate and accurate, and that the record of the sentencing proceeding will accurately reflect relevant circumstances of the offense and characteristics of the defendant which were not disclosed during the guilt phase of the case:

(A) If the prosecutor has access to the presentence report, he should measure it against information at his disposal and prepare himself to amplify parts which do not sufficiently reveal matters which are relevant to a proper sentence. The prosecutor should also take proper steps to controvert any inaccuracies in the report. The first such step should normally involve an attempt to avoid the formal production of evidence in open court by reaching an informal agreement with the defense attorney;

(B) If the prosecutor does not have access to the presentence report, he should present at the sentencing proceeding those facts at his disposal which are not known by him to be before the court and which are relevant to a proper sentence;

(ii) The prosecutor should disclose to the defense and to the court at or prior to the sentencing proceeding all information in his files which is favorable to the defendant on the sentencing issue;

(iii) If a plea was the result of plea discussions or an agreement which included a position on the sentence, the prosecutor should disclose its terms to the court;

(iv) The prosecutor should determine whether there are grounds for the imposition of a special term based on particular characteristics of the defendant (sections 2.5 [b], 3.1 [c], 3.3). If he finds such grounds, he should cause the notice contemplated by section 5.5(b)(i) to be served on the defendant and his attorney. He may then prepare a factual case for presentation at the sentencing proceeding.

(e) The defense attorney should recognize that the sentencing stage is the time at which for many defendants the most important service of the entire proceeding can be performed.

(f) The duties of the defense attorney with respect to each specific sentence should include the following steps:

(i) The attorney should familiarize himself with all of the sentencing alternatives that are available for the offense of which his client has been convicted and with community and other facilities which may be of assistance in a plan for meeting the needs of the defendant. Such preparation should also include familiarization with the practical consequences of different sentences, and with the normal pattern of sentences for the offense involved;

(ii) The attorney should explain the consequences of the likely sentences to the defendant and assure himself that the defendant understands the nature of the sentencing procceding. The attorney should ascertain the views of his client once such information has been conveyed;

(iii) The attorney should satisfy himself that the factual basis for the sentence will be both adequate and accurate, and that the record of the sentencing proceedings will accurately reflect relevant circumstances of the offense and characteristics of the defendant which were not disclosed during the guilt phase of the case:

(A) If the attorney has access to the presentence report, this duty should at a minimum involve verification of the essential bases of the report and amplification at the sentencing proceeding of parts which seem to be inadequate. The attorney should also take proper steps to controvert any inaccuracies in the report. The first such step should normally involve an attempt to avoid the formal production of evidence in open court by reaching an informal agreement with the prosecutor;

(B) If the attorney does not have access to the presentence report, this duty should at a minimum involve an attempt to the best of means at his disposal to ascertain the relevant facts. The attorney should also have the obligation to present at the sentencing proceeding all facts which are not known by him to be before the court and which in the interest of his client ought to be considered in reaching a sentence;

(iv) If a plea was the result of plea discussions or an agreement which included a position of the prosecutor on the sentence, the attorney should disclose its terms to the court;

(v) In appropriate cases, the attorney should make special

efforts to investigate the desirability of a disposition which would particularly meet the needs of the defendant, such as probation accompanied by employment of community facilities or commitment to an institution for special treatment. If such a disposition is available and seems appropriate, the attorney, with the consent of the defendant, should make a recommendation at the sentencing proceeding that it be utilized.

(g) It is inappropriate for either prosecution or defense counsel to re-try an individual sentence in the media of public communication.

DELAWARE LAW

There are no rules which specifically direct the conduct of the prosecutor and the defense attorney during the sentencing process. The prosecutor is bound by DR 7-103 of the Code of Professional Responsibility. Section (b) commands the prosecutor to make timely disclosure to the counsel for the defendant of the existence of evidence "that tends to . . . reduce the punishment."

Both the prosecutor and the defense attorney are liable for failing to act competently under DR 6-101(A) (3) if they "[n]eglect a legal matter entrusted to" them. Other than these very generalized canons there are no statutes dealing with the behavior of the lawyers at the sentencing procedure.

COMMENT

It would be extremely helpful to prosecutors and to defense attorneys, not to mention offenders, to have a set of guidelines such as the ones delineated in this Standard. It would aid in the smooth adminstration of justice. The Committee recommends adoption of the Standard.

5.4 Sentencing proceeding.

(a) As soon as practicable after the determination of guilt and the examination of any presentence reports (sections 4.1 - 4.6), a proceeding should be held at which the sentencing court should:

(i) entertain submissions by the parties which are relevant to the sentence;

(ii) afford to the defendant his right of allocution;

(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) Where the need for further evidence has not been eliminated by a presentence conference (section 4.5[b]), evidence offered by the parties on the sentencing issue should be presented in open court with full rights of confrontation, cross-examination and representation by counsel.

DELAWARE LAW

Superior Court Criminal Rule 32(a) gives counsel for the offender the opportunity to speak on his behalf. In family court, the judge is given the benefit of any information known by the defendant which refutes the contents of the presentence report, under Rule 260(c). Rule 32(a) also affords the offender his right of allocution. There is no provision on plea bargains. In Hinckle v. State Del. Supr., 189 A. 2d 432, where it appeared affirmatively in the record that the judge had expressly rejected the bargain that had been struck between the State and the defendant, the reviewing court remanded the case for resentencing in accordance with the agreement.

COMMENT

Delaware law is in harmony with section (a) (i) and (ii) of the Standard. Since the plea bargaining mentioned in 5.4(a) (iii) does take place in Delaware, the Committee recommends adoption of a rule relating to this matter which is in accord with the Standard.

STANDARD

5.5 Special requirements.

(a) The sentencing court should be required to obtain and consider a presentence report (section 4.1 - 4.5) supplemented by a report of the defendant's mental, emotional and physical condition (section 4.6) prior to the imposition of a minimum term of imprisonment (section 3.2), a consecutive sentence (section 3.4), a sentence as an habitual offender (section 3.3), or a special term based on exceptional characteristics of the defendant (sections 2.5[b], 3.1[c]).

(b) The sentencing court should not be authorized to impose a sentence as an habitual offender (section 3.3) or a sentence based on exceptional characteristics of the defendant (sections 2.5[b], 3.1[c]) without taking the following additional steps:

(i) Written notice should be served on the defendant and his attorney of the proposed ground on which such a sentence could be based a sufficient time prior to the imposition of sentence so as to allow the preparation of a submission on behalf of the defendant; and

(ii) With the exception of the presentence report and any supplemental reports on the defendant's mental, emotional and physical condition all of the evidence presented to sustain the proposed grounds on which such a sentence could be based should be presented in open court with full rights of confrontation, cross-examination and representation by counsel. The defendant should be afforded an opportunity to offer opposition to the proposed action; and

(iii) The presentence report and any supplemental reports on the defendant's mental, emotional and physical condition should be disclosed to the prosecution and the defense at least to the extent required by sections 4.4 and 4.5; and

(iv) Each of the findings required as the basis for such a sentence should be found to exist by a preponderance of the evidence, and should be appealable to the extent normally applicable to similar findings; and

(v) If the conviction was by plea, it should 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 should not be subject to such a sentence unless he is first given an opportunity to withdraw his plea without prejudice.

(c) The procedure for revocation of a sentence not involving confinement and for revocation of a sentence involving partial confinement should conform as nearly as possible to the procedure outlined in subsections (b)(i) through (b)(iv) of this section. Standards dealing with the procedure for changes in the conditions under which such sentences will continue in effect will be set forth in a separate report dealing with probation.

DELAWARE LAW

The Delaware courts are not required to obtain and consider a presentence report. It is entirely discretionary. 11 Del. C. §4331; Superior Court Criminal Rule 32(c)(1); Family Court Rule 260.

None of the steps described are taken by the court in the case of a habitual offender. Where the defendant is liable for an increased sentence because of a previous conviction, some of the directions are followed. Under 11 Del. C. §4215, the defendant shall be tried on the issue of the prior convictions if he stands silent or denies them.

The procedure for revocation of a sentence not involving confinement is dealt with only so far as parole violation or revocation of conditional release in 11 Del. C. §4352. The court is not required to give notice, although an arrest warrant may be used. The offender is afforded a hearing, but the quantum of evidence required is not specified, nor does he have access to any reports upon which the Board of Parole may relying.

COMMENT

Delaware law does not comply with the Standard. The Committee recommends adoption of a rule to conform with the Standard.

STANDARD

5.6 Imposition of sentence.

In addition to reaching the conclusions required as a prerequisite to imposition of the sentence selected, when sentence is imposed the court:

(i) should make specific findings on all controverted issues of fact which are deemed relevant to the sentencing decision;

(ii) normally should state for the record in the presence of the defendant the reasons for selecting the particular sentence to be imposed. In the exceptional cases where the court deems it in the best interests of the defendant not to state fully in his presence the reasons for the sentence, the court should prepare such a statement for inclusion in the record;

(iii) should assure that the record accurately reflects time already spent in custody for which credit will be given under the provisions of section 3.6; and

(iv) should state with care the precise terms of the sentence which is imposed.

DELAWARE LAW

There are no statutes in Delaware corresponding to the suggestions made in paragraph 5.6(i), (ii) or (iii). Paragraph 5.6(iv) is covered in 11 Del. C. §3901(a) which states, "When imprisonment is a part of the sentence, the term shall be fixed, and the time of its commencement and ending specified." Frye v. State, Del. Supr., 236 A.2d 424 (1967), construed this section to mean that the quantum of time assigned by the court was controlling, in months and days, despite the specific date mentioned.

COMMENT

Delaware practice is generally in accord with the Standard. The Committee would favor the adoption of rules covering these matters.

STANDARD

5.7 Record.

(a) As in the case of all other procedings in open court, a record of the sentencing proceeding should be made and preserved in such a manner that it can be transcribed as needed. The following items should be available for inclusion in a transcription:

(i) a verbatim account of the entire sentencing proceeding, including a record of any statements in aggravation or mitigation made by the defendant, the defense attorney and the prosecuting attorney, together with

any testimony recieved of witnesses on matters relevant to the sentence and any statements by the court explaining the sentence;

(ii) a verbatim account 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 presentence report and 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 should be subject to examination by the parties to the extent provided in sections 4.3 and 4.4. The record should reveal what parts of such reports or documents have been disclosed to the parties and by what method such disclosure was made. It should also contain any record of a presentence conference held in accordance with section 4.5(b).

(b) Adequate resources should be provided to the court so as to permit the transmission of relevant sentencing information to the prison suthorities in the event of a commitment. If the defendant is sentenced to imprisonment for a maximum term in excess of one year, the court should be required to forward to the prison authorities a copy of the items described in section 5.7(a)(iii) and a verbatim transcript of the proceeding described in section 5.6. The court should also be authorized and encouraged to forward any other part of the record which is deemed relevant to the defendant's classification and treatment.

COMMENT

Delaware practice is generally in accord with the Standard. The Committee would favor codifying the present procedure in the form of a rule.

STANDARD

5.8 Procedure for awarding credit.

The credit required by section 3.6 should be awarded in the following manner:

(i) It is good practice for the parties to communicate to the court at the time of sentencing the facts upon which credit for time served prior to sentencing will be based;

(ii) It is good practice for the court to inform the defendant at the time of sentencing of his status on the issue of credit for time previously served;

(iii) The court should assure that the record accurately reflects the facts upon which credit for time served prior to sentencing will be computed;

(iv) The custodian should 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;

(v) The credit to be awarded against the sentence should be computed by the prison authorities as soon as practicable and automatically awarded;

(vi) The prison authorities should inform the defendant of his status as soon as practicable;

(vii) The defendant should be afforded an avenue of post-conviction review for the prompt disposition of questions which may arise as to the amount of credit which should have been awarded.

DELAWARE LAW

None of the suggestions of the Standard exists in statutory form in Delaware at the present time. The court awards the offender credit under 11 Del. C. §3901(b).

COMMENT

For the sake of standardization and a uniform application of the law, the Committee favors adoption of the Standard.

PART VI. FURTHER JUDICIAL ACTION

6.1 Authority to reduce: general.

(a) It may be appropriate to authorize the sentencing court to reduce or modify a sentence within a specified time after its imposition or the final resolution of an appeal if new factors bearing on the sentence are made known. It is inappropriate for defense counsel or others on the defendant's behalf to make an ex parte approach to the judge. It is likewise inappropriate for a judge to reduce or modify a sentence by any proceeding which does not occur in open court.

(b) Under no circumstances should the sentencing court be authorized to increase a term of imprisonment once it has been imposed.

DELAWARE LAW

The superior court under Rule 35(b) has the discretion to reduce or modify a sentence within 4 months after the imposition of sentence or dismissal of appeal. 11 Del. C. §4204(g) provides: "Where modification of judgment is not provided by rule of court, the court may modify a judgment within 90 days after it is ordered."

COMMENT

Delaware law is in accord with the Standard as stated in Section (a). There should be an additional provision to cover the possibility discussed in Section (b).

STANDARD

6.2 Authority to reduce: minimum term.

The sentencing court should be authorized to reduce an imposed minimum term (section 3.2) to time served upon motion of the corrections or releasing authorities made at any time.

DELAWARE LAW

11 Del. C. §4346(b) states:

Consistent with law, the Board, upon written recommendation of the court which imposed the sentence, or the Department, may reduce the minimum term of eligibility when the Board is satisfied that the best interest of the public and the welfare of the person will be served by such reduction.

COMMENT

The Delaware law is the direct opposite of the Standard. The Committee believes that the court should have the power to reduce and not be restricted to making recommendations.

STANDARD

6.3 Authority to terminate: use of special facilities.

In the event that commitment to a special type of facility is authorized for a period beyond the maximum sentence normally applicable to the offense (section 2.6[b]), the sentencing court should be authorized to terminate the commitment or any supervision at any time. The custodial or supervisory authorities should be required annually to review the progress of the defendant and to make a showing to the court to the effect that contemplated treatment is actually being administered to the defendant and outlining the progress which the defendant has made.

COMMENT

There is no provision for termination of commitment to special facilities. The Committee favors adoption of the Standard.

STANDARD

6.4 Modification of sentence: sentence not involving confinement or sentence to partial confinement.

(a) The sentencing court should be authorized to terminate at any time continued supervision or the power to revoke either a sentence not involving confinement or a sentence involving partial confinement. The court should also be authorized to lessen the conditions on which such sentences were imposed at any time, and similarly to shorten the time during which the power to revoke will exist.

(b) The court should be authorized to revoke a sentence not involving confinement or a sentence to partial confinement upon the violation of specified conditions or to increase the conditions under which such a sentence will be permitted to continue in effect. The sentencing alternatives which should be available upon a revocation should be the same as were available at the time of initial sentencing. Specifically, such alternatives should include the imposition of a fine or the imposition of a sentence to partial or total confinement.

(c) The court should 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 should respect the limitations on consecutive sentences expressed in section 3.4; 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 to partial confinement results in a sentence to total confinement, credit should be given for all time spent in custody during the sentence to partial confinement.

DELAWARE LAW

The power to revoke parole can be exercised by the Board of Parole "[a]t any time during release on parole or conditional release" according to 11 Del. C. §4352(a). The Board of Parole, rather than the court has the power to modify. For the persons who are on probation or serving a suspended sentence, 11 Del.C. §4332 states," . . . nothing in this chapter shall limit the authority of the court to impose or modify any general or specific conditions of probation or suspension of sentence."

Upon violation of a specified condition, the court has the power to continue or revoke probation or suspension of sentence, and may require the violator to serve the sentence imposed, or any lesser sentence, or any sentence

which might originally have been imposed. 11 Del. C. §4334(c).

There is no provision prohibiting the imposition of a sentence of total confinement unless the specified conditions are met. A recent amendment to 11 Del. C. §4352(g) requires the imposition of a consecutive sentence for parole violators who commit a crime while on parole.

Credit is given for all time spent incarcerated under 11 Del. C. §3901 (b) but there is no provision for awarding credit for time spent on probation or suspended sentence.

COMMENT

Delaware law is substantially in accord with the Standard except in requiring a consecutive sentence for a person who commits a crime while on parole. The law would be improved by the addition of the conditions set forth in Section (c) to ensure that a sentence of total confinement is reserved for the causes which truly warrant it. The Committee notes with concern the legislative tendency toward requiring confinement as a sentence and limiting the court's sentencing alternatives.

STANDARD

6.5 Modification of sentence: fines; nonpayment.

(a) The sentencing court should have the power at any time to revoke or remit a fine or any unpaid portion, or to modify the terms and conditions of payment. When failure to pay a fine is excusable, such authority should be exercised.

(b) Incarceration should not automatically follow the nonpayment of a fine. Incarceration should be employed only after the court has examined the reasons for nonpayment. It is unsound for the length of a jail sentence imposed for nonpayment to be inflexibly tied, by practice or by statutory formula, to a specified dollar equation. The court should be authorized to impose a jail term or a sentence to partial confinement (section 2.3) for nonpayment, however, within a range fixed by the legislature for the amount involved, but in no event to exceed one year. Service of such a term should discharge the obligation to pay the fine, and payment at any time during its service should result in the release of the offender.

(c) The methods available for collection of civil judgment for money should also be available for the collection of a fine, and should be employed in cases where the court so specifies.

(d) In the event of nonpayment of a fine by a corporation, the court should be authorized to proceed against specified corporate officers under subsection (b) or against the assets of the corporation under subsection(c).

DELAWARE LAW

There is no specific statute giving the court the power to modify or remit a fine. Under 11 Del. C. §4204(g), the court can modify any judgment if it does so within 90 days of imposition. According to 11 Del. C. §4105 no person who defaults on payment of a fine shall be ordered to be imprisoned because of such default. The offender is afforded an opportunity to pay his debt by working a specified number of hours for the Department of Health and Social Services. The methods of collection that are available for civil judgments are also available in criminal matters. 11 Del. C. §4104 (b) allows the offender to post a bond for the debt due the State. Section (c) of the same heading permits a person obligated to pay a fine to execute an assignment of his wages. Both alternatives are within the discretion of the court. There is no provision relating to the nonpayment of a fine by a corporation.

COMMENT

Delaware law on fines is generally in accord with the Standard. It would be helpful to adopt a provision similar to subsection (d).

PART VII. DEVELOPMENT OF SENTENCING CRITERIA

7.1 Sentencing council.

In all courts where more than one judge sits regularly at the same place, and wherever else it is feasible, it is desirable that meetings of sentencing judges be held prior to the imposition of sentence in as many cases as is practical. The meeting should be preceded by distribution of the presentence report and any other documentary information about the defendant to each of the judges who will participate. The purpose of the meeting should be to discuss the appropriate disposition of the defendants who are then awaiting sentence and to assist the judge who will impose the sentence in reaching a decision. Choice of the sentence should nevertheless remain the responsiblility of the judge who will actually impose it.

STANDARD

7.2 Sentencing institutes.

Provision should be made in every state for the convening of sentencing judges from time to time for the purpose of holding institutes or seminars to discuss problems related to sentencing. The particular goal of such proceedings should be to develop criteria for the imposition of sentences, to provide a forum in which newer judges can be exposed to more experienced judges, and to expose all sentencing judges to new developments and tech-

niques. Prosecutors, members of the defense bar, appellate judges, and corrections and releasing authorities should be encouraged to participate in such proceedings in order to develop a better understanding of their roles in the sentencing process.

STANDARD

7.3 Orientation of new judges.

In addition to regular sentencing institutes, a program should be developed for the formal orientation of new judges. This should include familiarization with sentencing alternatives, with the services available to the sentencing judge, with the purposes of sentencing and sentence procedures, with the nature of non-custodial facilities which can be utilized in sentencing, and with the nature of the facilities to which a sentenced offender may be committed.

STANDARD

7.4 Regular visitation of facilities.

Provision should be made for regular visits by every sentencing judge to each of the custodial and non-custodial facilities which can be utilized in framing a sentence. In cases where the judge chooses incarceration but does not select the institution of commitment, such visits should include familiarization with the process by which an offender is assigned to an institution.

COMMENT

Sentencing institutes have not been held for Delaware judges, as such, but superior court judges regularly attend College of Trial Judges, in Reno, Nevada, for training in sentencing and other related matters.

CHAPTER 11

PROBATION

PART I. GENERAL PRINCIPLES

1.1 Nature of sentence to probation.

(a) The legislature should authorize the sentencing court in every case to impose a sentence of probation. Exceptions to this principle are not favored and, if made, should be limited to the most serious offenses.

DELAWARE LAW

Under 11 Del. C. §4204, probation is an available sentence, either alone or together with a fine or a sentence of confinement, for all offenses other than Class "A" felonies and offenses as to which the legislature has specifically denied probation. These include, for example, possession of a deadly weapon during mmission of a felony (11 Del. C. §1447) and subsequent offenses of robbery after a first conviction of robbery (11 Del. C. §832). Superior Court Criminal Rule 32(e) provides the procedural mechanism for sentencing a convicted defendant to probation.

COMMENT

Delaware law is substantially in accord with the Standard. There could be some disagreement with respect to whether all of the offenses as to which probation is unavailable in Delaware are properly included in such category. The Committee notes with regret a legislative tendency toward limiting the availability of probation in an increasing number of cases.

STANDARD

1.1(b) In this report the term "probation" means a sentence not involving confinement which imposes conditions and retains authority in the sentencing court to modify the conditions of the sentence or to resentence the offender if he violates the conditions. Such a sentence should not involve or require suspension of the imposition or the execution of any other sentence.

DELAWARE LAW

Under 11 Del. C. §4204(c), a sentence of probation alone may be given or such sentence may be combined with a fine or sentence of confinement. Under 11 Del. C. §4332, conditions may be imposed upon probation, but there is no requirement that conditions must be imposed. The court has authority to terminate probation at any time of to modify the conditions thereof. 11 Del. C. §4333. Delaware judges frequently impose

and suspend sentences of confinement where probation is to be granted. See 16 Del. C. §4764, which provides for conditional discharge on probation, without a finding of guilt, in cases of first offenders charged with possession of certain drugs, such as marijuana or hallucinogens. This is not a final judgment for purposes of appeal.

COMMENT

Delaware law is in accord with the Standard.

STANDARD

1.1(c) Upon a sentence to probation, the court should not be required to attach a condition of supervision by the probation department if in its judgment supervision is not appropriate for the particular case.

COMMENT

There is no legal requirement that a condition of supervision by the probation department be attached to a sentence of probation. In limited cases, the family court, which has a very heavy involvement in the area of probation, places juveniles on probation without supervision.

STANDARD

1.1(d) The court should specify at the time of sentencing the length of any term during which the defendant is to be supervised and during which the court will retain power to revoke the sentence for the violation of specified conditions. Neither supervision nor the power to revoke should be permitted to extend beyond a legislatively fixed time, which should in no event exceed two years for a misdemeanor or five years for a felony.

DELAWARE LAW

Under 11 Del. C. §4333, the court sets the period of probation. This is limited to the maximum term available for the offense involved or one year, whichever is longer. 11 Del. C. §4334 provides for arrest pursuant to warrant issued upon evidence of violation of the terms of probation.

COMMENT

Delaware law is not entirely in accord with the Standard, which would limit the period of probation to two years for misdemeanors and five years for felonies.

STANDARD

1.1(e) A sentence to probation should be treated as a final judgment for purposes of appeal and similar procedural purposes.

DELAWARE LAW

Probation is a final appealable order. Korematsu v. United States, 319 U.S. 432 (1943).

COMMENT

Delaware law is in accord with the Standard.

STANDARD

1.1(f) Upon revocation of probation the court should have available the same sentencing alternatives that were available at the time of initial sentencing. The court should not foreclose any of these alternatives before revocation.

COMMENT

Delaware practice is in accord with the Standard except in cases where the courts suspend a specific sentence and place the defendant on probation. In that case, upon violation of probation, the defendant may undergo the sentence which was suspended, although in many cases probation is continued. It should be noted that Standard 1.1(b) would deny the availability of this procedure.

STANDARD

1.2 Desirability of probation.

Probation is a desirable disposition in appropriate cases because:

(i) it maximizes the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violations of law;

(ii) it affirmatively promotes the rehabilitation of the offender by continuing normal community contacts;

(iii) it avoids the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community;

(iv) it greatly reduces the financial costs to the public treasury of an effective correctional system;

(v) it minimizes the impact of the conviction upon innocent dependents of the offender.

STANDARD

1.3 Criteria for granting probation.

(a) The probation decision should not turn upon generalizations about types of offenses or the existence of a prior criminal record, but should be rooted in the facts and circumstances of each case. The court should consider the nature and circumstances of the crime, the history and character of the offender, and available institutional and community resources. Probation should be the sentence unless the sentencing court finds that:

(i) confinement is necessary to protect the public from further criminal activity by the offender; 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 offense if a sentence of probation were imposed.

(b) 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.

COMMENT

Delaware law recognizes the desirability of probation and generally makes it available except in the instances detailed under Standard 1.1(a). On the other hand, there is no clear statutory preference for probation as opposed to other forms of treatment. In the family court, probation is clearly preferred over confinement, where appropriate.

PART II. THE PRESENTENCE REPORT

2.1 Availability and use.

(a) All courts trying criminal cases should be supplied with the resources and supporting staff to permit a presentence investigation and a written report of its results in every case.

(b) The court should explicitly be authorized by statute to call for such an investigation and report in every case. The statute should also provide that such an investigation and report should be made in every case where incarceration for one year or more is a possible disposition, where the defendant is less than [21] years old, or where the defendant is a first offender, unless the court specifically orders to the contrary in a particular case.

DELAWARE LAW

The court may order a presentence report in every case. Superior Court Criminal Rule 32(c); 11 Del. C. §4331. The appointment of presentence officers is provided for in 11 Del. C. §4335, and such officers are available to provide presentence reports not only in superior court cases but also in lower court cases. The family court has its own probation staff, part of whom are involved in presentence reports. Previously, Delaware law provided for a mandatory presentence report in any case in which a sentence of six months or more was given. This provision, however, was recently amended, and there is no longer a mandatory presentence report.

COMMENT

Delaware law is generally in accord with the Standard, except for the effect of the amendment to §4331 discussed under Delaware law. The Committee favors the approach of the present law, which makes the ordering of a presentence report discretionary in all cases, while favoring the concept that it is often desirable to order a presentence report not only in the circumstances expressed in the Standard, but also when short-term incarceration is under consideration in order to assist the court in determining whether probation under conditions would be an appropriate alternative to incarceration.

STANDARD

2.2 Purpose of report.

The primary purpose of the presentence report is to provide the sentencing court with succinct and precise information upon which to base a rational sentencing decision. Potential use of the report by other agencies in the correctional process should be recognized as a factor in determining the content and length of the report, but should be subordinated to its primary purpose. Where the presentence investigation discloses information useful to other correctional agencies, methods should be developed to assure that this data is made available for their use.

STANDARD

2.3 Content, scope and length of report.

Presentence reports should be flexible in format, reflecting differences in the background of different offenders and making the best use of available resources and probation department capabilities. Each probation department should develop gradations of reports between:

(i) a short-form report for primary use in screening offenders in

order to assist in a determination of when additional and more complete information is desirable. Short-form reports could also be useful in courts which do not have adequate probation services;

(ii) a full report, which normally should contain the following items:

(A) a complete description of the offense and the circumstances surrounding it, not limited to aspects developed for the record as part of the determination of guilt;

(B) a full description of any prior criminal record of the offender;

(C) a description of the educational background of the offender;

(D) a description of the employment background of the offender, including any military record and including his present employment status and capabilities;

(E) the social history of the offender, including family relationships, marital status, interests and activities, residence history, and religious affiliations;

(F) the offender's medical history and, if desirable, a psychological or psychiatric report;

(G) information about environments to which the offender might return or to which he could be sent should probation be granted;

(H) supplementary reports from clinics, institutions and other social agencies with which the offender has been involved;

(I) information about special resources which might be available to assist the offender, such as treatment centers, residential facilities, vocational training services, special educational facilities, rehabilitative programs of various institutions to which the offender might be committed, special programs in the probation department, and other similar programs which are particularly relevant to the offender's situation;

(J) a summary of the most significant aspects of the report, including specific recommendations as to the sentence if the sentencing court has so requested.

A special effort should be made in the preparation of presentence reports not to burden the court with irrelevant and unconnected details.

DELAWARE LAW

11 Del. C. §4331(b) specifies the matters which are to be covered by the presentence report, including "the circumstances of the offense, the motivation of the offender, the criminal record, social hisotry, behavior pattern and present condition of the offender." The same section requires the presentence report to "include an evaluation of the offender's criminal conduct, and. . . note wherein the judicial alternatives of the court may play a role in the rehabilitation of the offender as a law-abiding citizen." The

investigation may include physical and mental examination of the offender.

COMMENT

Delaware law is substantially in accord with the Standard. The Standard, however, contains a fuller and more helpful description of the matters which should be contained in the report, and the Standard could be adopted by rule of court or by departmental action without the necessity for any legislative action.

STANDARD

2.4 When prepared.

(a) Except as authorized in subsection (b), the presentence investigation should not be initiated until there has been an adjudication of guilt.

(b) It is appropriate to commence the presentence investigation prior to an adjudication of guilt only if:

(i) the defendant, with the 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 presentence investigation comes to the attention of the prosecution, the court, or the jury prior to an adjudication of guilt. The court should be authorized, however, to examine the report prior to the entry of a plea on request of the defense and prosecution.

DELAWARE LAW

The presentence report may be prepared at any time during the proceeding, although it is typically prepared after the defendant is convicted. See 11 Del. C. §4331; Superior Court Criminal Rule 32(c). The court does not, however, examine the report in any case until the defendant has been convicted.

COMMENT

Delaware law is substantially in accord with the Standard.

STANDARD

2.5 Availability of report; challenge of its contents.

Standards dealing with the disclosure of the presentence report and the resolution of controversy as to its accuracy are developed in the separate report of this Advisory Committee on Sentencing Alternatives and Procedures.

COMMENT

The matter of disclosure of the presentence report is more fully discussed in the Comparative Sutdy on Sentencing Alternatives and Procedures. It should be noted, however, that only in the family court is the presentence report always available upon request, subject to appropriate court-imposed limitations. See Family Court Rule 260. The adoption of a similar rule should be considered by other courts, especially in view of the fact that the report may contain hearsay or opinion.

PART III. CONDITIONS OF PROBATION

3.1 Imposition and implementation of conditions.

(a) All conditions of probation should be prescribed by the sentencing court and presented to the probationer in writing. Their purpose and scope and the possible consequence of any violations should be explained to him by the sentencing court or at an early conference with a probation officer.

(b) Probation officers must have authority to implement judicially prescribed conditions; but the conditions should be sufficiently precise so that probation officers do not in fact establish them.

(c) The probationer should have the right to apply to the sentencing court for a clarification for change of conditions.

DELAWARE LAW

All conditions of probation are prescribed by the court, although the Department of Health and Social Services may recommend conditions for approval by the court. 11 Del. C. §4332. The court may modify the conditions of probation upon the recommendation of the Department. There is no requirement that the conditions be given to the probationer in writing, except by Rule of family court, although this is usually done.

COMMENT

Delaware law is in accord with the Standard. The Committee recommends that in all cases, the probationer be given a written statement of the conditions of his probation.

STANDARD

3.2 Nature and determination of conditions.

(a) It should be a condition of every sentence to probation that the probationer lead a law-abiding life during the period of his probation. No

other conditions should be required by statute; but the sentencing court should be authorized to prescribe additional conditions to fit the circumstances of each case. Development of standard conditions as a guide to sentencing courts is appropriate so long as such conditions are not routinely imposed.

(b) Conditions imposed by the court should be designed to assist the probationer in leading a law-abiding life. They should be reasonably related to his rehabilitation and not unduly restrictive of his liberty or incompatible with his freedom of religion. They should not be so vague or ambiguous as to give no real guidance.

(c) Conditions may appropriately deal with matters such as the following:

(i) cooperating with a program of supervision;

(ii) meeting family responsibilities;

(iii) maintaining steady employment or engaging or refraining from engaging in a specific employment or occupation;

(iv) pursuing prescribed educational or vocational training;

(v) undergoing available medical or psychiatric treatment;

(vi) maintaining residence in a prescribed area or in a special facility established for or available to persons on probation;

(vii) refraining from consorting with certain types of people or frequenting certain types of places;

(viii) making restitution of the fruits of the crime or reparation for loss or damage caused thereby.

(d) Conditions requiring payment of fines, restitution, reparation, or family support should not go beyond the probationer's ability to pay.

(e) The performance bond now authorized in some jurisdictions should not be employed as a condition of probation.

(f) Probationers should not be required to pay the costs of probation.

COMMENT

11 Del. C. §4332 permits the Department of Health and Social Services to formulate standards relating to conditions of probation, but the actual imposition of conditions is by the court. No conditions are legislatively required. Delaware law is, therefore, in accordance with the Standard. The Committee recommends that the Department review the Standard and adopt such changes in its standards as may be required upon such review.

STANDARD

3.3 Modification and termination of conditions.

Conditions should be subject to modification or termination by the

court. All changes in conditions should be presented to the probationer in the manner prescribed in section 3.1 of this Report. Where the proposed modifications would result in a form of confinement as a condition of continued probation, the probationer should be afforded the procedural rights set forth in Part V of this Report.

DELAWARE LAW

The court has specific power to terminate probation at any time. 11 Del. C. §4333. There is no specific statutory grant of power to modify probation, but the court generally employs a rehearing process in cases where modification may be appropriate. See 11 Del. C. §4332 which recognizes the existence of such power.

COMMENT

Delaware practice is substantially in accord with the Standard. The Committee recommends adoption of a rule of court which would specifically formalize the procedure for modifying the conditions of probation.

PART IV. TERMINATION

4.1 Satisfactory completion of probation term.

It should be provided that probation automatically terminates upon the successful completion of the term set by the court at the time of sentencing. It is nevertheless desirable that the fact of termination be recorded in an order of the court, a copy of which should be furnished to the probationer.

COMMENT

Delaware practice is in accord with the Standard.

STANDARD

4.2 Early termination.

The sentencing court should have the authority to terminate probation at any time. Such authority should be exercised prior to the term fixed in the original sentence if it appears that the offender has made a good adjustment and that further supervision or enforced compliance with other conditions is no longer necessary.

DELAWARE LAW

The court has the power to terminate probation at any time. 11 Del.

C. §4333.

COMMENT

Delaware law is in accord with the Standard.

STANDARD

4.3 Criminal record.

Every jurisdiction should have a method by which the collateral effects of a criminal record can be avoided or mitigated following the successful completion of a term of probation and during its service.

COMMENT

Delaware law does not at present have a procedure which would be in accord with the Standard. Prior to the adoption of the Delaware Criminal Code, a section then numbered 4332(i) provided that when an offender had successfully completed probation, the plea or verdict of guilty entered or recorded against the offender would be stricken from the records of the court. This procedure did not get carried into the new Criminal Code, and in any event, would not necessarily have the effect contemplated by the Standard. See State v. Johnson, Del. Super., 270 A. 2d 537 (1970). The Committee recommends adoption of a procedure which would comply with the Standard.

PART V. REVOCATION OF PROBATION AND OTHER SANCTIONS

5.1 Grounds for and alternatives to probation revocation.

(a) Violation of a condition is both a necessary and a sufficient ground for the revocation of probation. Revocation followed by imprisonment should not be the disposition, however, unless the court finds on the basis of the original offense and the intervening conduct of the offender that:

(i) confinement is necessary to protect the public from further criminal activity by the offender; 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 probation were not revoked.

(b) It would be appropriate for standards to be formulated as a guide to probation departments and courts in processing the violation of conditions. In any event, the following intermediate steps should be considered

in every case as possible alternatives to revocation:

(i) a review of the conditions, followed by changes where necessary or desirable;

(ii) a formal or informal conference with the probationer to re-emphasize the necessity of compliance with the conditions;

(iii) a formal or informal warning that further violations could result in revocation.

DELAWARE LAW

Upon a finding by the court that a probationer has violated the conditions of his probation, the court has power to revoke probation. 11 Del. C. §4334(c). Except in cases where a suspended sentence has been given at the time of the original sentencing, the court has the power to impose any sentence which would have been available for the original offense upon revocation of probation. 11 Del. C. §4334(c).

COMMENT

Delaware law is substantially in accord with the Standard, except in cases where a sentence is actually imposed and suspended at the time of the original sentencing procedure.

STANDARD

5.2 Arrest of probationers.

(a) Formal arrests of probationers for the alleged violation of conditions of their probation should be preceded by the issuance of an arrest warrant based upon probable cause that a violation has occurred. Arrests without a warrant should be permitted only when the violation involves the commission of another crime and when the normal standards for arrests without a warrant have otherwise been met.

(b) Probation officers should not be authorized to arrest probationers.

DELAWARE LAW

11 Del. C. §4334 provides that the court may issue a warrant for the arrest of a probationer charged with violation of any of the conditions of his probation; alternatively it may issue a notice to appear and answer a charge of violation. In addition, any probation officer may arrest a probationer without warrant if in his judgment there has been a violation of any condition of probation.

COMMENT

Delaware law is not in accord with the Standard in that it permits arrest by a probation officer without the prior intervention of a court.

STANDARD

5.3 Proceedings following commission of another crime.

A revocation proceeding based solely upon commission of another crime ordinarily should not be initiated prior to the disposition of that charge. However, upon a showing of probable cause that another crime has been committed by the probationer, the probation court should have discretionary authority to detain the probationer without bail pending a determination of the new criminal charge.

COMMENT

There is no specific Delaware provision on the matter covered by the Standard. Under the present statutory scheme, there is little doubt that the court has power to revoke probation upon an arrest for a subsequent offense, even though the defendant has not been convicted.

STANDARD

5.4 Nature of revocation proceedings.

(a) The court should not revoke probation without an open court proceeding attended by the following incidents:

(i) a prior written notice of the alleged violation;

(ii) representation by retained or appointed counsel; and

(iii) where the violation is contested, establishment of the violation by the government by a preponderance of the evidence.

Sentence should be imposed following a revocation according to the same procedures as are applicable to original sentencing proceedings.

(b) The government is entitled to be represented by counsel in a contested revocation proceeding.

(c) As in the case of all other proceedings in open court, a record of the revocation proceeding should be made and preserved in such a manner that it can be transcribed as needed.

(d) An order revoking probation should be appealable after the offender has been resentenced.

COMMENT

Superior Court Criminal Rule 32(f) provides that "The Court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed." The defendant is permitted to be represented by counsel at such a hearing, as is the State. A record of the proceedings is made by a court reporter. An order revoking probation is appealable after the defendant has been resentenced, but the appeal is limited to the question of whether the court has abused its discretion. See Brown v. State, Del. Supr., 249 A. 2d 269 (1968).

PART VI. PROBATION DEPARTMENT ADMINISTRATION, SERVICES AND PERSONNEL

6.1 Legislative responsibility; administrative structure.

(a) Legislative bodies should appropriate sufficient funds so that all trial courts administering criminal justice will have adequate probation services and personnel in order to implement properly the standards developed in this Report.

(b) It is appropriate for probation services to be administered at either the state or local level, but in no event should control be vested in an agency having prosecutorial functions.

COMMENT

Probation services in Delaware are administered at the State level. The superior court has a probation service, as does the family court. In general, it is believed that the probation services are not adequately funded and that case loads are therefore high.

STANDARD

6.2 Establishing minimum standards.

Minimum standards for probation services should be formulated and enforced by an appropriate state agency and should be applicable to all probation departments within the state. In addition to the standards recommended in this report, the following general principles are important in developing minimum standards:

(i) Supervision of probationers.

There should be a sufficiently low average caseload to provide adequate supervision for probationers and to encourage the development of variable caseloads for different types of offenders and assignment teachniques which

will maximize the benefit of offered supervision. In appropriate cases, supervision should be supplemented by group counseling and therapy programs. Where feasible, branch probation offices should be located in the community in which probationers live so as to meet more effectively the demands of supervision. To complement supervision, helping services should be obtained from community facilities in appropriate cases and, where necessary, probation personnel should actively intervene with such facilities on behalf of their probationers;

(ii) Research and statistics.

Accurate and uniform records and statistics should be available as a foundation for research into sentencing criteria and probation department programs. Continuous research and evaluation, involving a cooperative effort among operations and research personnel, should be an integral part of probation departments;

(iii) Working conditions.

To help achieve the standards recommended in this Report, probation personnel should have adequate office space, clerical assistance and conference facilities.

COMMENT

The Committee favors adoption of the Standard while noting that appropriate action to bring Delaware practice in accord with the Standard rests both with the legislature and the Department of Health and Social Services. Adequate funding must, of course, be provided if the Department is to comply with the Standard. The procedures of subsection (i) deserve special emphasis.

STANDARD

6.3 Collateral Services.

In appropriate cases, probation departments should be prepared to provide additional services which may be foreign to the traditional conceptions of providing presentence reports and supervising convicted offenders. Examples of such additional services include the preparation of reports to assist courts in making pretrial release decisions and assistance to prosecutors in diverting selected charged individuals to appropriate noncriminal alternatives.

COMMENT

In general, the probation services in Delaware are available for the

purposes outlined in the Standard.

STANDARD

6.4 Appointment of probation personnel.

(a) Responsibility for appointing chief probation officers in local probation departments should reside solely in the chief judge of the court or an appropriate judicial body. Consideration should be given to the creation of an agency or committee to advise in recruiting and screening chief probation officers. Such a committee should consist of representatives of government, the judiciary, the bar, and the community.

(b) Chief probation officers should make all appointments of probation personnel in accordance with a merit system. After a probationary period, tenure should be granted and removal permitted only after a hearing conducted by a civil service commission or other career service organization.

COMMENT

Delaware practice is substantially in accord with the Standard.

STANDARD

6.5 Qualifications for probation officers; other personnel.

(a) The educational and occupational requirements for probation officers should be possession of a bachelor's degree supplemented by:

(i) a year of graduate study in social work, corrections, counseling, law, criminology, psychology, sociology, or related fields; or

(ii) a year of full-time casework, counseling, community or group work experience in a recognized social, community, correctional or juvenile agency dealing with offenders or disadvantaged persons, or its equivalent as determined by the hiring agency.

(b) A significant number of probation officers in a department should have graduate degrees in one of the subjects enumerated in this section.

(c) While the core of any probation department should be professionally educated and trained personnel, it is desirable that the staff include individuals who may lack such professional qualifications but have backgrounds similar to those of the probationers themselves. In addition, in appropriate cases citizen volunteers should be used to assist probation officers.

COMMENT

Delaware's educational requirements are not in accord with the Stand-

ard. A bachelor's degree is required for employment and a graduate degree is required for appointment as a supervisor. All employees are on a merit system. Volunteers are used in the family court to supplement the activities of the Probation Department.

STANDARD

6.6 Education and training.

(a) Fellowships for graduate study should be made available to probation officers and college graduates interested in probation. In addition, probation officer trainee programs combining work and education should be established for high school graduates and college students.

(b) In-service education and training programs should be jointly planned and developed by appropriate state agencies, universities, and local probation departments. In state and larger local probation departments, implementation of these programs should be made a full-time responsibility.

COMMENT

Fellowships for graduate study are available as are in-service education and training programs including, for example, three-day joint study programs for probation officers.

STANDARD

6.7 Salaries of probation personnel.

(a) Entry salaries should be competitive with entry salaries offered in related fields such as welfare, education, and community action programs.

(b) Salaries should be structured so that promotion to an administrative or supervisory job is not the only means of obtaining a higher salary. Merit pay increases should be available for outstanding job performance, advanced academic achievement, or completion of special in-service training.

COMMENT

Merit pay increases are theoretically available for probation officers. However, funding limitations have made it difficult to provide all merit increases which would be warranted. The Committee recommends adoption of the Standard and implementation thereof by appropriate legislative funding.

CHAPTER 12

APPELLATE REVIEW OF SENTENCES

PART I. GENERAL PRINCIPLES

11. Principle of review.

(a) In principle, judicial review should be available for all sentences imposed in cases where provision is made for review of the conviction. This is specifically meant to include

(i) review of a sentence imposed after a guilty plea or the equivalent, if the case is one in which review of the conviction would be 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 class of cases.

(b) 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.

DELAWARE LAW

The availability of appellate review of sentences in Delaware depends on which court tries the case in the first instance. Where the case falls within the original jurisdiction of an inferior court established under Article IV, section 28 of the State constitution, the right of appeal is governed by that section, which states:

> The General Assembly may by law regulate this jurisdiction [of the inferior courts established pursuant to the provisions of this section], and provide that the proceedings shall be with or without indictment by grand jury, or trial by petit jury, and may grant or deny the privilege of appeal to the Superior Court; provided, however, that there shall be an appeal to the Superior Court in all cases in which the sentence shall be imprisonment exceeding one (1) month, or a fine exceeding One Hundred Dollars ($100.00).

Under these provisions of the constitution, a defendant sentenced by any inferior court to imprisonment exceeding one month or a fine exceeding one hundred dollars enjoys an automatic right of appeal to the superior court. Where the defendant has been convicted either by the court sitting alone or by a jury, he is entitled to a hearing de novo in superior court. See State v. Coffield, Del. Super., 171 A. 2d 62, 64 (1961); Donaghy v. State, Del. Supr., 100 A.696, 708 (1917). Where the defendant is sentenced after entering a plea of guilty, the appeal to the superior court is for the sole purpose of reviewing the propriety of the sentence. See Hinckle v. State, Del. Supr., 189 A. 2d 432, 434 (1963); Jones v. Anderson, Del. Supr., 183 A. 2d 177, 178 (1962); State v. Gale, Del. Super., 130 A. 2d 786, 787 (1957).

Thus, a defendant guilty of a misdemeanor falling within the jurisdiction of an inferior court and sentenced by such court to imprisonment exceeding one month or a fine exceeding one hundred dollars has a constitutional right to at least have his sentence reviewed by the superior court.

Where the case falls within the original jurisdiction of the superior court, however, the defendant enjoys no such automatic right to review of his sentence by an appellate court. The Supreme Court of Delaware has expressly held that as long as "the sentence imposed [by the superior court] . . . is within the statutorily-permitted maximum, this Court has no jurisdiction to reduce an allegedly-excessive sentence falling within that limit." Cannon v. State Del. Supr., 196 A. 2d 399, 400 (1963). See also, Osburn v. State, Del. Supr., 224 A. 2d 52 (1966); Seeney v. State, Del. Supr., 211 A. 2d 908, 909 (1965); Hinckle v. State, Del. Supr., 189 A. 2d 432, 433-434 (1963). A recent case may, however, recognize a power in the supreme court to review a sentence for abuse of discretion. See Kreisher v. State, Del. Supr., 319 A. 2d 31, 32 (1974), in which the court was called upon to review the lower court's discretion in imposing a one-year sentence for possession of marijuana. The court stated, "Nor do we deem the sentence an abuse of discretion."

Superior Court Criminal Rule 35 does provide for a form of sentence review. Under Rule 35(a), a defendant may seek post-conviction correction of an illegal sentence by moving the sentencing court itself for such relief. The defendant may seek to challenge the sentence on the grounds that it was imposed in violation of the state or federal Constitutions, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed exceeded the maximum authorized by law.

In addition to Rule 35(a) providing for the correction of an illegal sentence, Rule 35(b) sets forth a procedure whereby a defendant may seek to have his sentence reduced.

> The Court may reduce a sentence within 4 months after the sentence is imposed, or within 4 months after receipt by the Court of a mandate issued upon affirmance of the judgment or dismissal of an appeal, writ of error or writ of certiorari. Nothing herein contained shall prevent the reduction of a sentence after the expiration of the 4 month period specified above if such reduction is made pursuant to an application made within the specified 4 month period.
>
> A motion for reduction of sentence will not be noticed for presentation in open court but will be filed with the Prothonotary who will refer it to the Judge who imposed the sentence. Such motions will be considered and decided without formal presentation, hearing or argument unless the Judge in his discretion requests a presentation, hearing or argument.

The supreme court has held that applications for relief under Rule 35 are motions addressed to the discretion of the superior court. Shy v. State, Del. Supr., 246 A. 2d 926, 927 (1968). The supreme court may review the denial of such motions to determine whether there has been an abuse of discretion. Jones v. Anderson, Del. Supr., 183 A. 2d 177 (1962). See Hamilton v. State, Del. Supr., 285 A. 2d 807, 808 (1971); Hinckle v. State, Del. Supr., 189 A. 2d 432, 434 (1963). Both cases involved a failure by the superior court to take into consideration in imposing sentence plea bargains made by the defendants with prosecutorial officials. See also Cannon v. State, Del. Supr., 196 A. 2d 399 (1963), in which the defendant pleaded guilty to a charge of grand larceny and was sentenced by the superior court to three years imprisonment and to be whipped with 20 lashes. Citing Rule 35(a), the supreme court then remanded the case to the superior court with instructions to conduct a hearing to determine the mental condition of the defendant and any probable unwarranted adverse effects to whipping him.

COMMENT

Present Delaware law is not in accord with the Standard. Appellate review of sentences imposed by the superior court is not available except in cases of abuse of discretion (this differs from the case of inferior court sentences which can be reviewed by the superior court). On the other hand, because a relatively small number of judges constitute the superior court bench, it is quite likely that informal contacts between and among the judges results in greater uniformity of sentences than is characteristic of larger jurisdictions. The primary purpose of sentence review on the appellate level (as opposed to the type of review available under Superior Court Criminal Rule 35 in the sentencing court itself) is imposition from a higher court resulting in a higher level of uniformity of sentences, as well as system-wide recognition of the factors which will tend to aggravate or mitigate a sentence imposed in a particular case.

The Committee recommends that Rule 35 be amended to provide for review of sentences imposed in superior court cases by a panel of three judges of the superior court, none of whom shall have been the sentencing judge, and that the scope of review be as set forth in Standard 1.2. These recommendations are further explained in other Comment sections below. Review by a panel rather than by the sentencing judge, as is now provided by Rule 35, would in the Committee's view be more likely to accomplish the objectives of these Standards. This recomendation is not intended to eliminate the supreme court's power to review sentencing for abuse of discretion.

STANDARD

1.2 Purposes of review.

The general objectives of sentence review are:

(i) to correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;

(ii) to facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have 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.

DELAWARE LAW

As indicated with respect to Standard 1.1, Delaware law provides for appellate review of sentences only in the case of a sentence imposed by an inferior court, other than in rare cases of abuse of discretion. The scope and purposes of review are not specified in the constitution or in any statute. In State v. Stevens, Ct. Gen. Sess., 139 A. 78, 79 (1927), the court noted "that the provision allowing an appeal [Section 28 of the Constitution of 1897], was inserted for the express purpose of allowing a review of the case where any judge or justice had imposed what might be considered as an immoderate sentence or where the offense might not be commensurate with the penalty imposed." In Hinckle v. State, Del. Supr., 189 A. 2d 432, (1963), the court further observed that "Section 28 was included in the Constitution in order to permit review of unrestrained power in inferior court judges and justices of the peace to impose sentences without limit when the proceeding had been without indictment or trial by jury."

COMMENT

The Committee recommends revision of Rule 35 to include specification of the purposes of review as set forth in Standard 1.2.

PART II. AVAILABILITY OF REVIEW

2.1 Reviewing court.

In general, each court which is empowered to review the conviction should also be empowered to review the disposition following conviction. It may be advisable to depart from this principle in some contexts, as, for example, where intermediate appellate courts are available to review sentences and it is deemed unwise to involve the highest court in such matters. In any event, specialized courts should not be created to review the sentence only.

DELAWARE LAW

As noted with respect to Standard 1.1, the Supreme Court of Delaware does not assert general power to review sentences imposed in superior court, other than in cases of abuse of discretion, whereas the superior court has been granted power to review sentences imposed in inferior courts.

COMMENT

Delaware law is not in accord with the Standard because it does not provide for supreme court review of sentences imposed in superior court. On the other hand, the Committee does not recommend that the supreme court expand its activities in this area, believing that it would be preferable for sentence review to occur at the superior court level. Thus the Committee recommends that Superior Court Criminal Rule 35 be amended to provide that a sentencing review panel of the superior court be established, to include the chief judge of the court and two other judges, appointed on a rotating basis, none of whom shall be the sentencing judge. This panel would, upon application, review any sentence imposed by the superior court in accordance with the principles set forth in Standard 1.2.

STANDARD

2.2 Procedure and conditions.

(a) In all cases where sentence is imposed after a trial on the question of guilt, review of the sentence should be available on the same basis as review of the conviction.

(b) In all cases where a sentence is imposed after a guilty plea or the equivalent, review of the sentence, as well as review of other matters which can be raised, could appropriately be governed by a procedure patterned after the following:

(i) Notice of appeal should be required of the defendant within [15] days of the imposition of sentence. The court should advise the defendant at the time of sentencing of his right to appeal and of the time limit, and should at the same time afford him the opportuinty to comply orally with the notice requirement. It should be the responsibility of the attorney who represented the defendant at the sentencing stage to advise him with respect to the filing of the notice of appeal, and to assure that his rights in this respect are protected. Both the sentencing court and the reviewing court should be authorized to enlarge the time for filing the notice of appeal for good cause;

(ii) The sentence appeal should be of right, except to courts where appeal from a conviction after trial would be by leave of court. In cases where leave is required, it may be preferable to follow normal procedures

instead of a special procedure patterned after this subsection;

(iii) Unless the defendant is able to retain his own legal assistance or elects not to be represented, an attorney should be appointed as soon as the notice of appeal is filed. Unless it appears inappropriate in a particular instance, it is desirable that the same attorney who represented the defendant at the trial level be appointed to prosecute the sentence appeal;

(iv) The clerk or other responsible official should be required to secure a transcript of the record within [10] days of the filing of the notice of appeal. He should also be required to provide a copy as soon as it is available to the defendant's attorney, to the defendant if he has no attorney, to the state, and to the reviewing court;

(v) All papers in support of the merits of the appeal should be required to be filed within [15] days from the time the attorney, or the defendant if he has no attorney, receives the record, unless the time is enlarged upon application to the reviewing court;

(vi) Any response which the state desires to make should be required to be filed within [10] days of the filing of the defendant's papers, unless the time is enlarged upon application to the reviewing court. The state should promptly notify the court if it has decided not to file a response;

(vii) All written submissions may be typed rather than printed;

(viii) In courts of more than three judges, panels of three may be designated to hear the sentence appeal, without a hearing en banc unless the court sua sponte so orders. The appeal should be decided as expeditiously as is consistent with a fair hearing of the defendant's claims. If possible, time should be allocated each week for the hearing of all appeals which are then ready for disposition, and a decision should be rendered as promptly as the case permits. It may be appropriate in some cases, as where the appeal is patently without merit, to decide the case summarily without a hearing;

(ix) The defendant should commence service of a prison term upon imposition of the sentence, unless bail or the equivalent is granted by the sentencing court or the reviewing court upon special application, or unless either the sentencing court or the reviewing court specifies upon application that the defendant should be detained in a local facility until the sentence appeal has been concluded.

If such a procedure is developed for guilty plea cases, it may also be appropriate to use it in all cases where matters relating to the sentence are the only questions which can be appealed.

COMMENT

The Committee recommends adoption of procedures under Superior Court Criminal Rule 35 which will conform to the Standard, with the exception that, as stated in the Comment to Standard 2.1, review should be by a sentencing review panel of the superior court.

STANDARD

2.3 Record on appeal; statement explaining sentence.

(a) The following items should be available for inclusion in the record on appeal:

(i) a verbatim record of the entire sentencing proceeding, including a record of any statements in aggravation or mitigation made by the defendant, the defense attorney and the prosecuting attorney, together with any testimony received of witnesses 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 presentence 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 should 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 normally should be prepared in each case in the same manner as would any other record to be presented to the court involved.

(c) The sentencing judge should be required in every case to state his reasons for selecting the particular sentence imposed. Normally, this should be done for the record in the presence of the defendant at the time of sentence. In cases in which the sentencing judge deems it in the interest of the defendant not to state fully the reasons for the sentence in the presence of the defendant, he should prepare such a statement for transmission to the reviewing court as a part of the record.

DELAWARE LAW

There are no equivalent provisions in Delaware law, other than Superior Court Criminal Rule 37 which provides that where an appeal is taken to superior court from the judgment of an inferior court, "It shall be the duty of the court below to file forthwith in the office of the Prothonotary . . . a certified transcript of the record." Superior Court Criminal Rule 32(c) privides for a presentence investigation and report to the court if the superior court so directs. Disclosure of the report to the defendant is at the discretion of the court. There is no requirement that the sentencing judge state his reasons for the sentence imposed.

COMMENT

The Committee recommends adoption of procedures under Superior Court Criminal Rule 35 which will conform to the Standard, except that the Committee does not recommend that any requirement be imposed upon the sentencing judge to state reasons for his sentence other than as part of the sentencing proceeding in the defendant's presence.

PART III. SCOPE OF REVIEW

3.1 Duties of reviewing court.

(a) It should be the obligation of the reviewing court to make its own examination of the record designed to effect the objectives of sentence review as stated in section 1.2.

(b) In those cases in which it would substantially contribute to the achievement of the objectives of sentence review as stated in section 1.2, the reviewing court should set forth the basis for its disposition in a written opinion. Normally, this should be done in every case in which the sentence is modified or set aside by the reviewing court.

DELAWARE LAW

There are no equivalent provisions in Delaware law.

COMMENT

The Committee recommends adoption of procedures under Superior Court Criminal Rule 35 which will conform to the Standard.

STANDARD

3.2 Powers of reviewing court: scope of review.

The authority of the reviewing court with respect to the sentence should specifically extend 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.

DELAWARE LAW

There are no equivalent provisions in Delaware law.

COMMENT

The Committee recommends adoption of procedures under Superior Court Criminal Rule 35 which will conform to the Standard.

STANDARD

3.3 Powers of reviewing court; available dispositions.

Every reviewing court should be specifically empowered to:

(i) affirm the sentence under review;

(ii) 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 for re-sentencing on the basis of such further proceedings.

DELAWARE LAW

There is no equivalent provision in Delaware law.

COMMENT

The Committee recommends adoption of the Standard as part of revised Superior Court Criminal Rule 35. It should be specifically noted that the Standard would permit the reviewing court to increase the sentence originally imposed upon the defendant. While it is recognized that danger of an increased sentence might limit applications for review, the Committee can see no reason in principle why the reviewing court ought not to have the power to increase a sentence which, upon review, it deems to be too lenient.

The Commentary appearing with the official version of the Standard does not address itself to the constitutionality of increasing a sentence upon appellate review thereof. However, cases in analogous areas suggest arguments in favor of constitutionality. In Colten v. Kentucky, 407 U.S. 104 (1972), the Supreme Court held that imposition of a greater sentence after a trial de novo in a higher court did not deprive the accused of due process or subject him to double jeopardy. Likewise, in North Carolina v. Pearce, 395 U.S. 711 (1969), the Court found no constitutional impediment to imposition of a greater sentence upon retrial of a person whose conviction had been reversed on appeal. See generally, Annot., 12 A.L.R. 3d 978 (1967).

CHAPTER 13

CRIMINAL APPEALS

PART I. BASIC ASPECTS OF A SYSTEM OF CRIMINAL APPEALS

1.1 The necessity of appellate review of convictions in criminal cases.

(a) The possibility of appellate review of trial court judgments should exist for every criminal conviction. It is undesirable to have any class of case in which such trial court determinations are unreviewable.

(b) An appeal is not a necessary and integral part of every conviction.

DELAWARE LAW

Appeal to the supreme court from the superior court is available, upon application of the defendant, in all criminal cases in which the sentence is death, imprisonment exceeding one month, or fine exceeding $100. Del. Const. Art. IV, §11 (1) (b). Appeal to the superior court from an inferior court is available if the sentence is imprisonment exceeding one month or a fine exceeding $100. Del. Const. Art. IV, §28. Appeals in prosecutions for election offenses are governed by Del. Const. Art. V, §8. An appeal is not, in any case, a necessary or integral part of a conviction.

COMMENT

Delaware law is not in accord with the Standard. The Standard would permit appeals even in the very minor cases in which appeals are not now within the jurisdiction of the supreme court or constitutionally required to be made available in the case of appeals to the superior court.

STANDARD

1.2 Appellate court structure; specialized criminal courts of appeal.

(a) The structure of appellate courts should be consonant with the purposes of appellate review, to wit:

(i) to protect defendants against prejudicial legal error in the proceedings leading to conviction and, within limits, against verdicts unsupported by sufficient evidence;

(ii) authoritatively 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 criminal process.

(b) It is undesirable to have specialized appellate courts such that a court, or a division of a court, is assigned appeals in criminal cases as its basic or exclusive task.

(c) In a three-tiered court system, the jurisdiction of the highest court may appropriately be discretionary with that court.

DELAWARE LAW

Except for cases of review by the superior court of inferior court judgments, all criminal appellate jurisdiction is in the supreme court, which is a court of general appellate jurisdiction. The only type of appeal the hearing of which is discretionary with the appellate court is an appeal by the State in a criminal case on the ground that the case raises "a substantial question of law or procedure." 10 Del. C. §9903.

COMMENT

Delaware law complies with the Standard.

STANDARD

1.3 Limitations on defendants' appeals; final judgments and interlocutory appeals.

(a) A defendant should have the right to seek review of 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 upon plea of guilty or nolo contendere.

(b) In general, a defendant should not be permitted to take an appeal until a final judgment adverse to him has been entered in the trial court.

(i) Interlocutory appeals by a defendant should not be allowed on the ground of error in denial of pretrial defensive motions. To avoid needless trials, however, the right to appeal from such orders should be explicitly declared even though the defendant thereafter enters a plea of guilty or nolo contendere.

(ii) A defendant should be permitted to seek appellate review of an order granting a new trial, where the defendant claims that the proper trial court disposition would have been a final judgment in his favor.

(iii) A defendant should be allowed to appeal from an order, not on his motion, finding him incompetent to stand trial.

DELAWARE LAW

The Delaware Supreme Court has strictly construed its jurisdiction over criminal appeals, based on the wording of Article IV, Section 11 of the Delaware constitution. Jurisdiction has been held to exist only after a final judgment in a criminal case, State v. Roberts, Del. Supr., 282 A.2d 603 (1971); Norman v. State, Del. Supr., 177 A. 2d 347 (1962). The court has no jurisdiction over interlocutory appeals. Hunter v. State, Del. Supr., 209 A. 2d

469 (1965). Nor does the court have jurisdiction in a case in which the lower court's disposition involved something less than a final judgment of conviction, for example, a conditional discharge. See Rash v. State, Del. Supr., 318 A. 2d 603 (1974). The supreme court has held that it lacks jurisdiction to consider an appeal where the actual fine is less than the $100 constitutional amount, despite the potential availability in the case of a fine greater than the constitutional amount. Szucs v. State, Del. Supr., 284 A. 2d 291 (1971). No cases have been found on the matters covered by subparagraphs (b) (ii) and (iii) of the Standard.

COMMENT

Delaware law is generally in accord with the Standard. It is likely, however, that adoption of a rule of the supreme court codifying its views on its appellate jurisdiction in criminal cases would reduce the number of cases in which expansion of its jurisdiction is sought. It would also be desirable to adopt a rule permitting appeals in the cases covered by subparagraphs (b) (ii) and (iii) of the Standard.

STANDARD

1.4 Prosecution appeals.

(a) The prosecution should be permitted to appeal in the following situations:

(i) from judgments dismissing an indictment or information on substantive grounds, such as the unconstitutionality of the statute under which the charge was brought, or for failure of the charging instrument to state an offense under the statute;

(ii) from other pretrial orders that terminate the prosecution, such as upholding the defenses of double jeopardy, autrefois convict, autrefois acquit, or denial of speedy trial;

(iii) from pretrial orders that seriously impede, although they do not technically foreclose, prosecution, such as orders granting pretrial motions to suppress evidence or pretrial motions to have confessions declared involuntary and inadmissible.

Such judgments are likely to rest upon principles that ought to be clearly and uniformly applied throughout the state.

(b) Where more than one level of appellate review is provided, the prosecution should be permitted to seek further review in the highest court whenever an intermediate court has ruled in favor of a defendant-appellant.

(c) In an appeal at the instance of the prosecution, special provision should be made as to the custody of the defendant. Where the trial court has dismissed the indictment or information on substantive grounds or the

court has otherwise upheld a pretrial motion that terminated the prosecution, the defendant should be released on nominal bail or his own recognizance pending final decision on appeal. In other cases, defendant should not be denied liberty pending determination of such an appeal unless there is cogent evidence that he will not abide by the judgment of the appellate court.

DELAWARE LAW

The State has the right to appeal from an order consitituting a dismissal of an indictment or information, or any count thereof, or the granting of a motion vacating a verdict or judgment of conviction where the order of the lower court is based either on the invalidity or construction of the statute on which the indictment or information is founded or on the lack of jurisdiction of the lower court over the person of the defendant or the subject matter of the action. 10 Del. C. §9902. Appeal by the State is within the discretion of the supreme court where the decision below raises a substantial question of law or procedure. 10 Del. C. §9903. In such a case, the court's decision on appeal does not affect the liberty of the defendant.

COMMENT

Delaware law is in accord with the Standard as stated in subparagraph (a) (i). It does not afford a right of appeal in the cases covered by subparagraphs (a) (ii) and (iii), nor does it specifically deal with custody of the defendant pending appeal, as suggested by paragraph (c). The Committee would favor expansion of the State's right of appeal in accord with the Standard.

PART II. TRANSITION FROM TRIAL COURT TO APPELLATE COURT

2.1 The notice of appeal.

(a) A definite time period, such as thirty days after trial court judgment, should be specified as the time during which appeals must be instituted. The appellate court, however, should have power to entertain appeals taken after the prescribed time if the delay is found to be excusable.

(b) It is appropriate for courts imposing sentence in contested cases to assume the burden of advising the defendant that he has the right of review, that it must be exercised within a specified time, and that he should promptly consult counsel in that regard.

DELAWARE LAW

Notice of an appeal to the supreme court must be filed with the clerk of the court within 30 days after the imposition of sentence. 10 Del. C. § 147; Supreme Court Rule 23. It is a typical practice for a court imposing

sentence to advise the defendant concerning his right to appeal and the time within which he must act. The supreme court has held that it lacks jurisdiction over non-timely appeals. Trowell v. Diamond Supply Co., Del. Supr., 91 A. 2d 797 (1952).

COMMENT

Delaware law is in accord with the Standard.

STANDARD

2.2 Trial counsel's duties with regard to appeal.

(a) Trial counsel, whether retained or court-appointed, should continue to represent a convicted defendant to advise on whether to take an appeal and, if the 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) Defense counsel is uniquely situated and should take it as his duty to advise a defendant on the meaning of the court's judgment and his right to appeal and on the possible grounds for appeal and the probable outcome of appealing. While counsel should do what is needed to inform and advise his client, the decision whether to appeal, like the decision whether to plead guilty, must be the defendant's own choice.

(c) Where a case has been tried, prior to final judgment, defense counsel should review the prospects of appeal. One alternative to be considered is whether it is in his client's interests to seek mitigation in the grade of the offense or in the severity of the sentence in exchange for a decision to forego appeal.

COMMENT

Delaware practice is in accord with the principles set forth in the Standard. In Erb v. State, Del. Supr., 322 A. 2d (1974), the court, citing Standard 2.2, indicated that trial counsel's responsibility in Delaware is commensurate with that Standard.

STANDARD

2.3 Unacceptable inducements and deterrents to taking appeals.

(a) Defendants should be neither induced to take appeals nor deterred from appealing by systematized factors unrelated to the probable outcome of their appeals.

(b) Examples of unacceptable inducements to taking appeals are:

(i) Automatic release pending appeal, on bail or recognizance, of defendants sentenced to confinement;

(ii) Automatic detention of convicted defendants, confined pending appeal, in facilities substantially different in quality and regime from those in which inmates serving sentence are held.

(c) Examples of unacceptable deterrents to taking appeals are:

(i) Denial of legal assistance at government expense to appellants who cannot afford adequate legal representation;

(ii) Denial of recovery of the costs of appeal to successful appellants who have not proceeded in forma pauperis;

(iii) The prospect of a more severe sentence or of conviction of an offense of higher degree upon reprosecution, if the appeal is well-grounded.

DELAWARE LAW

Delaware law does not provide for automatic release pending appeal, nor does it provide substantially better accommodations for persons sentenced to confinement who have taken an appeal. Supreme Court Rule 10A (3) provides for counsel at State expense for indigent appellants, if the court determines that such counsel is necessary. Successful appellants who have not proceeded in forma pauperis may recover their costs of appeal. Supreme Court Rule 25 (4) (b). Delaware courts do not follow a practice of discouraging appeals by the threat of a harsher sentence upon a retrial of a case after a successful appeal.

COMMENT

Delaware law is in accord with the Standard.

STANDARD

2.4 Eliminating frivolous appeals; pre-appeal screening.

(a) Procedural devices for pre-appeal screening, designed to eliminate frivolous cases from appellate court dockets, are impractical and unsound in principle.

(i) A requirement of the trial court's certificate as a condition of appellate review is inconsistent with the right to appeal unless a decision to refuse the certificate is itself appealable. If such decision is appealable, the procedure for transition of cases to the appellate court has been unnecessarily complicated and the burden upon the appellate court has been substantially increased.

(ii) Devices for screening out frivolous cases by the appellate court, such as a requirement for leave of the court to appeal at the first level of review, add a useless stage to most appeals at a considerable burden to the court. Flexibility of procedure so that any appeal terminates, by a decision

on the merits, at the earliest practical stage of its consideration in the appellate forum is far preferable.

(b) There appear to be no acceptable penalties that can be imposed upon appellants who willfully prosecute frivolous appeals beyond the sanction of assessment of costs, which has no impact on those proceeding in forma pauperis.

DELAWARE LAW

The right to appeal is available to all convicted defendants, without trial court certification or other pre-appeal screening, in all cases within the constitutionally imposed limits on appeals. The supreme court itself examines the appeal for frivolity only with respect to the necessity of appointment of counsel for indigent defendants. Supreme Court Rule 10A (5).

COMMENT

Delaware law is in accord with the Standard.

STANDARD

2.5 Release pending appeal; stay of execution.

(a) When an appeal has been instituted by a convicted defendant after a sentence of imprisonment has been imposed, the question of the appellant's custody pending final decision on appeal should be reviewed and a fresh determination made by the trial court. The burden of seeking a stay of execution and release may properly be placed on the appellant. The decision of the trial court should be subject to review by an appellate judge or court on the initiative of either the prosecution or the defense.

(b) Release should not be granted unless the court finds that there is no substantial risk the appellant will not appear to answer the judgment following conclusion of the appellate proceedings and that the appellant is not likely to commit a serious crime, intimidate witnessess or otherwise interfere with the administration of justice. In making this determination, the court should take into account the nature of the crime and length of sentence imposed as well as the factors relevant to pretrial release.

(c) Execution of a death sentence should be stayed automatically when an appeal is instituted.

(d) Procedural devices can safeguard against dilatory prosecution of appeals where such problems may be found. A provision that release is conditioned upon appellats' perfecting their appeals promptly after notice of appeal insures against delay in the commencement of appeals. A provision for termination of the release after a period sufficient to permit cases to be argued or submitted to the appellate court in normal course guards

against lack of diligence in preparation of briefs and records. Such limitations, if used, should be subject to extension where circumstances justify longer periods.

(e) In a jurisdiction with an intermediate appellate court, when review in the highest court is sought by a defendant – appellant, the question of his custody pending decision by the highest court may be redetermined by the intermediate appellate court or a judge thereof. When review is sought by the prosecution, standards relevant to custody of defendants pending prosecution appeal from trial court decisions should be applied. Decisions at the intermediate court level should be subject to review by the highest court.

DELAWARE LAW

In cases other than those in which the death penalty or a sentence of life imprisonment has been imposed, a stay of execution may be granted if the writ of certiorari is sued out within 30 days after the date of final judgment and if the appellant obtains from the trial court (or, upon its refusal, from a justice of the supreme court) a certificate that there is a reasonable ground to believe that there is error in the record which might require a reversal of the judgment below, or that the record presents a question of substantive law which ought to be decided by the supreme court, and if the appellant provides bond in the amount fixed by a justice of the supreme court. 11 Del. C. §4502. In cases in which a sentence of death or life imprisonment has been imposed, the appellant may not be released from custody pending appeal. 11 Del. C. §4502.

COMMENT

Delaware law is generally in accord with applicable parts of the Standard. However, the provision requiring the providing of the bond is of questionable wisdom, and the statute should be expanded to require consideration of the factors set forth in subparagraph (b) prior to granting pre-appeal release.

PART III. PROCESSING APPEALS

3.1 Supervision during the preparation of cases.

(a) Continuing, authoritative supervision of criminal cases on appeal, from docketing through hearing and submission, should be exercised. It may be desirable to assign each case to a single judge who, with an appropriate aide, is authorized to resolve the procedural questions that arise. Under such an arrangement, the judge could delegate to the administrative aide authority to handle most questions, with recourse always available to the judge in charge.

(b) Illustrative of matters that can be administered by such a process would be questions arising in the preparation and filing of the record of the proceedings below; the appointment of counsel and, where necessary, changes in assignment of counsel; granting of stays of execution and admission to bail, at least until the full court can act in due course; and employing practices designed to expedite the appeals by detecting and eliminating unnecessary causes of delay.

COMMENT

The Committee believes that the present practice of the supreme court in controlling its docket of criminal appeals fully complies with the objectives of the Standard.

STANDARD

3.2 Counsel on appeal.

(a) Every appellant should have assistance of counsel at all stages of appeal. For appellants without means to obtain adequate legal assistance, counsel should be assigned unless the right to counsel is explicitly waived. Assigned counsel should be compensated from public funds.

(b) Counsel should not seek to withdraw from a case solely because of his determination that the appeal lacks merit.

(i) Counsel should give his client his best professional estimate of the quality of the case and should endeavor to persuade the client to abandon a wholly frivolous appeal, or to eliminate particular contentions that are lacking in any substance.

(ii) If the client wishes to proceed, it is better for counsel to present the case, so long as his advocacy does not involve deception or misleading the court. After preparing and filing a brief on behalf of the client, counsel may appropriately suggest that the case be submitted on briefs or request permission to withdraw.

(c) Unexplained, general requests by appellants for dismissal of their assigned counsel should be viewed with disfavor.

(d) In a jurisdiction with an intermediate appellate court, appellate counsel for a defendant who has prevailed in the intermediate court should continue to represent the client if the prosecution seeks review in the highest court unless new counsel is substituted or unless the highest court permits counsel to withdraw in the interests of justice or for other sufficient cause. Similarly, in any jurisdiction, appellate counsel should continue to represent his client if the prosecution seeks review in the Supreme Court of the United States.

DELAWARE LAW

Counsel for indigent appellants is constitutionally required at the first level of appellate review, if such review is available as of right. Douglas v. California, 372 U.S. 353 (1963). The Supreme Court Rules provide for appointment of counsel for indigent appellants at State expense. Supreme Court Rule 10A (3). However, this rule does "not apply to any case in which the record on appeal satisfactorily shows that the appeal on its face is without any basis in fact or in law, or is on its face frivolous." Supreme Court Rule 10A (5). Delaware practice accords with subparagraphs (b) and (c).

COMMENT

Delaware law is in accord with the Standard.

STANDARD

3.3 The record on appeal.

(a) Continuing efforts should be exerted to improve techniques for the preparation of records for appeals. Methods should be adopted that will minimize the cost of preparation in terms of money and time. The traditional requirement of the printed record should be abandoned completely. Developing technology should be watched; and, as promising new processes are perfected, they should be accepted as soon as they provide more rapid and efficient preparation of records.

(b) For defendants appealing in forma pauperis, transcripts of the testimony and other elements of the record should be supplied at public expense.

DELAWARE LAW

In an appeal from a conviction by an indigent defendant (if indigency is evidenced by appointment of counsel by the superior court at trial or by the filing of a pauper's oath in the supreme court), under Rule 10A (1) the appellant is entitled to a free copy of the transcript of the evidence at trial if it appears that the ground of his appeal will necessitate a review of the evidence. The request for a free transcript is made initially to the trial court, whose ruling is reviewable by a justice of the supreme court. Supreme Court Rule 10A (2).

COMMENT

Delaware law is in accord with the Standard.

STANDARD

3.4 Expediting handling of appeals.

An appellate court should develop and employ techniques for expediting the handling of appeals. In addition to continuing evaluation of time schedules for various stages of the appeal, the court should seek to minimize the process for each appeal.

COMMENT

The Committee believes that the supreme court is acting in accordance with the Standard in the handling of its criminal appellate docket.

CHAPTER 14

POST-CONVICTION REMEDIES

PART I. GENERAL PRINCIPLES

1.1 Unitary post-conviction remedy.

There should be one comprehensive remedy for post-conviction review (i) of the validity of judgments of conviction or (ii) of the legality of custody or supervision based upon a judgment of conviction. The unitary remedy should encompass all claims whether factual or legal in nature and should take primacy over any existing procedure or process for determination of such claims.

DELAWARE LAW

Superior Court Criminal Rule 35(a) provides as follows:

> Any person who has been sentenced by the Court may apply by motion for post conviction relief for any meritorious claim challenging the judgment of conviction including claims: (i) That the conviction was obtained or sentence imposed in violation of the Constitution and laws of this State or the United States; (ii) that the Court imposing the sentence was without jurisdiction to do so; or (iii) that the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law. An application may be filed at any time, provided, however, that post conviction relief shall not be available so long as there is a possibility of taking a timely appeal from the judgment of conviction. Unless the motion and the files and records of the case show to the satisfaction of the Court that the applicant is not entitled to relief, the Court shall cause notice thereof to be served on the Attorney General, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto, If the Court finds the applicant is entitled to relief, the Court may set aside the judgment, release the applicant from custody, resentence the applicant, grant the applicant a new trial, or otherwise correct the judgment of conviction as may appear appropriate. The court need not entertain a second motion or successive motions for similar relief on behalf of the same applicant.

Delaware courts have held that, after the time for appeal has expired, the appropriate remedy for prejudicial trial error is under Rule 35, not by a writ of habeas corpus. Only where the judgment is not legal on its face, or where extraordinary circumstances are involved may a prisoner directly resort to habeas corpus. Golla v. State, Del. Supr., 135 A. 2d 137 (1957); Curran v. Wooley, Del. Supr., 104 A. 2d 771 (1954). Rule 35 also has been held the proper means to raise matters dehors the record. Williams v. State, Del. Supr., 205 A. 2d 9 (1963).

COMMENT

Present Delaware law closely approximates the Standard, but the Standard would permit more comprehensive relief with respect to the custody and supervision of a convicted person, The Standard suggests that there should be one comprehensive post-coviction remedy for the review both of the validity of the conviction (presumably limited to a review of matters dehors the record which cannot be reviewed on appeal) and of the legality of custody or supervision based upon a judgment of conviction. This would permit a challenge to the conditions of parole, probation or incarceration. This would permit an inquiry into matters which cannot now be raised under Rule 35(a) which focuses in this area solely on whether a sentence is authorized by law.

STANDARD

1.2 Characterization of the proceeding.

The characteristics of the post-conviction remedy should not be governed by whether it is denominated a civil or criminal proceeding. It partakes of some attributes of each. The procedures should be appropriate to the objectives of the remedy. While the post-conviction proceeding will necessarily be separate from the original prosecution proceeding for many purposes, the post-conviction stage is, in a sense, an extension of the original proceeding and should be related to it insofar as feasible.

DELAWARE LAW

See Superior Court Criminal Rule 35(a) set forth in full under Standard 1.1. The Rule itself prescribes certain rudiments of the applicable procedure. Though Delaware law does not specifically denominate the proceeding it is part of the criminal rules of the superior court and it has been held that the civil rules of discovery are not applicable under Rule 35 as they are in habeas corpus. Curran v. Woolley, Del. Supr., 104 A. 2d 771 (1954).

COMMENT

Delaware is in accord with the Standard.

STANDARD

1.3 Parties; legal representatives of the respondent.

(a) The appropriate moving party in a post-conviction proceeding is the person seeking relief, proceeding in his own name. The appropriate respondent is the entity in whose name the original prosecution was brought,

e.g., State, People, Commonwealth, or the United States of America.

(b) The legal officer with primary responsibility for responding to applications for post-conviction relief should be the attorney general, or other designated legal officer with state-wide jurisdiction, with power to assign cases to the local prosecutors when the attorney general deems it in the interest of the state to do so.

COMMENT

The Delaware practice is in accord with the Standard. Though not specifically required by Superior Court Criminal Rule 35, actions thereunder have been prosecuted in the names of the defendant and the State.

STANDARD

1.4 Jurisdiction and venue.

(a) Original jurisdiction to entertain applications for post-conviction relief can be vested either in those local trial courts authorized to try criminal cases or in a single court of state-wide jurisdiction, such as an appellate court. Although choice of a single state-wide court has several theoretical and practical advantages, it would not be inappropriate to continue the prevailing practice of using local courts as the courts of original jurisdiction.

(b) The most desirable venue for a post-conviction proceeding is in the court in which the applicant's challenged conviction and sentence were rendered. Such a choice fosters administrative convenience and equitable distribution of the burden of litigation. To guard against prejudice because of the site of the forum, procedure for change of venue should be provided and liberally administered.

(c) Where jurisdiction is vested in the trial courts and venue is determined as in (b) above, neither a general rule favoring nor one disfavoring submission of post-conviction applications to the same trial judge who originally presided is clearly preferable. If the practice of ordinary assignment to the same judge is adopted, it should be tempered to permit the judge freely to recuse himself in a particular case, whether or not formally disqualified by bias or by being potentially a witness who may testify, whenever he finds it better to have a different judge preside in the case.

DELAWARE LAW

Superior Court Criminal Rule 35 is applicable to the superior court, but has been held by analogy to apply to inferior courts as well. Jones v. Anderson, Del. Supr., 183 A. 2d 177 (1962). There is no statute or rule relating to change of venue for post-conviction motions. Superior Court Criminal Rule 21 is limited to obtaining a "fair and impartial trial."

COMMENT

Delaware law complies with paragraph (a) of the Standard, but not, at least in written form, with paragraphs (b) and (c). The Committee believes that a rule should be adopted to conform with paragraphs (b) and (c) to prevent an unfair burden of cases from arising in New Castle County because of the location of the State prison in that county.

PART II. SCOPE OF REMEDY

2.1 Grounds for relief.

A post-conviction remedy ought to be sufficiently broad to provide relief

(a) for meritorious claims challenging judgments of 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 in which the judgment was rendered;

(ii) that the applicant was convicted under a statute that is in violation of the Constitution of the United States or the constitution of the state in which judgment was rendered, 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 theretofore 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 law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence, where sufficient reasons exist to allow retroactive application of the changed legal standard;

(vii) on grounds otherwise properly the basis for collateral attack upon a criminal judgment;

(b) for meritorious claims challenging 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 unlawful revocation of parole or probation or conditional release.

DELAWARE LAW

Delaware's post-conviction remedy is contained in Superior Court

Criminal Rule 35 which is set forth in full under Standard 1.1. In terms, it covers the matters dealt with in subparagraphs (a)(i) through (a)(iv), but the courts have tended to expand the coverage of the remedy to include all matters which might at common law have been raised under the writs of habeas corpus and coram nobis. Rule 35 is thus probably available to cover most of the matters dealt with in subparagraphs (a)(v) through (a)(vii). See Curran v. State, Del. Supr., 122 A. 2d 126 (1956); Curran v. Wolley, Del. Supr., 104 A. 2d 771 (1954). On the other hand, Rule 35 does not cover most of the matters dealt with in paragraph (b). Where the relief sought is release from custody because a sentence is alleged to have expired, habeas corpus is the proper remedy. Frye v. State, Del. Supr., 236 A. 2d 424 (1967).

COMMENT

The Committee suggests that the present Rule 35 should be redrafted and expanded to include in one uniform procedure all of the matters discussed in the Standard.

STANDARD

2.2 Prematurity of application for post-conviction relief; postponed appeals.

(a) Post-conviction relief should not be available so long as there is a possibility of taking a timely appeal from the judgment of conviction and sentence.

(b) The over-all procedural system should be sufficiently flexible on the timeliness of appeals from judgment of conviction and sentence to permit postponed or nunc pro tunc appeals where reason for such exits. If an application for leave to take a postponed appeal is denied because it raises issues outside the record, or if for any other reason it appears more appropriate to consider the claims in a post-conviction proceeding, the system should provide for the expeditious transfer of the case to such a proceeding.

DELAWARE LAW

Superior Court Criminal Rule 35 is not a substitute for appeal; it may be employed only after all rights of appeal have been exhausted or have expired. Priest v. State, Del. Supr., 227 A. 2d 576 (1967). Superior Court Criminal Rule 45(b) permits the court to enlarge the time within which an act must be done, but denies such power in the case of appeals and motions under Rule 35. The supreme court has, however, frequently treated a defective habeas corpus petition as a motion under Rule 35. See Rocker v. State, Del. Supr., 240 A. 2d 141 (1968).

COMMENT

Delaware practice is in accord with the Standard. The Committee favors revision of Rule 35 to include language making the present practice part of the Rule.

STANDARD

2.3 Custody requirement.

Except for a claim under section 2.1(b) which does not affect the validity of a criminal judgment, the availability of post-conviction relief should not be dependent upon the applicant's attacking a sentence of imprisonment then being served or other present restraint. The right to seek relief from an invalid conviction and sentence ought to exist:

(i) even though the applicant has not yet commenced service of the challenged sentence;

(ii) even though the applicant has completely served the challenged sentence;

(iii) even though the challenged sentence did not commit the applicant to prison, but was rather a fine, probation, or suspended sentence.

DELAWARE LAW

Superior Court Criminal Rule 35(a) does not require that the defendant be in custody. It has been employed even prior to sentencing. See Rocker v. State, Del. Supr., 240 A. 2d 141 (1968). The Rule is silent as to whether a motion thereunder may be made after the sentence has been fully served, and no case on this point has been found.

COMMENT

Delaware law is partially in accord with the Standard. The Committee is concerned about possible abuse of subsection (i), and would favor a revision thereof to prevent use of this device solely to delay the start of the sentence.

STANDARD

2.4 Statute of limitations; abuse of process; stale claims.

(a) It is unsound to fix a specific time period as a statute of limitations to bar post-conviction review of criminal convictions. The circumstances that will occasion applications for post-conviction relief are too many and varied to permit of one useful limitations period.

(b) It should be considered an abuse of process for a person with a tenable or meritorious claim for post-conviction relief deliberately and knowingly to withhold presentation of that claim until an event occurs which he believes prevents successful re-prosecution or correction of the vitiating error. An applicant who has committed such abuse of process may be denied relief on his claim. Courts should not be required to deny relief in all such cases. Abuse of process ought to be an affirmative defense to be specifically pleaded and proved by the state.

(c) A state has a legitimate interest in avoiding litigation of stale claims. Where an applicant has completed service of a challenged sentence and, belatedly, seeks post-convinction relief, he can be charged with the responsibility of showing present need for such relief. A sufficient showing of present need is made, for example, where:

(i) an 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) an applicant is or may be disadvantaged in seeking parole under a later sentence; or

(iii) an applicant is under a civil disability resulting from the challenged conviction and preventing him from a desired and otherwise feasible action or activity.

COMMENT

In conformity with the Standard, Delaware law sets no time limitation on the availability of a Superior Court Criminal Rule 35 motion. It does not, however, enunciate any principle disfavoring stale claims. The Committee believes that Rule 35 should be amended to include specific provisions against stale claims.

PART III. THE APPLICATION: PREPARATION, FILING, AND SERVICE

3.1 Preparation of applications for relief; resources available to applicants.

(a) Every post-conviction relief system must take into account the necessary premise that the initial legal step, preparation and filing of an application, probably will be performed by laymen in prison without assistance of counsel and without access to more than limited legal materials.

(b) The minimum conditions desirable in prison would include:

(i) availability of stationery and supplies;

(ii) the right to purchase and retain legal reference materials in reasonable amounts;

(iii) reasonable access to any legal reference materials in the prison library; and

(iv) free and uninhibited access to the courts and to private counsel.

(c) In addition, it is desirable for a state to arrange for, or to permit, in-prison guidance or counselling of prisoners on the validity or invalidity of claims for post-conviction relief. The following steps may be appropriately considered:

(i) regular visits by lawyers or law students to the prison to discuss cases or problems with prisoners on an individual basis, arranged by an independent agency such as a local bar association or defender association or law school;

(ii) establishment and supervision of an adequate collection of legal reference materials related to criminal law and procedure in the prison library to permit the prisoners' own research to be as accurate and complete as possible;

(iii) distribution of specially prepared pamphlets or brochures to prisoners, prepared by reliable and independent agencies, outlining the scope of post-conviction relief in language and form understandable to the prison population.

(d) Optimally, a state could establish a regular agency to be charged with the responsibility of providing legal advice and representation to its prisoners. A state with a public defender system could make this task an added function of that office, or a special agency could be created for this purpose. In no event should this function be administratively related to the custodial personnel.

COMMENT

There is no comparable provision in the Delaware statutes or Superior Court Criminal Rules. Many of the matters covered by the Standard are dealt with in an inmate reference manual, promulgated in 1972, and available to all Delaware prisoners. The Committee does not favor adoption of subsection (c)(i), believing that the suggested visits would likely result in ethical problems and would only stir up frivolous applications. The Committee believes that sufficient legal assistance is available without such visits.

STANDARD

3.2 Standardized application forms.

The preparation and use of a standarized application form using language and concepts understandable to laymen can aid considerably in improving the quality of applications filed pro se by prisoners. The cost is slight compared to the gain in coherence and intelligibility of applications.

COMMENT

There is no comparable provision in the Delaware statutes or Superior Court Criminal Rules. The Committee recommends adoption of the Standard.

STANDARD

3.3 Applications with false allegations; verification requirement.

(a) There should be a requirement of verification of pro se applications for post-conviction relief, subject to the law of perjury or false swearing for knowing falsehoods.

(b) Prisoners should have ready access to a notary public or other officer authorized to administer oaths.

COMMENT

There is no comparable provision of present Delaware law. However 11 Del. C. § 1233 provides class A misdemeanor penalties for a person who "makes a false [written] statement which he knows to be false or does not believe to be true in a written instrument bearing a notice, authorized by law, to the effect that false statements therein are punishable." This section could provide an appropriate vehicle for verification of applications for post-conviction relief and would not require the presence of a notary. Alternatively, the perjury provision of 11 Del. C. § 1222(1) could be made applicable by a requirement that the application be "under oath." Ready access to a notary public is available at Delaware correctional institutions.

STANDARD

3.4 Supporting affidavits; sources of evidence to prove claims.

It is not reasonable to require a prisoner to submit with his application affidavits of third parties in support of his claim for post-conviction relief, as a condition for consideration of the application. Nor can the applicant be fairly expected, at this stage, to outline how he intends to prove all the factual allegations material of his claim. Exploration of the existence of evidentiary bases for allegations, sufficient on their face, may be appropriately a matter for inquiry at a later stage, rather than as a test of pleading sufficiency.

DELAWARE LAW

Superior Court Criminal Rule 47(a) provides as follows:

An application to the Court for an order shall be by motion. A motion

other than one made during a trial or hearing shall be in writing unless the Court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit.

COMMENT

Delaware law is in substantial compliance. Rule 47 states that an affidavit may be presented but is not required. However, one case has suggested the superior court adopt a rule dealing specifically with applications of this sort and that consideration might be given to a requirement that such application must be supported by affidavits in order to supply the superior court on review with knowledge of the ground of the application. Jones v. Anderson, Del. Supr., 183 A. 2d 177 (1962). However, other cases uniformly hold an application may be dismissed without a hearing where on the records and files of the case there is no showing of entitlement to relief as determined within the discretion of the court. Shy v. State, Del. Supr. 246 A. 2d 926 (1968). A defendant merely has to show there is a possible ground for relief on the basis of records and files in order to be granted a hearing. Cannon v. State, Del. Supr., 196 A. 2d 399 (1963), reversed a trial judge's ruling which had denied a Rule 35(a) motion on the basis that a presentence investigation and report available to the judge, were sufficient to grant said motion.

STANDARD

3.5 Filing fees.

(a) Because the overwhelming number of applicants for post-conviction relief are indigent, it is probably unwise to require a filing fee for applications. The cost of administration entailed in a procedure for waiver of fees will likely exceed the revenues from fees paid.

(b) If a filing fee is required, there should be a routine procedure for waiver of the requirement. Standardized forms for applications should include the requisite averments necessary to proceed without payment of fees.

COMMENT

No filing fee is required for an application for post-conviction relief in Delaware. Thus Delaware law complies with the Standard.

PART IV. PROCESSING APPLICATIONS

4.1 Judicial responsibility for disposition; masters.

(a) All dispositions should be made by appropriate judicial officers,

who bear and acknowledge responsibility for the judgments. The utilization of masters for preliminary inquiries may be appropriate and should be explicitly authorized. Applications should not be disposed of by administrative or non-judicial personnel, whether by refusal to docket or otherwise.

(b) Final disposition of applications should be made at the earliest stage consistent with the purpose of deciding claims on their underlying merits rather than on formal or technical grounds.

DELAWARE LAW

Superior Court Criminal Rule 35(a) provides for a prompt hearing by the court of applications for post-conviction relief, but only if preliminary study by the court does not satisfy it that the applicant is not entitled to relief. There is no provision for utilization of masters.

COMMENT

There does not appear to be an immediate need for the appointment of masters to screen applications for post-conviction relief in Delaware. Masters may be needed if post-conviction relief is expanded. With respect to the provision for prompt hearing, Delaware law complies with the Standard.

STANDARD

4.2 Preliminary judicial screening of applications.

(a) Because of the limited pleading capabilities of lay applicants, it is not expedient for courts to undertake to evaluate applications filed pro se by such persons. A routine practice of ruling on such applications for sufficiency of pleadings should be avoided. The court will be better able to understand the nature of the grievance asserted and to determine the proper mode of proceeding after a responsive pleading has been filed and the pertinent record has been brought into focus. It is preferable, therefore, that the courts make it clear that responsive pleadings are expected as of course.

(b) If any preliminary judicial screening of pro se applications is undertaken prior to receipt of responsive pleadings, orders of final dismissal should be confined to cases of unmistakably frivolous allegations.

DELAWARE LAW

Superior Court Criminal Rule 35(a) specifically provides for preliminary review by the court of the "files and records of the case" and requires a hearing and notice to the Attorney General only if the application survives such initial review.

COMMENT

Delaware law is not in compliance with the Standard. However, it should be noted that printed decisions on Rule 35(a) motions reveal that the courts have followed a practice of careful and judicious review. The Committee favors retention of the present screening practice.

STANDARD

4.3 Responsive pleading; calendar priority; bail; stays of execution; dismissal on the pleadings.

(a) A responsive pleading should be required, by a rule to show cause or otherwise, no more than 30 days after an application has been filed. The response should fully and fairly meet the allegations of the application. Where the record of prior proceedings would aid the court in understanding the nature of the contentions, counsel for the respondent should undertake to supply the relevant portions, to the extent that they are not appended to the application.

(b) In addition to making effective the requirement of prompt response by the state, if the applicants are held under sentence of death or imprisonment, or if there is other reason for expedition, courts should accord calendar priority to the determination of applications for post-conviction relief.

(c) Courts should have the power to order executions stayed or to release applicants on recognizance or with sufficient sureties in appropriate cases, pending final disposition of applications for post-conviction relief.

(d) In light of the application and response, the court must determine whether to order further proceedings, including appointment of counsel for a pro se applicant, if not made previously, or to look toward termination of the matter. If the latter course is taken, the court should indicate its intention to dismiss the application with a brief statement of the reasons, and permit the applicant a reasonable opportunity to reply before final disposition.

(e) Disposition on the pleadings and record of prior proceedings without appointment of counsel for the unrepresented applicant is not proper if it requires resolution of a non-frivolous question of law. Disposition at this stage is always improper whenever there exists a material issue of fact.

DELAWARE LAW

Superior Court Criminal Rule 35(a) does not in terms provide for a responsive pleading to motions for post-conviction relief filed in superior court. Supreme Court Rule 40 (relating to correction of illegal sentences imposed by courts of inferior jurisdiction) provides that the Attorney General

"may" file answering affidavits after receiving the petitioner's affidavits. Calendar priority is not provided for applications for post-conviction relief, other than the general preference for criminal matters set forth in Superior Court Criminal Rule 50(a). There is no rule expressly permitting stay of execution or release pending the outcome of a Rule 35(a) or Supreme Court Rule 40 application. The presence of the defendant or his counsel is not seemingly required by Superior Court Criminal Rule 43 in a Rule 35(a) motion. See Shy v. State, Del. Supr., 246 A. 2d 926 (1968). As has been previously stated, Rule 35(a) contemplates that Rule 35(a) applications which appear nonmeritorious on the basis of the motion and the files and records may be dismissed without responsive pleading and without argument. On the other hand, Superior Court Criminal Rule 44 provides that the court may assign counsel for an unrepresented defendant "at every stage of the proceeding." This Rule would presumably provide for representation if the Rule 35(a) motion survives initial review by the court.

COMMENT

The Committee favors adoption of the Standard, except that paragraph (c) does not give sufficient weight to the fact that there may have previously been an appeal raising the same contentions as are raised on post-conviction motions. Moreover, the Committee would favor calendar priority for trials of incarcerated defendants, rather than post-conviction motions.

STANDARD

4.4 Appointment of counsel; withdrawal of appointed counsel.

(a) It is most desirable to avoid processing of applications for post-conviction relief beyond the initial screening of the documents without counsel representing the applicant. Counsel should be provided for pro se applicants unable to afford adequate representation. When private counsel are appointed to represent such applicants, their services should be compensated adequately from public funds.

(b) The responsibility of appointed counsel to continue to serve their clients through any appellate proceedings, including review by the Supreme Court of the United States, should be affirmed. Even if appointed counsel is not expected to continue in a case beyond the level of the court appointing him, he should be responsible at a minimum to continue in the case, if the applicant wishes to proceed further, until an appeal is perfected or the necessary preliminary steps have been taken to bring the case before the reviewing court.

COMMENT

As stated under Standard 4.3, there is no clear requirement under the

present Delaware rules that counsel be appointed to represent applicants for post-conviction relief. Superior Court Criminal Rule 44 should be amended to provide for the appointment of such counsel.

STANDARD

4.5 Summary disposition without plenary hearing; discovery.

(a) Applications for post-conviction relief can appropriately be decided on the merits without a plenary evidentiary hearing, and without the expense, risk, and inconvenience of transporting the applicants, if in custody, from the prison to the courthouse. Such summary disposition is proper in all cases where there is no factual issue or where the case is submitted on an agreed statement of facts.

(b) Discovery techniques, specially adapted for post-conviction proceedings, should be utilized for assistance in advancing a case toward disposition by exploring issues of fact. The fruits of the discovery process may be useful in determining whether summary disposition is appropriate, or whether a plenary evidentiary hearing is necessary to resolve material issues of fact.

(i) In-prison depositions of applicants in custody, to develop more fully the nature of their claims and the potential evidentiary support therefor, should be authorized. Such depositions may be oral or upon written interrogatories.

(ii) An effective procedure should be established for the production of documents, including the relevant parts of the transcript of the original trial, or tangible things, for taking depositions of witnesses, and for the service of requests for admissions or written interrogatories on the opposing party.

(iii) Employment of the various discovery techniques in this context should be subject to continuing court supervision. A requirement of a showing of good cause may be appropriate prior to utilization.

(iv) It is a prerequisite of effective discovery that the applicant be represented by counsel.

(v) The applicant retains his privilege against self-incrimination and cannot be compelled to create evidence which might prejudice him at any retrial. Such evidence, reflecting on the guilt or innocence of the applicant, would not in any event be relevant to his claim for post-conviction relief.

(vi) The costs of discovery, where the applicants are indigent, should be borne by the state.

COMMENT

Delaware law at present clearly contemplates summary disposition

of Superior Court Criminal Rule 35(a) motions. See Shy v. State, Del. Supr., 246 A. 2d 926 (1968); Cannon v. State, Del. Supr., 196 A. 2d 399 (1963). However, Rule 35(a) does not comply with the Standard because summary disposition may occur without the necessity of any pleading by the Attorney General. The Rule should be amended to comply with the Standard. The Rule should also be amended to provide for suitable discovery procedures as contemplated by paragraph (b) of the Standard.

STANDARD

4.6 Plenary hearing; presence of applicant; evidence and proof; findings of fact.

(a) A plenary hearing to receive evidence, by testimony or otherwise, is required whenever there are material questions of fact which must be resolved in order to determine the sufficiency of the application for relief.

(b) The applicant and his counsel should be present at a plenary hearing, unless the right to be present has been expressly waived. The applicant's presence is not required at any preliminary conference held to frame the issues and expedite the hearing.

(c) Normal rules of admissibility of evidence should be followed in post-conviction hearings. Evidence should be given in open court, recorded and preserved as part of the record.

(i) A duly authenticated record or transcript, or portion therof, may be used as evidence of facts and occurences during prior proceedings. Such record or transcript should be subject to impeachment by either party.

(ii) Depositions of witnesses, unavailable for the hearing, should be admissible if properly administered and taken subject to the right of cross-examination.

(iii) If facts within the personal knowledge of the judge who presided at an earlier proceeding are to be adduced by his testimony or otherwise, he cannot properly preside at the hearing. The presiding judge at the hearing should not take into account facts within his personal knowledge unless those facts may be judically noticed.

(d) The allocation between the applicant and respondent of the burden of proof on issues of fact is primarily a corollary of the underlying substantive law governing the claims advanced. Ordinarily, the proponent of factual contentions, whether the applicant's proof of the elements of a prima facie case or the respondent's proof of affirmative defenses, should have the burden of establishing those facts by a preponderance of evidence.

(e) At the conclusion of a plenary hearing, the court should make explicit findings on material questions of fact. Effort to keep separate the recital of relevant historical events from the legal characterization of those events is most desirable, especially on issues that may be described as involving mixed questions of law and fact.

DELAWARE LAW

Superior Court Criminal Rule 35(a) provides for a hearing, upon notice to the Attorney General, in any case which gets beyond the preliminary screening process. At this hearing, the court is to "determine the issues and make findings of fact and conclusions of law with respect thereto." There are no other rules of procedure which by their terms apply to a Rule 35(a) proceeding.

COMMENT

Rule 35(a) should be expanded to include the specific procedural provisions contemplated by the Standard.

STANDARD

4.7 Dispositive orders; trial court opinions.

(a) The order of the court, at the conclusion of a post-conviction proceeding, should provide appropriate disposition.

(i) If the court finds in favor of the state, it should enter an order denying the application for relief. The order should indicate whether the denial is after plenary hearing, on summary disposition, or on the pleadings.

(ii) If the court finds in favor of the applicant, the order should identify clearly the claim or claims found meritorious. The kind of affirmative relief ordered will vary with the nature of the meritorious contention. Where the court finds in favor of the applicant for error in the trial or pretrial stages of the process leading to conviction, relief may be immediate discharge from custody or may be release at a specified early date unless, within that time, the state takes the necessary steps to commit the applicant to custody pending re-indictment, re-arraignment, retrial, or re-sentence, as the case may be. In some instances, only a declaration of invalidity of the prior conviction may be required. Where the court finds in favor of the applicant for error concerning his right to appeal from his judgment of conviction, the court should have authority to fix the time within which the applicant may now pursue such appeal.

(iii) The court should have authority in all instances, upon timely request, to stay its final order or to issue supplementary orders regarding custody, bail, and the like, pending review of its determination by an appellate court.

(b) It is desirable that the court prepare at least a brief opinion indicating the legal standards applied and, in light of the findings of fact, its specific conclusions of law. Such opinion is especially useful in the event of appeal from the court's determination.

COMMENT

Because of Superior Court Criminal Rule 35(a)'s requirement that the court make findings of fact and conclusions of law, Delaware law is in accord with the Standard. It may be desirable, however, to expand the Rule to cover more specifically the points made by the Standard. For example, the Rule might state the alternate dispositions which may be made, and might require the filing of a memorandum opinion. The Committee believes that a written opinion should be mandatory in each case.

PART V. APPELLATE REVIEW

5.1 Appellate jurisdiction; limitation on right to appeal.

(a) If post-conviction applications are considered in the first instance by the trial level courts (see section 1.4, supra), appellate review should be available through the same courts authorized to hear appeals from judgments of conviction. The time period within which the appellate process must be initiated should be the same as is normally provided for appeals from judgments of conviction, unless that period is too short in light of the difficulties of communication between a person confined in prison, his counsel and the court.

(b) Appellate review of final judgments should be available as of right at the instance of either the applicant or respondent. It is undersirable to impose as a condition of taking an appeal that the party seeking review obtain leave to appeal from either the trial court or the appellate court.

(c) Appellate review of an interlocutory order denying a stay of execution of a death sentence should be authorized when necessary to prevent carrying out of the sentence before final judgment in the trial court. Such power of review may be assigned to a single judge or justice.

COMMENT

Delaware complies with the Standard. There is clearly recognized a right of appeal to the supreme court from a superior court ruling on a Superior Court Criminal Rule 35(a) application. Preston v. State, Del. Supr., 306 A. 2d 712 (1973); Harris v. State, Del. Supr., 305 A. 2d 318 (1973); Hamilton v. State, Del. Supr., 285 A. 2d 807 (1971); Hodsdon v. Superior Court, Del. Supr., 239 A. 2d 222 (1968). Furthermore, when the defendant failed to appeal denial of a Rule 35(a) application to the supreme court, the district court refused a petition for a writ of habeas corpus. United States ex rel. Samuels v. Anderson, 304 F. Supp. 545 (D. Del. 1969). Leave to appeal is not required.

Supreme Court Rule 23 and 10 Del. C. § 147 specify appeal from the

superior to the supreme court within 30 days after imposition of sentence; there is no provision for an extension of time.

There is no statutory provision or rule covering appellate review of an interlocutory order denying a stay of exection of a death sentence.

STANDARD

5.2 Appellate court process; counsel; bail.

(a) As is true with respect to proceedings in trial level courts, appeals should not be processed pro se for want of assignment of counsel to persons unable to afford adequate representation. Where counsel has been appointed to represent an applicant in the court of original jurisdiction, it is desirable to recognize his continuing responsibility to represent his client through any appellate proceedings.

(b) The appellate court, or an individual judge or justice, should be authorized to release applicants for post-conviction relief or otherwise to stay execution of their judgments of conviction pending appellate review. It is appropriate to require applicants to seek such interim relief first from the trial courts, and ordinarily the determinations of the trial courts on such matters should not be modified or reversed.

DELAWARE LAW

Supreme Court Rule 10A provides for the appointment of counsel for an indigent defendant if the court determines that such appointment is necessary. There is no rule or statute expressly governing the power of the supreme court or a Justice thereof to release appellants or to stay execution of their sentences. Compare 11 Del. C. §4502 dealing with the effect of a writ of certiorari.

COMMENT

Delaware law complies with paragraph (a) of the Standard. Probably revision of 11 Del. C. §4502 would be required to comply with paragraph (b).

STANDARD

5.3 Appellate court disposition; scope of appellate review.

(a) Appellate courts should exercise a broad scope of review on matters of fact and law consistent with the fundamental rights subject to litigation in post-conviction proceedings.

(b) A statement of the basis or bases for decision in a reasoned opinion ought to accompany disposition of appeals.

DELAWARE LAW

The Supreme Court of Delaware has held that a Superior Court Criminal Rule 35 motion is addressed solely to the discretion of the court. Shy v. State, Del. Supr., 246 A. 2d 926 (1968). Furthermore, review is only available where the lower court has abused its discretion. Hamilton v. State, Del. Supr., 285 A. 2d 807 (1971); Hinckle v. State, Del. Supr., 189 A. 2d 432 (1963); Jones v. Anderson, Del. Supr., 183 A. 2d 177 (1962). In Hinckle and Hamilton the lower court refused to consider evidence of plea bargaining and was held to have abused its discretion. In Cannon v. State, Del. Supr., 196 A. 2d 399 (1963), the supreme court held the lower court abused its discretion by denying a hearing to a defendant who claimed a sentence including 20 lashes was excessive. The court held:

> We have little doubt but that a sentence excessive in the sense that it has an entirely unwarranted adverse effect upon a prisoner may be attacked collaterally under Rule 35(a). Because the presentence report contained sufficient evidence of the defendant's possible mental instability and the possible far reaching and unwarranted adverse effect upon him as an individual it was an abuse of discretion to deny a hearing under Rule 35. As stated in Levitt v. Bouvier, Del. Supr., 287 A. 2d 671 (1972), the findings of a trial judge, supported as they are by sufficient evidence, will not be disturbed unless they are "clearly wrong and the doing of justice requires their overturn.

The Supreme Court of Delaware issues an opinion which states the basis for its decision.

COMMENT

Delaware law is not in accord with paragraph (a) of the Standard because it places a substantial limitation on the scope of appellate review.

PART VI. FINALITY OF JUDGMENTS

6.1 The judgments of conviction; waiver.

(a) Unless otherwise required in the interest of justice, any grounds for post-conviction relief as set forth in section 2.1 which have been fully and finally litigated in the proceedings leading to the judgment of conviction should not be re-litigated in post-conviction proceedings.

(i) It is essential that accurate and complete records of proceedings leading to such judgments be compiled and retained in accessible form.

(ii) A question has been fully and finally litigated when the highest court of the state to which a 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 state.

(b) Claims advanced in post-conviction applications should be decided on their merits, even though they might have been, but were not, fully and finally litigated in the proceedings leading to judgments of conviction.

(c) Where an applicant raises in a post-conviction proceeding a factual or legal contention which he knew of and which he deliberately and inexcusably

(i) failed to raise in the proceeding leading to judgment of conviction, or

(ii) having raised the contention in the trial court, failed to pursue the matter on appeal,

a court should deny relief on the ground of an abuse of process. If an application otherwise indicated a claim worthy of further consideration, the application should 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 counsel, to reply.

(b) Because of the special importance of rights subject to vindication in post-conviction proceedings, courts should be reluctant to deny relief to meritorious claims on procedural grounds. In most instances of unmeritorious claims, the litigation will be simplified and expedited if the court reaches the underlying merits despite possible procedural flaws.

DELAWARE LAW

Superior Court Criminal Rule 35(a) has been held to be a means of reviewing violations of constitutional guarantees and illegal sentences, but not a substitute for a motion for new trial or an appeal. Priest v. State, Del. Supr., 227 A. 2d 576 (1967). It is unclear, however, whether a defendant can in a Rule 35(a) application raise a matter that was fully and finally litigated at trial and on appeal. Compare Supreme Court Rule 40 which requires an allegation that the point or points set forth in the motion where not raised in the course of its proceeding resulting in the allegedly illegal sentence and the reasons why the point or points were not raised. Rule 35(a) has been held to be the appropriate method to raise matters which were not raised at trial. Curran v. Woolley, Del. Supr., 104 A. 2d 771 (1954). No cases have been found dealing with a deliberate and inexcusable failure to raise a matter.

COMMENT

Delaware law partially complies with the Standard, but should be amended to cover all points made in the Standard.

STANDARD

6.2 Prior post-conviction proceedings; repetitive applications.

(a) In general, the degree of finality appropriately accorded to a prior judgment denying relief in a post-conviction proceeding should be governed by the extent of the litigation upon the earlier application and the relevant factual and legal differences between the present and earlier applications. In particular,

(i) a judgment dismissing an application, on its face, for want of sufficient allegations should not bar consideration of the merits of a subsequent application that adequately indicates a cognizable claim; and

(ii) a judgment denying relief, after plenary evidentiary hearing, to an applicant represented by counsel should be binding on questions of fact or of law fully and finally litigated and decided, unless otherwise required in the interest 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.

Finality is an affirmative defense to be pleaded and proved by the state.

(b) In any case where an 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 or,

(ii) having raised the contention in the trial court, failed to pursue the matter on appeal,

a court should deny relief on the ground of an abuse of process. If an application otherwise indicates a claim worthy of further consideration, the application should not be dismissed for abuse of process unless the state has raised the issue in its answer and the applicant has had an opporutnity, with assistance of counsel, to reply.

(c) A judgment granting relief in a post-conviction proceeding should not foreclose renewal of prosecution proceedings against the applicant so long as that does not conflict with the ground upon which relief was granted. Proceedings can commence with the stage at which the vitiating defect occurred, without necessity to repeat valid process.

DELAWARE LAW

Superior Court Criminal Rule 35(a) provides that, "The Court need not entertain a second motion or successive motions for similar relief on behalf of the same applicant." It has been noted that this formulation does not preclude repeated petitions for relief, but does give the court discretion to deny a second petition for similar relief. United States ex rel. Winsett v. Anderson, 320 F. Supp. 784 (D. Del. 1970).

COMMENT

Rule 35(a) should be amended to conform to the Standard so that specific principles will govern availability of a second application under the Rule. The Committee recognizes, however, that repetitive applications should be discouraged by proper application of judicial discretion.

STANDARD

6.3 Sentence on re-prosecution of successful applicants; credit for time served.

(a) Where prosecution is initiated or resumed against an applicant who has successful sought post-conviction relief and a conviction is obtained, or where a sentence has been set aside as the result of a successful application for post-conviction relief and the defendant is to be re-sentenced, the sentencing court should not be empowered to impose a more severe penalty than that originally imposed.

(b) Credit should be given towards service of the minimum and maximum term of any new prison sentence for time served under a sentence which has been successfully challenged in a post-conviction proceeding.

COMMENT

No comparable rule or statute has been found. Superior Court Criminal Rule 35(a) should be amended to conform to the Standard.

PART V – THE PERSONNEL OF THE CRIMINAL JUSTICE SYSTEM

CHAPTER 15

THE URBAN POLICE FUNCTION

INTRODUCTORY NOTE

In accordance with recommendations prepared by the Joint American Bar Association – International Association of Chiefs of Police Advisory Committee on Implementation of the ABA Standards relating to the Urban Police Function, the Committee has prepared a Comparative Study of only some of the Standards in this area. In limiting its work in this way, the Committee does not mean to take a negative position on the Standards not reviewed. Rather, it is the Committee's view that the matters not covered here are not appropriate for review by a Committee composed of judges and practicing lawyers. Rather, to the extent such matters are commented on, such comment should be by persons more directly involved in police work.

The Standards selected for review deal mainly with rules governing police conduct, sanctions for police misconduct, and alternatives to the criminal justice system for dealing with certain types of antisocial behavior.

The emphasis in the Comments is on Wilmington, but police forces in Dover and Newark were also contacted.

All of the Standards adopted by the ABA are printed below for reference.

PART I. GENERAL PRINCIPLES

1.1 Complexity of police task.

(a) Since police, as an agency of the criminal justice system, have a major responsibility for dealing with serious crime, efforts should continually be made to improve the capacity of police to discharge this responsibility effectively. It should also be recognized, however, that police effectiveness in dealing with crime is often largely dependent upon the effectiveness of other agencies both within and outside the criminal justice system. Those in the system must work together through liaison, cooperation, and constructive joint effort. This effort is vital to the effective operation of the police and the entire criminal justice system.

(b) To achieve optimum police effectiveness, the police should be recognized as having complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses. Such other police tasks include protection of certain rights such as to speak and to assemble, participation either directly or in conjunction with other public and social agencies in the prevention of criminal and delinquent behavior, maintenance of order and control of pedestrian and vehicular traffic, resolution of conflict, and assistance to citizens in need of help such as the person who is mentally ill, the chronic alcoholic, or the drug addict.

(c) Recommendations made in these standards are based on the view that this diversity of responsibilities is likely to continue and, more importantly, that police authority and skills are needed to handle appropriately a wide variety of community problems.

STANDARD

1.2 Scope of standards.

To ensure that the police are responsive to all the special needs for police services in a democratic society, it is necessary to:

(i) identify clearly the principal objectives and responsibilities of police and establish priorities between the several and sometimes conflicting objectives;

(ii) provide for adequate methods and confer sufficient authority to discharge the responsibility given them;

(iii) provide adequate mechanisms and incentives to ensure that attention is given to the development of law enforcement policies to guide the exercise of administrative discretion by police;

(iv) ensure proper use of police authority;

(v) develop an appropriate professional role for and constraints upon individual police officers in policy-making and political activity;

(vi) provide police departments with human and other resources necessary for effective performance;

(vii) improve the criminal justice, juvenile justice, mental health, and public health systems of which the police are an important part;

(viii) gain the understanding and support of the community; and

(ix) provide adequate means for continually evaluating the effectiveness of police services.

STANDARD

1.3 Need for experimentation.

There is need for financial assistance from the federal government and from other sources to support experimental and evaluative programs designed to achieve the objectives set forth in these standards.

PART II. POLICE OBJECTIVES AND PRIORITIES

2.1 Factors accounting for responsibilities given police.

The wide range of government tasks currently assigned to police has been given, to a great degree, without any coherent planning by state or local governments of what the overriding objectives or priorities of the police should be. Instead, what police do is determined largely on an ad hoc basis by a number of factors which influence their involvement in responding to various government or community needs. These factors include:

(i) broad legislative mandates to the police;
(ii) the authority of the police to use force lawfully;
(iii) the investigative ability of the police;
(iv) the twenty-four-hour availability of the police; and
(v) community pressures on the police.

STANDARD

2.2 Major current responsibilities of police.

In assessing appropriate objectives and priorities for police service, local communities should initially recognize that most police agencies are currently given responsibility, by design or default:

(i) to identify criminal offenders and criminal activity and, where appropriate, to apprehend offenders and participate in subsequent court proceedings;

(ii) to reduce the opportunities for the commission of some crimes through preventive patrol and other measures;

(iii) to aid individuals who are in danger of physical harm;
(iv) to protect constitutional guarantees;
(v) to facilitate the movement of people and vehicles;
(vi) to assist those who cannot care for themselves;
(vii) to resolve conflict;

(viii) to identify problems that are potentially serious law enforcement or governmental problems;

(ix) to create and maintain a feeling of security in the community;

(x) to promote and preserve civil order; and
(xi) to provide other services on an emergency basis.

STANDARD

2.3 Need for local objectives and priorities.

While the scope and objectives of the exercise of the government's police power are properly determined in the first instance by state and local legislative bodies within the limits fixed by the Constitution and by court decisions, it should be recognized there is considerable latitude remaining with local government to develop an overall direction for police services. Within these limits, each local jurisdiction should decide upon objectives and priorities. Decisions regarding police resources, police personnel needs, police organization, and relations with other government agencies should then be made in a way which will best achieve the objectives and priorities of the particular locality.

STANDARD

2.4 General critieria for objectives and priorities.

In formulating an overall direction for police services and in selecting appropriate objectives and priorities for the police, communities should be guided by certain principles that should be inherent in a democratic society:

(i) The highest duties of government, and therefore the police, are to safeguard freedom, to preserve life and property, to protect the constitutional rights of citizens and maintain respect for the rule of law by proper enforcement thereof, and thereby, to preserve democratic processes;

(ii) Implicit within this duty, the police have the responsibility for maintaining that degree of public order which is consistent with freedom and which is essential if our urban and diverse society is to be maintained;

(iii) In implementing their varied responsibilities, police must provide maximum opportunity for achieving desired social change by freely-available, lawful, orderly means; and

(iv) In order to maximize the use of the special authority and ability of the police, it is appropriate for government, in developing objectives and priorities for police services, to give emphasis to those social and behavioral problems which may require the use of force or the use of special investigative abilities which the police possess. Given the awesome authority of the police to use force and the priority that must be given to preserving life, however, government should firmly establish the principle that the police should be restricted to using the amount of force reasonably necessary in responding to any situation.

STANDARD

2.5 Role of local chief executive.

In general terms, the chief executive of a governmental subdivision should be recognized as having the ultimate responsibility for his police department and, in conjuction with his police administrator and the municipal legislative body, should formulate lawful policy relating to the nature of the police function, the objectives and priorities of the police in carrying out this function, and the relationship of these objectives and priorities to general municipal strategies. This will require that a chief executive, along with assuming new responsibilities for formulating overall directions for police services, must also:

(i) insulate the police department from inappropriate pressures including such pressures from his own office;

(ii) insulate the police department from pressures to deal with matters in an unlawful or unconstitutional manner; and

(iii) insulate the police administrator from inappropriate interference with the internal administration of his department.

DELAWARE LAW

The Wilmington City Code places the responsibility of administrative supervision over the Department of Public Safety with the Administrative Assistant to the Mayor. (See Wilmington City Code 5-100.)

COMMENT

The present statutory provisions can be interpreted to give full force and effect to the Standard. The Committee does not believe more specific language is necessary.

PART III. METHODS AND AUTHORITY AVAILABLE TO THE POLICE FOR FULFILLING THE TASKS GIVEN THEM

3.1 Alternative methods used by police.

The process of investigation, arrest, and prosecution, commonly viewed as an end in itself, should be recognized as but one of the methods used by police in performing their overall function, even though it is the most important method of dealing with serious criminal activity. Among other methods police use are, for example, the process of informal resolution of conflict, referral, and warning. The alternative methods used by police should be recognized as important and warranting improvement in number and effectiveness; and the police should be given the necessary authority to use them under circumstances in which it is desirable to do so.

STANDARD

3.2 Avoiding overreliance upon the criminal law.

The assumption that the use of an arrest and the criminal process is the primary or even the exclusive method available to police should be recognized as causing unnecessary distortion of both the criminal law and the system of criminal justice.

STANDARD

3.3 Need for clarified, properly limited authority to use methods other than the criminal justice system.

There should be clarification of the authority of police to use methods other than arrest and prosecution to deal with the variety of behavioral and social problems which they confront. This should include careful consideration of the need for and problems created by providing police with recognized and properly-limited authority and protection while operating thereunder:

(i) to deal with interferences with the democratic process. Although it is assumed that police have a duty to protect free speech and the right of dissent, their authority to do so is unclear, particularly because of the questionable constitutionality of many statutes, such as the disorderly conduct statutes, upon which police have relied in the past;

DELAWARE LAW

The laws of the State of Delaware and City of Wilmington do not offer appropriate guidelines for alternatives to arrest and detention as a means of protecting constitutionally guaranteed rights. It would appear, however, that 11 Del. C. §1301, dealing with disorderly conduct intentially causing "public inconvenience, annoyance or alarm to any other person" and making such offense a class B misdemeanor, would be sufficient in most cases to deal with serious disorders which affect the rights of others.

COMMENT

The Committee recommends adoption of the Standard by means of police department guidelines which would provide police with appropriate non-criminal authority in this area.

STANDARD

3.3(ii) to deal with self-destructive conduct such as that engaged in by persons who are helpless by reason of mental illness or persons who are incapacitated by alcohol or drugs. Such authority as exists it too often dependent upon criminal laws which commonly afford an inadequate basis to deal effectively and humanely with self-destructive behavior;

DELAWARE LAW

11 Del. C. §4210 provides non-criminal treatment for persons arrested for public intoxication who are chronic alcoholics and who submit to treatment in detoxification centers. 11 Del. C. §4213 deals with admission to a detoxification center after arrest of persons under the influence of drugs, enabling such persons to receive proper medical treatment.

COMMENT

Delaware is in accord with the Standard. Adequate provision exists for referral for appropriate treatment of the mentally ill, the publicly intoxicated and those under the influence of drugs.

STANDARD

3.3(iii) to engage in the resolution of conflict such as that which occurs so frequently between husband and wife or neighbor and neighbor in the highly-populated sections of the large city, without reliance upon criminal assault or disorderly conduct statutes;

COMMENT

Delaware law is silent in this area. This is an area that can best be covered by intensive police training to prepare the officer to react properly when faced with domestic situations and by acquainting the police generally with family and neighborhood counseling services. The Committee notes, however, that resolution of such conflicts is dangerous to police officers and requires considerable police time.

STANDARD

3.3(iv) to take appropriate action to prevent disorder such as by ordering crowds to disperse where there is adequate reason to believe that such action is required to prevent disorder and to deal properly and effectively with disorder with it occurs; and

DELAWARE LAW

Present Delaware law provides authority for the police to disperse crowds where there is adequate reason to believe that such action is required to prevent disorder. See 11 Del. C. §§ 1301-02 and Wilmington City Code § 39-71. However, these provisions are criminal statures and authority to disperse crowds would be limited to a situation in which arrest and prosecution for disorderly conduct would not be appropriate.

COMMENT

Delaware is not in accord with the Standard to the extent that the Standard suggests other than a criminal penalty. The Committee favors non-criminal procedures in these cases. Executive powers may also provide remedies in certain circumstances.

STANDARD

3.3(v) to require potential victims of crime to take preventive action such as be a legal requirement that building owners follow a burglary prevention program similar to common fire prevention programs.

DELAWARE LAW

Delaware law is silent in this area.

COMMENT

The Committee recommends that there be a continuation and expansion of the existing program of educating the public concerning home security devices, electrical engraving devices for property identification and self-defense. There is presently no law requiring such action and the Committee does not recommend that such program be mandatory.

STANDARD

3.4 Legislative concern for feasibility of criminal sanction.

Within the field of criminal justice administration, legislatures should, prior to defining conduct as criminal, carefully consider whether adequate authority and resources exist for police to enforce the prohibition by methods which the community is willing to tolerate and support. Criminal codes should be reevaluated to determine whether there are adequate ways of enforcing the prohibition. If not, noncriminal solutions to all or a portion of the problem should be considered.

COMMENT

The Delaware Criminal Code became effective in 1973, following many years of study by the legal profession and the legislature. In the course of codifying the criminal law, decisions were made to eliminate certain conduct from the area of criminal sanctions. For example, statutes making adultery, fornication and consensual homosexual intercourse criminal were not reenacted and provision was made for treatment in detoxification centers of persons charged with public intoxication and certain drug offenses. The approach taken in codifying the Delaware law is thus in accord with the Standard.

PART IV. LAW ENFORCEMENT POLICY-MAKING

4.1 Exercise of discretion by police.

The nature of the responsibilities currently placed upon the police requires that the police exercise a great deal of discretion -- a situation that has long existed, but is not always recognized.

COMMENT

Delaware practice is in accord with the Standard, which relates

primarily to police contact with the public in the street.

STANDARD

4.2 Need for sturctu'e and control.

Since individual police officers may make important decisions affecting police operations without direction, with limited accountability, and without any uniformity within a department, police discretion should be structured and controlled.

COMMENT

The Committee, while believing that in Wilmington a departmental effort is made to structure and control police discretion, favors the adoption of uniform guidelines in critical areas. See Comment to Standard 4.3.

STANDARD

4.3 Administrative rule-making.

Police discretion can best be structured and controlled through the process of administrative rule-making by police agencies. Police administrators should, therefore, give the highest priority to the formulation of administrative rules governing the exercise of discretion, particularly in the areas of selective enforcement, investigative techniques, and enforcement methods.

DELAWARE LAW

The Wilmington City Charter, §3-103 provides, "The administrative board shall consist of the mayor, who shall be the chairman thereof, the administrative assistant to the mayor, the director of finance, the city solicitor, the president of the council and the chairman of the finance committee of the council."

The Wilmington City Charter, §4-200 provides, "(1) Appraisals. The administrative board shall approve or disapprove: (a) All rules prescribed by departments, boards and commissions for their internal government; ..."

COMMENT

Delaware is in accord with the Standard. The Wilmington Bureau of Police has rules and regulations which serve as administrative rules for the conduct of a police officer. The Bureau also has General Orders which reflect permanent policy decisions, Special Orders which reflect temporary policy decisions, and Memoranda which reflect permanent procedures. These are

being combined into a Procedural Manual of which the first draft has been completed and is currently being revised into final form.

STANDARD

4.4 Contribution by legislatures and courts.

To stimulate the development of appropriate administrative guidance and control over police discretion, legislatures and courts should actively encourage police administrative rule-making.

(a) Legislatures can meet this need by delegating administrative rule-making responsiblilty to the police by statute.

(b) Courts can stimulate administrative development in several ways including the following:

(i) Properly-developed and published police administrative policies should be sustained unless demonstrated to be unconstitutional, arbitrary, or otherwise outside the authority of the police;

(ii) To stimulate timely and adequate administrative policy-making, a determination by a court of a violation of an administrative policy should not be a basis for excluding evidence in a criminal case unless the violation of administrative policy is of constitutional dimensions or is otherwise so serious as to call for the exercise of the superintending authority of the court. A violation per se should not result in civil liability; and

(iii) Where it appears to the court that an individual officer has acted in violation of administrative policy or that an administrative policy is unconstitutional, arbitrary, or otherwise outside the authority of the police, the court should arrange for the police administrator to be informed of this fact, in order to facilitate fulfillment by the police administrator of his responsibility in such circumstances to reexamine the relevant policy or policies and to review methods of training, communication of policy, and supervision and control.

DELAWARE LAW

The Wilmington City Charter, § 3-103 provides, "The administrative board shall consist of the mayor, who shall be the chairman thereof, the administrative assistant to the mayor, the director of finance, the city solicitor, the president of the council and the chairman of the finance committee of the council."

The Wilmington City Charter, § 4-200 provides, "(1) Appraisals. The administrative board shall approve or disapprove: (a) All rules prescribed by departments, boards and commissions for their internal government, . . ."

COMMENT

Delaware is in accord with the Standard, except that the Committee believes that the function described in subparagraph (b) (iii) should be

performed by the Attorney General rather than the court.

STANDARD

4.5 Method of policy-making.

In its development of procedures to openly formulate, implement, and reevaluate police policy as necessary, each jurisdiction should be conscious of the need to effectively consult a representative cross-section of citizens in this process.

PART V. CONTROL OVER POLICE AUTHORITY

5.1 Need for accountability.

Since a principal function of police is the safeguarding of democratic processes, if police fail to conform their conduct to the requirements of law, they subvert the democratic process and frustrate the achievement of a principal police function. It is for this reason that high priority must be given for ensuring that the police are made fully accountable to their police administrator and to the public for their actions.

STANDARD

5.2 Need for positive approaches.

Control over police practice should, insofar as possible, be positive, creating inducements to perform properly rather than concentrating solely upon penalizing improper police conduct. Among the ways this can be accomplished are:

(i) Education and training oriented to the development of professional pride in conforming to the requirements of law and maximizing the values of a democratic society;

(ii) Inducements to police officers in terms of status, compensation, and promotion, on the basis of creteria that are related as directly as possible to the police function and police goals;

(iii) Elimination of responsibilities where there is a community expectation that police will "do something," but adequate lawful authority is not provided. Either the need authority should be given or the police should be relieved of the responsibility;

(iv) Systematic efforts by prosecutors and judges to encourage conforming police behavior through; (a) a more careful review of applications for warrants and (b) formulation of new procedures to simplify and otherwise provide easy access for judical review of applications for warrants, thereby encouraging maximum use of the formal warrant process;

(v) Requirements that police develop administrative policies

controlling police actions which, if reasonable, would be sustained and utilized by the courts; and

(vi) Effective involvement of the community in the development of police programs.

COMMENT

The Committee favors adoption of the Standard.

STANDARD

5.3 Sanctions.

Current methods of review and control of police activities include the following sanctions:

(i) the exclusion of evidence obtained by unconstitutional means;

COMMENT

Delaware is in accord with this Standard.

STANDARD

5.3 (ii) criminal and tort liability for knowingly engaging in unlawful conduct;

(iii) injunctive actions to terminate a pattern of unlawful conduct; and

(iv) local procedures for handling complaints against police officers, procedures which usually operate administratively within police departments.

Each of these should be continually reevaluated and changed when necessary to achieve both effective control over the exercise of police authority and the effective administration of criminal justice.

DELAWARE LAW

The Civilian Investigator is a branch of the City Solicitor's Office which handles citizen complaints against police officers in conjunction with the Internal Affairs Unit of the Wilmington Bureau of Police.

Although neither an ordiance nor a resolution set up the Civilian Investigator's Office, it has been continued as a function of the City Solicitor's Office. It has been interpreted as coming within the City Solicitor's authority to investigate and enforce violations of City and State laws. The Criminal

Division of the Attorney General's Office handles citizen complaints against State and local police officers, other than officers of the City of Wilmington.

COMMENT

Delaware is in accord with the Standard.

STANDARD

5.4 Need for administrative sanctions and procedures.

In order to strengthen administrative review and control, responsibility should formally be delegated to the police for developing comprehensive administrative policies and rules governing the duties and responsibilities of police officers together with procedures and sanctions for ensuring that these duties and responsibilities are met. Police administrative rules and procedures should establish effective investigative, hearing, and internal review procedures for alleged violations. Such procedures should include provisions for handling, monitoring, and reviewing citizen complaints in such a way as to ensure diligence, fairness, and public confidence. In developing such rules and procedures, recognition must be given to the need to conform procedures to administrative due process requirements, to develop means for ensuring impartial investigations, and to keep the public informed of all administrative actions as they are taken.

DELAWARE LAW

The Wilmington Bureau of Police Rules and Regulations adopted by the Department of Public Safety and accepted by the Administrative Board of the City establishes a Complaint Hearing Board.

Section II, Chapter II of the Rules and Regulations establishes the procedure through which complaints are handled. After determining that the complaint is valid, the Department may sanction the officer either by (1) summary punishment or (2) punishment determined by a Complaint Hearing Board.

The Wilmington Bureau of Police has adopted a procedure which affords the police officer rights beyond the minimum required in administrative disciplinary proceedings. The Complaint Hearing Board procedure has been specifically upheld in Boulware v. Battaglia, 344 F. Supp. 899, 905 (D. Del. 1972), aff'd., 478 F. 2d 1398 (3rd Cir. 1973).

The Complaint Hearing Board recommends punishment to the Chief of Police who determines the adequacy of the sanction.

COMMENT

The Committee recommends adoption of the Standard. The requirements of the Standard are already in force in Wilmington.

STANDARD

5.5 Tort liability.

In order to strengthen the effectiveness of the tort remedy for improper police activities, governmental immunity, where it still exits, should be eliminated, and legislation should be enacted providing that governmental subdivisions shall be fully liable for the actions of police officers who are acting within the scope of their employment. Neither tort liability nor costs attendant to the defense of a tort action should be imposed upon a police officer for wrongful conduct that has been ordered by a superior or is affirmatively authorized by police rules or regulations unless the conduct is a violation of the criminal law. Instead, liability and incidental costs and expenses in such cases should be borne by the governmental subdivision.

COMMENT

Delaware law is not in accord with Standard. Where a municipality is uninsured, municipal tort immunity still persists with respect to actions of police officers. Register v. H. Burton Elliott, Inc., Del. Super., 229 A. 2d 488 (1967); Flait v. Mayor and Council of Wilmington, Del. Supr., 97 A. 2d 545 (1953).

PART VI. POLICE UNIONS AND POLITICAL ACTIVITY

6.1 Collective interest of policemen and limitations thereon.

(a) Policemen have a proper collective interest in many aspects of their job such as wages, length of work week, and pension and other fringe benefits. To implement this interest, the right of collective bargaining should be recognized. However, due to the critical nature of the police function within government, legislation should provide that there shall be no right to strike. Effective alternatives to the right to strike should be made available as methods by which policemen can pursue their collective interest; and model procedures governing this important matter should be developed.

(b) The right of police to engage in collective action, however, should be subject to the following limitations:

(i) The preservation of governmental control over law enforcement policy-making requires that law enforcement policy not be the subject of collective bargaining.

(ii) The need to preserve local control over law enforcement and over the resolution of law enforcement policy issues requires that law enforcement policy not be determined by a police union or other police employee organization.

(iii) The maintenance of police in a position of objectivity in engaging in conflict resolution requires that police not belong to a union which also has non police members who may become party to a labor dispute.

(iv) The maintenance of proper control by the police administrator over his department requires that collective action not interfere with the administrator's ability effectively to implement the policies and objectives of the agency.

DELAWARE LAW

19 Del. C. § 1302 grants to public employees the right to organize and select representatives for collective bargaining. 19 Del. C. § 1301. (2) defines public employee as any employee of a public employer except elected officials or those appointed by the Governor.

19 Del. C. § 1304 provides a number of standards for the determination of a bargaining unit. The Standard that is most commonly used is, "the desire of the public employees." This standard permits all policemen regardless of rank to be in the same bargaining unit with no exclusion of supervisors.

19 Del. C. § 1312 prohibits public employees from striking. This section was interpreted very broadly in City of Wilmington v. General Teamsters Local Union 326, Del. Supr., 321 A. 2d 123 (1974), wherein the prohibition against "strikes" was interpreted to include a wide range of concerted employee action. In addition the court followed the federal private sector law holding a union liable for the actions of its members.

19 Del. C. § 1310 provides for the resolution of collective bargaining disputes, except matters of wages or salaries, by submission of the dispute to the Delaware Department of Labor. The statute does not specify what action is to be taken by the Department.

COMMENT

The Committee recommends adoption of the Standard, with some reservations about its scope. It does not deal with the question of unit definition which can have a significant impact on negotiations. The language leaving open what specific alternatives there might be to the right to strike is viewed very favorably as there are a number of possible methods being experimented with, such as conventional arbitration, last offer arbitration, mediation, fact

finding, etc. Until a body of experience is developed no one method should be established. In fact, more probably each jurisdiction may be most comfortable with a dispute resolution procedure of its own design to meet its specific situations.

STANDARD

6.2 Police officer contribution to police policy.

Policemen, as individuals and as a group, have a proper professional interest in and can make significant contributions to the formulation and continuing review of local law enforcement policies within individual communities. Methods should be developed by police administrators, therefore, to ensure effective participation in the policy-making process by all ranks including the patrolman who, because of his daily contact with operational problems and needs, has unique expertise to provide on law enforcement policy issues.

COMMENT

Delaware is in accord with the Standard. The Wilmington Bureau of Police in conjunction with the National Training Labs for Applied Behavioral Science has conducted a training course for all the members of the Bureau in the area of the collateral approach to problem solving. The collateral approach offers police officers in task force groups, which cut across divisions and ranks, the opportunity to particiapte in policy making and operational decisions. The approach has been found to be most rewarding and has contributed greatly to the Wilmington Bureau of Police.

STANDARD

6.3 Political activity by policemen.

Policemen share the individual right to engage in political and other protected first amendment activity. However, police should not use their authority or the indicia of office, such as the uniform, for this purpose because of their possible coercive effect nor should they engage in collective political activity which compromises their ability to view objectively conflicts with which they may be called upon to deal.

DELAWARE LAW

There is no specific prohibition in the State of Delaware against police officer participation in political activity, although other public employees are subject to such restriction. See 31 Del. C. § 105.

COMMENT

The Committee believes that 31 Del. C. § 105 should be amended to include police, but that an officer should be able to participate in activities which although elective are essentially non-political in nature, such as being a school board member. More direct participation in overt political activity which is now prohibited by department regulations should be prohibited by the full force of law, providing the distincition discussed herein can be properly drawn.

PART VII. ADEQUATE POLICE RESOURCES

7.1 Variety of police methods.

Police should be provided with effective methods for carrying out the full range of governmental responsibilities delegated to them. Adequate development of such methods requires:

(i) a variety of skills in individual police officers;

(ii) arrangements for police officers to make referrals to the various private and public services and resources available in the community, and the existence of sufficient resources to meet community needs; and

(iii) broad use of informal means of resolving conflict.

STANDARD

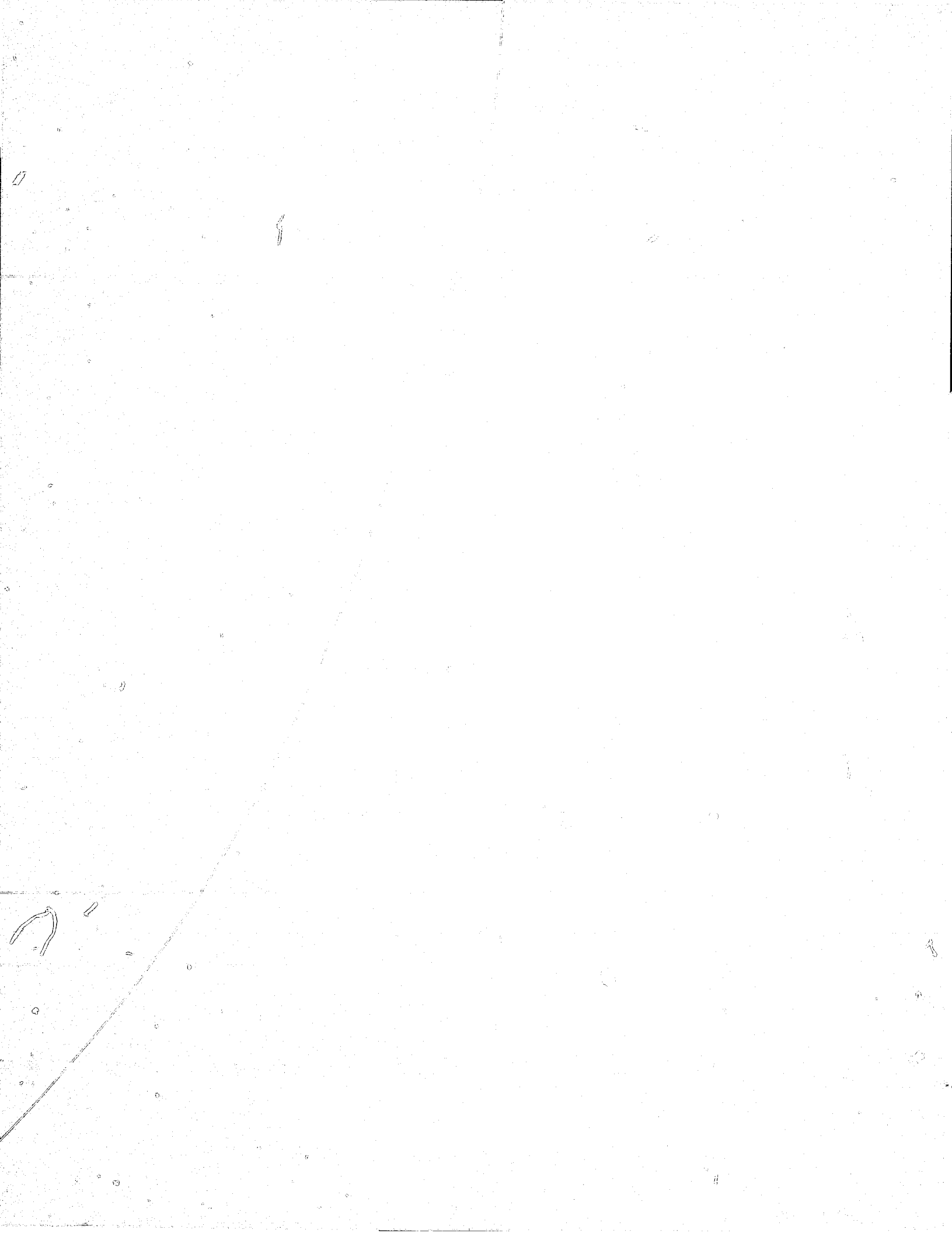
7.2 Important function of patrolmen.

The nature of police operations makes the patrolman a more important figure than is implied by his rank in the organization. He exercises broad discretion in a wide array of situations, each of which is potentially of great importance, under conditions that allow for little supervision and review. Even with the controls recommended in these standards, in the interest of developing a police profession as well as in the interest of improving the quality of police operations generally, the patrolman himself should understand the important and complex needs of policing in a free society and have a commitment to meeting those needs.

STANDARD

7.3 Recruitment.

In view of the broad diversity of the police role, experiments should be conducted which make use of different levels of entry for personnel and standards particularly relevant for the various levels. Such recruitment standards should be related directly to the requirements of various police tasks and should reflect a great degree of concern for such factors as judgmental



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ability, emotional stability, and sensitivity to the delicate and complicated nature of the police role in a democratic society.

COMMENT

Delaware is in accord with the Standard. The Wilmington Bureau of Police uses a psychologist to interview and evaluate all applicants for the positions of police officer and cadet. All police officers by tradition enter at the rank of patrolman, although there is no legal prohibition against the Wilmington Bureau of Police hiring someone to begin at a different rank.

STANDARD

7.4 Training.

Training programs should be designed, both in their content and in their format, so that the knowledge that is conveyed and the skills that are developed relate directly to the knowledge and skills that are required of a police officer on the job.

DELAWARE LAW

11 Del. C. §8405 deals with mandatory training and education for police officers. A Delaware Police Training Commission has been established pursuant to that law, and as part of its duties has set a minimum mandatory training requirement of 400 hours.

COMMENT

Delaware is in accord with the Standard. The Committee believes that there is a need for actual in-court training in procedure and testimony and actual exposure to the grand jury and court.

STANDARD

7.5 Recruitment of college graduates.

College graduates should be encouraged to apply for employment with police agencies. Individuals aspriring to careers in police agencies and those currenlty employed as police officers should be encouraged to advance their education at the college level. Communities should support further educational acheivement on the part of police personnel by adopting such devices as educational incentive pay plans and by gradually instituting requirements for completion of specified periods of college work as a prerequisite for initial appointment and for promotion. To increase the number of qualified personnel, police departments should initiate or expand police

cadet or student intern programs which subsidize the education and training of potential police candidates.

COMMENT

The Committee recommends adoption of the Standard except for that clause which would gradually institute a requirement that a specific amount of college work be a prerequisite for initial appointment. It is felt that this requirement is inappropriate until such time as such a standard can be directly related to the requirements of police work (See Standard 7.3). The Wilmington Bureau of Police does encourage its officers to advance their college education by an incentive pay plan. The Wilmington Breau of Police has expanded its police cadet program for the purpose of providing an expanded group of individuals with subsidized education and training.

The following statistics as to educational levels of the Wilmington police are based on the calendar year of 1974:

Masters Degree –	1 officer
Bachelor of Art Degree –	3 officers
Bachelor of Science Degree –	21 officers
Associate Degree –	31 officers
Officers with 90 credits or more who have not yet attained a Bachelor's Degree –	2 officers
Officers with 30 credits or more who have not yet attained an Associate Degree –	87 officers
Officers with less than 30 credits –	72 officers
Officers with no college credits –	37 officers

STANDARD

7.6 Police education.

Educational programs that are developed primarily for police officers should be designed to provide an officer with a broad knowledge of human behavior, social problems, and the democratic process.

COMMENT

Delaware is in accord with the Standard. Currently the Wilmington Bureau of Police works closely with Brandywine College, Delaware Technical and Community College, and Wilmington College in developing curricula for police officers.

STANDARD

7.7 Importance of police administrator.

In addition to directing the day-to-day operations of his agency, the police administrator has the responsibility to exert leadership in seeking to improve the quality of police service and in seeking to solve community-wide problems of concern to the police. The position of police chief should be recognized as being among the most important and most demanding positions in the hierarchy of governmental officials.

COMMENT

Delaware is in accord with the Standard.

STANDARD

7.8 Authority of police administrator.

A police administrator should be held fully responsible for the operations of his department. He should, therefore, be given full control over the management of the department; and legislatures, civil service commissions, and employee associations should not restrict the flexibility that is required for effective management.

STANDARD

7.9 Qualifications for police administrator.

In the screening of candidates to assume leadership roles in police agencies, special attention should be given to the sensitivity of the candidate to the peculiar needs of policing in a free society; to the degree to which the candidate is committed to meeting the challenge of achieving order within the restraints of the democratic process; to the capacity of the candidate to deal effectively with the complicated and important issues that police administrators must confront in the decision-making processes that affect police operations; and to the overall ability of the candidate to manage and direct the total resources of the agency. A community should employ the best qualified candidate without regard to his present location or departmental affiliation. Because of the fundamental importance of the objectives set forth in section 10.1, the police administrator should be given the necessary support, job security, and procedural safeguards to allow him to achieve these objectives.

STANDARD

7.10 Police department organization.

More flexible organizational arrangements should be substituted for the

semimilitary, monolithic form of organization of the police agency. Police administrators should experiment with a variety of organizational schemes, including those calling for substantial decentralization of police operations, the development of varying degrees of expertise in police officers so that specialized skills can be brought to bear on selected problems, and the substantial use of various forms of civilian professional assistance at the staff level.

STANDARD

7.11 Research.

A research capability should be developed within police agencies that will aid the police administrator in systematically formulating and evaluating police policies and procedures and that will equip the administrator to participate intelligently in the public discussion of important issues and problems involving the police.

STANDARD

7.12 Need for in-house police legal advisor.

Given the nature of the police funciton, police administrators should be provided with in-house police legal advisors who have the personal orientation and expertise necessary to equip them to play a major role in the planning and in the development and continual assessment of operating policies and training programs. The police legal advisor should be an attorney appointed by the police adminsitrator or selected by him from an existing governmental unit.

STANDARD

7.13 Relationship of legal advisor to police administrator.

In view of the important and sensitive nature of his role, a police legal advisor or the head of a police legal unit should report directly to the police administrator. The relationship of a police legal advisor to a police department should be analogous to that of house counsel to a corporation. The police legal advisor should provide independent legal advice based upon his full understanding of the police function and his legal expertise, and should anticipate as well as react to legal problems and needs.

STANDARD

7.14 Priority tasks for legal advisor.

Among the range of tasks that may be performed by police legal advisors,

priority should be given to assisting police administrators in:

(i) formulating the types of administrative policies that are recommended in these standards;

(ii) developing law-related training programs pertinent to increased understanding of the nature of the police function, of departmental policies, of judicial trends and their rationale, and of the significant role of the police in preserving democratic processes;

(iii) formulating legislative programs and participating in the legislative process;

(iv) maintaining liaison with other criminal justice and municipal agencies on matters primarily relating to policy formulation and policy review, and assessing the effectiveness of various agencies in responding to common legal problems; and

(v) developing liaison with members of the local bar and encouraging their participation in responding to legal problems and needs of the police agency.

DELAWARE LAW

The Wilmington City Charter, § 4-300 provides as follows:

> The law department shall have the power and its duty shall be to perform the following functions:
>
> (a) Legal advice. It shall furnish legal advice to the mayor, to the council and to all officers, departments, boards and commissions concerning any matter or thing arising in connection with the exercise of their official power or performance of their official duties and except as otherwise expressly provided, shall supervise, direct and control all of the law work of the city.

COMMENT

The Committee favors continued funding for a police legal advisor, associated with the city solicitor.

PART VIII. POLICE PERFORMANCE IN THE CRIMINAL JUSTICE SYSTEM

8.1 Relationship of the criminal justice and other systems to the quality of police service.

(a) To the extent that police interact with other governmental systems such as the criminal justice, juvenile justice, and public and mental

health systems, police effectiveness should be recognized as often largely dependent upon the performance of other agencies within these systems.

(b) For these standards to be of value in the criminal justice system, other parts of the system must operate, as a minimum, in such a manner that: (i) criminal cases are speedily processed; (ii) prosecutors and judges carefully review applications for warrants and use simplified procedures and otherwise provide easy access for impartial review of applications for warrants; (iii) the lower trial courts, especially in the larger cities, are conducted in a dignified and orderly manner, considerate of and respectful toward all the participants; and (iv) sentencing alternatives and correctional programs are as diversified and effective as possible.

COMMENT

The Committee recommends adoption of the Standard, believing that the principles it enunciates are generally recognized and accepted in Delaware.

PART IX. PUBLIC UNDERSTANDING AND SUPPORT

9.1 Contribution of legal profession.

Members of the legal profession should play an active role, individually and collectively, in developing local government policies relating to the police, in supporting needed changes in the form of police services, and in educating the total community on the importance and complexity of the police function. Among other things, each local bar association should appoint a special committee with which the police administrator can confer as to appropriate means of achieving objectives proposed in these standards.

COMMENT

The Committee recommends adoption of the Standard. The Committee understands that the Delaware Bar Association proposes to revise its By-laws to expand the duties of its Criminal Law Committee to include police department administration.

STANDARD

9.2 Responsibility of educational institutions.

Educational institutions should undertake research and teaching programs which provide understanding of the complex social and behavioral problems which confront urban police.

COMMENT

The Committee notes that colleges in the Wilmington area have undertaken educational programs for police officers.

STANDARD

9.3 The news media.

Public understanding of the police funciton is heavily dependent upon the coverage given by mass media to the newsworthy events in which the police are involved. Newspaper, radio, and television reporters assigned to reporting on police activities should have a sufficiently thorough understanding of the complexities of the police function to enable them to cover such events (as well as other matters that now go unreported) in a manner that promotes the public's understanding of the police role.

STANDARD

9.4 Openness by police.

Police should undertake to keep the community informed of the problems with which they must deal and the complexities that are involved in dealing with them effectively. Police agencies should cooperate with those who seek an understanding of police operations by affording opportunities for interested citizens to acquaint themselves with police operations and by providing access to the accumulation of knowledge and experience that the police posses.

PART X. EVALUATION

10.1 Measure of police effectiveness.

The effectiveness of the police should be measured generally in accordance with their ability to achieve the objectives and priorities selected for police service in individual communities. In addition, the effectiveness of police should be measured by their adherence to the principles set forth in section 2.4. This means that, among other things, police effectiveness should be measured in accordance with the extent to which they:

(i) safeguard freedom, preserve life and property, protect the constitutional rights of citizens and maintain respect for the rule of law by proper enforcement therof, and, thereby, preserve democratic processes;

(ii) develop a ruputation for fairness, civility, and integrity that wins the respect of all citizens, including minority or disadvantaged groups;

(iii) use only the amount of force reasonably necessary in responding to any given situation;

(iv) conform to rules of law and administrative rules and procedures, particularly those which specify proper standards of behavior in dealing with citizens;

(v) resolve individual and group conflict; and

(vi) refer those in need to community resources that have the capacity to provide needed assistance.

Traditional criteria such as the number of arrests that are made are inappropriate measures of the quality of performance of individual officers. Instead, police officers should be rewarded, in terms of status, compensation, and promotion, on the basis of criteria defined in this section which directly relate to the objectives, priorities, and essential principles of police service.

STANDARD

10.2 Responsibility of society and government generally.

The recommendations made in these standards require particular attention at the level of municipal government. Along with the recommendations relating specifically to police agencies, however, it should be recognized that police effectiveness is also dependent, in the long run, upon:

(i) the ability of government to maintain faith in democratic processes as the appropriate and effective means by which to achieve change and to redress individual grievances;

(ii) the willingness of society to devote resources to alleviating the despair of the culturally, socially, and economically deprived; and

(iii) the improvement of the criminal justice, juvenile justice, mental health and public health systems as effective ways of dealing with a wide variety of social and behavioral problems, such as improvements in programs to provide assistance to citizens in need to help such as the person who is mentally ill, the chronic alcoholic, or the drug addict.

CHAPTER 16

THE PROSECUTION FUNCTION

PART I. GENERAL STANDARDS

1.1 The function of the prosecutor.

(a) The office of prosecutor, as the chief law enforcement official of his jurisdiction, is an agency of the executive branch of government which is charged with the duty to see that the laws are faithfully executed and enforced in order to maintain the rule of law.

COMMENT

In Delaware, the office of the prosecutor is held by the Attorney General, a constitutional officer elected by the public for a term of four years. Del. Const. Art. 3, §21. The Attorney General's office is thus more than simply an agency of the executive branch but is the office of a separately elected and constitutionally created officer. This status gives the Attorney General greater independence than would be attainable if he were simply another appointed officer of the executive branch. Other provisions concerning the Attorney General's office are contained in 29 Del. C. §§ 2501-16.

STANDARD

1.1(b) The prosecutor is both an administrator of justice and an advocate; he must exercise sound discretion in the performance of his functions.
(c) The duty of the prosecutor is to seek justice, not merely to convict.

COMMENT

Delaware practice is generally in accord with the Standard. It is generally considered that the responsibility of the Attorney General differs from that of the usual trial attorney. His duty is to seek justice, not merely to convict. See Code of Professional Responsibility EC 7-13. The Committee recommends adoption of the Standard.

STANDARD

1.1(d) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined in codes and cannons of the legal profession, and in this report. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in ABA Standards, The Defense Function, section 1.3.

COMMENT

Delaware has adopted the Code of Professional Responsibility which is generally applicable to the Attorney General and members of his professional staff. The Ethics Committee of the Delaware Bar Association is also available for advice on a case-by-case basis. Of course, because the Attorney General is a separately elected, constitutional officer of Delaware, he has certain rights and duties to take public postions on issues which are not incumbent upon other members of the bar. It is thus necessary to strike a proper balance between prejudicial pre-trial conduct and the duty of a public official to make appropriate comments about public actions.

STANDARD

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

STANDARD

1.2 Confilicts of interest.

A prosecutor should avoid the appearance or reality of a conflict of interest with respect of his official duties. In some instances, as defined in the Code of Professional Responsibility, his failure to do so will constitute unprofessional conduct.

COMMENT

The Attorney General's entire Criminal Division Staff is full time, eliminating most situations where a conflict of interest can be created. It is considered improper for a member of the Attorney General's office to practice with a firm that handles any legal matters involving the State of Delaware.

STANDARD

1.3 Public statements.

(a) The prosecutor should not exploit his office by means of personal publicity connected with a case before trial, during trial and thereafter.

(b) The prosecutor should comply with the ABA Standards of Fair Trial and Free Press, In some instances, as defined in the Code of Professional Responsibility, his failure to do so will constitute unprofessional conduct.

COMMENT

Comments allowed by the prosecutor should be consistent with justice, fair play and his role as a public official elected by the people and responsible to them, consistent with his obligation to support the law and maintain justice. Thus, a proper balance must be struck between rules relating to prejudicial pre-trial publicity and the duty of the Attorney General to speak out on matters of public concern.

STANDARD

1.4 Duty to improve the law.

It is an important function 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 should stimulate efforts for remedial action.

COMMENT

Under 29 Del. C. §2504 (7) the Attorney General is required "To recommend revisions in the Constitution and statutes of this State with particular reference to law enforcement." Other than this statute, there is no written requirement that the Attorney General take other actions, such as propsoing rule changes to the court or other bodies or taking any other specific action regarding substantive or procedural law that may come to his attention. However, members of the Attorney General's office have actively participated in various criminal law revision projects, including the revision of the Delaware Criminal Code, the preparation of Standard Jury Instructions and the Supreme Court Advisory Committee on the A B A Standards for Criminal Justice. The Committee recommends adoption of the Standard.

PART II. ORGANIZATION OF THE PROSECUTION FUNCTION

2.1 Prosecution authority should be vested in a public official.

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

COMMENT

The office of the Attorney General is created by the Delaware constitution. There is no constitutional requirement that the Attorney General be a lawyer, and under those circumstances, the general assembly would not be permitted to require that the Attorney General be a lawyer. The Committee favors adoption of the Standard, and amendment of the constitution to require that the Attorney General be a lawyer admitted to practice in Delaware.

STANDARD

2.2 Inter-relationship of prosecution offices within state.

(a) Local authority and responsibility for prosecution is properly vested in a district, county or city attorney. Wherever possible, a unit of prosecution should be designed on the basis of population, caseload and other relevant factors sufficient to warrant at least one full-time prosecutor and the supporting staff necessary to effective prosecution.

(b) In some states conditions such as geographical area and population may make it appropriate to create a statewide system of prosecution in which the state attorney general is the chief prosecutor and the local prosecutors are his deputies.

(c) In all states there should be coordination of the prosecution policies of local prosecution offices to improve the administration of justice and assure the maximum practicable uniformity in the enforcement of the criminal law throughout the state. A state council of prosecutors should be established in each state.

(d) In cases where questions of law of statewide interest of concern arise which may create important precedents, the prosecutor should consult and advise with the attorney general of the state.

(e) A central pool of supporting resources and manpower, including laboratories, investigators, accountants, special counsel and other experts, to the extent needed should be maintained by the state government and should be available to all local prosecutors.

COMMENT

The Attorney General in Delaware is the chief law enforcement officer for the State. There are no county or district attorneys. There is a city solicitor in Wilmington who conducts preliminary hearings on felony charges committed in the city and conducts trials for misdemeanors and traffic offenses alleged to have occurred within the city. There is also a town solicitor in Newark who prosecutes Town Code violations and State motor vehicle violations before an alderman in Newark. Since the two solicitors

in question are appointed by the mayors of their respective towns, there is not always complete cooperation and coordination between them, although there is a great deal of informal discussion. The Committee believes that the uniformity that the Standard comtemplates would best be attained if all prosecuting attorneys were within the office of the Attorney General.

STANDARD

2.3 Assuring high standards of professional skill.

(a) The function of public prosecution requires highly developed professional skills. This objective can best be achieved by promoting continuity of service and broad experience in all phases of the prosecution function.

(b) Wherever feasible, the offices of chief prosecutor and his staff should be fulltime occupations.

(c) Professional competence should be the only basis for selection for prosecutorial office. Prosecutors should select their staffs on the basis of professional competence without regard to partisan political influence.

(d) In order to achieve the objective of professionalism and to encourage competent lawyers to accept such offices, compensation for prosecutors and their staffs should be commensurate with the high responsibilities of the office and comparable to the compensation of their peers in the private sector.

COMMENT

Delaware practice is generally in accord with the Standard. The Attorney General has in recent years had the policy of developing a highly skilled, full-time professional staff in the criminal division. This staff is selected on the basis of merit and not on the basis of politics, except, of course, that the Attorney General is himself elected in a partisan political election. At present, the salary scale in the Attorney General's office is behind the private sector, from the point of view of retention of experienced attorneys. The Committee recommends adoption of the Standard and particularly calls attention to the fact that the only way to attract and retain competent and experienced people is through proper compensation and assignment of work.

STANDARD

2.4 Special assistants, investigative resources, experts.

(a) Funds should be provided to enable a prosecutor to 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.

COMMENT

Funds are avialable in the annual appropriation for the Department of Justice covering the appointment of special counsel for investigations and trials. The Committee believes that such counsel should be used sparingly to prevent the creation of morale problems within the Attorney General's office and because proliferation of special counsel gets away from the concept of centralized administration of justice.

STANDARD

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

COMMENT

Under a supplementary appropriation passed by the general assembly in June 1974, two new special investigator positions were created within the Department of Justice. The Committee favors adoption of the Standard and notes that more funds are needed within the Attorney General's office for investigative purposes.

STANDARD

2.5 Prosecutor's handbook; policy guidelines and procedures.

(a) Each prosecutor's office should 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 should 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 should be maintained in a handbook of internal policies of the office.

COMMENT

The Committee recommends adoption of the Standard. The Attorney General's office is at present in the process of developing a procedure manual which will comply with the provisions of the Standard.

STANDARD

2.6 Training programs.

Training programs should be established within the prosecutor's office for new personnel and for continuing education of his staff. Continuing education programs for prosecutors should be substantially expanded and public funds should be provided to enable prosecutors to attend such programs.

COMMENT

The Committee recommends adoption of the Standard. There is a need for more training within the Attorney General's office, including a more orderly and progressive assignment of courts and case load so that a deputy can work up to handling more serious cases in the superior court after some experience in lower courts. Meetings and other programs have been established to provide better training and education of the staff. Federal funds have been obtained to permit members of the staff to attend professional courses sponsored by the ABA, The National College of District Attorneys, The American Trial Lawyers Association and other groups outside the State. It should not, however, be necessary to resort to Federal funds for these purposes.

STANDARDS

2.7 Relations with the police.

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

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

COMMENT

There is considerable interplay between the police and the Attorney General's office regarding the handling of cases and providing specific legal advice. For example, during the months before the Delaware Criminal Code became effective, the Attorney General's office sponsored training classes for all police officers in the State, and they have been participating with greater frequency in the training of new police officers and the retraining of existing police officers. The Committee commends this practice and recommends adoption of the Standard. Regular participation in new recruit and in-service training by the Attorney General is highly recommended. There is a need for increasing cooperation.

STANDARD

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) A prosecutor's duties necessarily involve frequent and regular official contacts with the judge or judges of his jurisdiction. In such contacts he should carefully strive to preserve the appearance as well as the reality of the correct relationship which professional traditions and canons require between advocates and judges.

(c) It is unprofessional conduct for a 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.

(d) In his necessarily frequent contacts with other members of the bar, the prosecutor should 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.

COMMENT

Delaware practice is generally in accord with the Standard. Code of Professional Responsibility DR 1-102 provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation or engage in conduct that is prejudicial to the administration of justice. Code of Professional Responsibility Canon 9 provides that a lawyer should avoid even the appearance of professional impropriety. DR 7-110 (B) provides that in an adversary proceeding a lawyer shall not communicate, or cause another to communicate, as to the merits of the case with a judge or an official before whom the proceeding is pending except with proper notice to the opposing party.

STANDARD

2.9 Prompt disposition of criminal charges.

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

(b) The prosecution function should be so organized and supported with staff and facilities as to enable it to dispose of all criminal charges promptly. The prosecutor should be punctual in attendance in court and in the submission of all motions, briefs and other papers. He should 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.

COMMENT

Delaware practice is generally in accord with the Standard. The Standards impose a similar duty upon defense counsel. See the Comparative Study on The Defense Function.

STANDARD

2.10 Supersession and substitution of prosecutor.

(a) Procedures should be established by appropriate legislation to the end that the governor or other elected state official is empowered by law to suspend and supersede a local prosecutor upon making a public finding, after reasonable notice and hearing, that he is incapable of fulfilling the duties of his office.

(b) The governor or other elected state official should be empowered by law to substitute special counsel in the place of the local prosecutor in a particular case, or category of cases, upon making a public finding that this is required for the protection of the public interest.

COMMENT

The Standard is not applicable to Delaware which does not have local prosecutors. It would be unconstitutional for the Governor to have the power suggested by the Standard in relation to the Attorney General.

PART III. INVESTIGATION FOR PROSECUTION DECISION

3.1 Investigative function of prosecutor.

(a) A prosecutor, as the chief law enforcement official of his jurisdiction, ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts, but he 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 should 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 the 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 should avoid interviewing a prospective witness except in the presence of a third person unless the prosecutor is prepared to forego impreachment 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.

COMMENT

The Committee recommends adoption of the Standard. In general, Delaware practice is in accord with the Standard.

STANDARD

3.2 Relations with prospective witnesses.

(a) It 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.

COMMENT

The present practice of the Attorney General's office is in accord with the Standard, except that reimbursement to Delaware residents for appearance at court is at the rate of $2.00 per day which is obviously inadequate to compensate for loss of wages and travel expenses. Code of Professional Responsibility DR 7-109 (C) prohibits payment of witnesses other than expert witnesses, but permits reasonable reimbursement for expenses and compensation for loss of time in attendance for testifying. The Committee favors adoption of the Standard.

STANDARD

3.3 Relations with expert witnesses.

(a) A prosecutor who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject. To the extent necessary,

the prosecutor should 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.

COMMENT

The Committee recommends adoption of the Standard as an internal policy of the Attorney General's office. The Committee is not aware of any presently existing violations of the Standard.

STANDARD

3.4 Decision to charge.

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

COMMENT

At present, the decision in the vast majority of cases regarding the person to be charged and the charge to be placed is the responsibility of the police or the magistrates. Many charges are placed without prior consultation with the Attorney General's office. In more serious cases, informal consultation may occur. The Committee would recommend adoption of the Standard and proceedures which would require consultation with the Attorney General's office in formulating an appropriate charge.

STANDARD

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

COMMENT

The Attorney General's office has established a screening intake procedure for evaluating complaints. However, it is firm office policy to indict only on those charges that seem capable of proof and not to indict on a higher charge in an attempt to seek a plea to a lesser charge.

STANDARD

3.4(c) Where the law permits a citizen to complain directly to a judicial

officer or the grand jury, the citizen complainant should be required to present his complaint for prior approval to the prosecutor and the prosecutor's action or recommendation thereon should be communicated to the judicial officer or grand jury.

COMMENT

Present Delaware practice is not in accord with the Standard, because most citizen complaints are made directly to the police or to a magistrate without the necessity for approval of a decision to charge by the Attorney General. The Committee favors adoption of the Standard.

STANDARD

3.5 Relations with grand jury.

(a) Where the prosecutor is authorized to act as 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 should give due deference to its status as an independent legal body.

(b) The prosecutor should 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 should be on the record.

COMMENT

Present Delaware practice is in accord with Subsection (a) of the Standard, except that the superior court also acts as a legal adviser to the grand jury, and there is not a very clear line of authority between the Attorney General's office and the superior court in this respect. With respect to Subsection (b), current practice is not entirely in accord with the Standard, and the Committee believes that there are some instances in which it is appropriate to acknowledge the difference between the grand jury, which is an accusatory body, and a petit jury which is a finder of fact. It is very rare for a record to be made of anyone's remarks before a grand jury, and in this respect Delaware practice is not in accord with Subsection (c) of the Standard.

STANDARD

3.6 Quality and scope of evidence before grand jury.

(a) A prosecutor should 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.

COMMENT

Present Delaware practice is not in accord with the Standard. The typical practice is to present only the testimony of a police officer who summarizes the testimony of other witnesses. Since the Standard is not dictated by any rule of the Supreme Court of the United States, the Committee sees no present need for its adoption.

STANDARD

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

(c) A prosecutor should 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 should 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 should 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 the law.

COMMENT

Delaware practice is generally in accord with the Standard, except that Delaware practice requires that a witness state that he intends to exercise his privilege aganist self-incrimination before immunity can be granted. Therefore, Subsection (e) of the Standard is inappropriate to present Delaware practice.

STANDARD

3.7 Quality and scope of evidence for informations.

Where the prosecutor is empowered to charge by information, his decisions should be governed by the principles embodied in section 3.6, supra.

COMMENT

Where the information procedure is used, Delaware practice is substantially in accord with the Standard.

STANDARD

3.8 Discretion as to non-criminal disposition.

(a) The prosecutor should 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 should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

COMMENT

Delaware practice is in accord with the Standard. The Attorney General's office often employs methods of non-criminal disposition of defendants, particularly in cases of driving under the influence of alcohol, young first offenders, drug cases and other cases where there are rehabilitative programs or other alternative means of disposition.

STANDARD

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 cuase 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 should 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 should 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.

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

COMMENT

The Standard summarizes the present practice of the Attorney General's Office and, therefore, present Delaware practice is in accord with the Standard. Another factor which would properly be considered in the exercise of discretion in charging is the prior criminal record of the accused.

STANDARD

3.10 Role in first appearance and preliminary hearing.

(a) If the prosecutor is present at the first appearance (however denominated) of the accused before a judicial officer, he should cooperate in obtaining cousel for the accused. He should cooperate in good faith in arrangements for release under the prevailing system for pretrial release.

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

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

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

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

COMMENT

Members of the Attorney General's staff are not generally present at the preliminary arraignment of the accused. There have been questions raised at times about the use of the indictment proceedure to circumvent a preliminary hearing, but the Attorney General's office maintains that its policy

is to indict without a preliminary hearing only in cases where witness' safety and protection of informants demands it. A prosecutor is present at all preliminary hearings held in Wilmington and New Castle County, and steps are being taken to assure the presence of a prosecutor at preliminary hearings in Kent and Sussex Counties.

STANDARD

3.11 Disclosure of evidence by the prosecutor.

(a) It 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 should 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 opporutnity.

(b) The prosecutor should comply in good faith with discovery procedures under the applicable law.

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

COMMENT

The suppression by the prosecution of evidence favorable to the accused when requested violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83 (1963). Code of Professional Responsibility DR 7-103 provides for timely disclosure to counsel for the defendant, or to the defendant himself if he has no counsel, of the existence of evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment. For further information with respect to Delaware discovery practice, see the Comparative Study on Discovery and Procedure Before Trial. At present there is some variance between the deputies about volunteering information, but the general conduct of the Attorney General's staff is in accord with the Standard.

PART IV. PLEA DISCUSSIONS

4.1 Availability for plea discussions.

(a) The prosecutor should 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; the prosecutor would be well advised, however, to 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.

COMMENT

As discussed in the Comparative Study on Pleas of Guilty, plea bargaining is frequently resorted to in Delaware as a method of disposing of criminal cases. The Attorney General's office has taken the position that it will charge a defendant only with an offense on which it is prepared to go to trial.

The Code of Professional Responsibility deals with the matters raised in Subsections (b) and (c) of the Standard. Code of Professional Responsibility DR 7-104 prevents a lawyer from communicating or causing another to communicate on a subject with a party he knows to be represented by a lawyer in the matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so. DR 7-102 forbids making false statements of law or fact. DR 1-102 forbids conduct prejudicial to the administration of justice.

STANDARD

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.

COMMENT

Superior Court Criminal Rule 11 permits a guilty plea only upon court determination "that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." However, it is not necessary that the defendant admit his guilt. It is only necessary that there be a factual basis for a plea of guilty even though the defendant, in fact, maintains his innocence. See North Carolina v. Alford, 400 U.S. 25 (1970). For a further discussion of this matter, see the Comparative Study on Pleas of Guilty.

STANDARD

4.3 Fulfillment of plea discussions.

(a) It is unprofessional conduct for a prosecutor to make any promise or 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 should avoid implying a greater power to influence the dispositon 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 should 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.

COMMENT

The Standard is followed in practice by the Attorney General's office. Because the superior court does not enter into plea negotiations and does not take an advance position on sentencing, the Attorney General's office does not make any promises with respect to disposition of the defendant. It is entirely proper, however, for the Attorney General's office to make recommendations with respect to sentencing.

STANDARD

4.4 Record of reasons for nolle prosequi disposition.

Whenever felony criminal charges are dismissed by way of nole prosequi (or its equivalent), the prosecutor should make a record of the reasons for the action.

COMMENT

Superior Court Criminal Rule 48 permits the Attorney General to file in open court either orally or in writing a nolle prosequi of an indictment, information or complaint. Upon such filing, the prosecution terminates. In the case of a guilty plea or a verdict of guilty, a nolle prosequi may be filed and entered only with the consent of the court. The Attorney General's office does not follow the practice of recording the reasons for such an aciton, particularly in the lower courts. A reason should be stated for each nolle prosequi.

PART V. THE TRIAL

5.1 Calendar control.

Control over the trial calendar should be vested in the court. The prosecuting attorney should be required to file with the court as a public record periodic reports setting forth the reasons for delay as to each case for which he has not requested trial within a prescribed time following charging. The prosecuting attorney should also advise the court of facts relevant in determining the order of cases on the calendar.

COMMENT

In the past, the Attorney General's office has had control of the criminal calendar. Pursuant to a directive issued by Chief Justice Daniel L. Herrmann, superior court assumed control of its calendar beginning October 1, 1975. The superior court has always possessed the power to require the Attorney General's office to schedule a case for trial or to provide appropriate reasons for not so doing.

STANDARD

5.2 Courtroom decorum.

(a) The prosecutor should 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 should 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 should comply promptly with all orders and directives or 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 should be punctual in all court appearances.

(f) Prosecutors should take leadership in developing, with the cooperation of the courts and the bar, a code of decrum and professional etiquette for courtroom conduct.

COMMENT

The Committee favors adoption of Standard 5.2. Indeed, many of the

matters covered thereby are covered by the Code or Professional Responsibility. For example, DR 7-106 (C)(6) forbids undignified or discourteous conduct which is degrading to the court. DR 7-106(A) provides that a lawyer shall not disregard or advise his client to disregard a ruling made by a court, but may take appropriate steps in good faith to contest the validity of such a ruling. With respect to Subsection (f) of the Standard, the Committee is of the opinion that the Code of Professional Responsibility provides adequate guidelines for courtroom conduct.

STANDARD

5.3 Selection of jurors.

(a) The prosecutor should prepare himself prior to trial to discharge effectively his function in the selection of the jury and the exercise of challenges for cause and peremptory challenges.

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

(c) In jurisdictions where lawyers are permitted to personally question jurors on voir dire, the opportunity to question jurors should be used solely to obtain information for the intelligent exercise of challenges. A prosecutor should 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.

COMMENT

Particularly because trial counsel in Delaware do not participate actively in voir dire, there is a need for counsel to become familiar with the background of prospective jury members. In general, Delaware practice is in accord with the Standard. See the Comparative Study on Trial by Jury.

STANDARD

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 should avoid the reality or appearance of any such improper communications.

(b) The prosecutor should 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 should 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.

COMMENT

Delaware practice is in accord with the Standard. Code of Professional Responsibility DR 7-108 (A)-(C) forbids communication with a juror outside the course of official proceedings both before and during trial. The conduct covered by Subsection (c) of the Standard is covered by DR 7-108 (D).

STANDARD

5.5 Opening statement.

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

COMMENT

Delaware practice is generally in accord with the Standard, but violations should be dealt with appropriately by the court. Code of Professional Responsibility DR 7-106(C)(1) forbids stating or alluding to any matter that counsel has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

STANDARD

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 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 should be by an offer of proof and a ruling obtained.

COMMENT

The use of false evidence is prohibited, as is the eliciting of false testimony or permitting a witness to testify knowing the testimony to be false or misleading. Miller v. Pate, 386 U.S. 1 (1967); Alcorta v. Texas, 355 U.S. 28 (1957); Code of Professional Responsibility DR 7-102(A)(4). Delaware practice is in accord with the Standard, which should be equally binding upon defense counsel. See the Comparative Study on The Defense Function.

STANDARD

5.7 Examination of witnesses.

(a) The interrogation of all witnesses should 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. Proper cross-examination can 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 in all circumstances, but may affect the method and scope of cross-examination. He should 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 should 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. In some instances, as defined in the Code of Professional Responsibility, doing so 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.

COMMENT

Delaware practice is generally in accord with the Standard. Certainly

the Standard should be interpreted to provide for a fairly wide range of conduct which does not violate ordinary notions of courtroom decorum.

STANDARD

5.8 Argument to the jury.

(a) The prosecutor may argue all reasonable inferences form 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 or the guilt of the defendant.

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

(d) The prosecutor should 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.

COMMENT

Delaware practice is generally in accord with the Standard. Code of Professional Responsibility DR 7-102(A)(5) prohibits knowingly making a false statement of law or fact. DR 7-106(C)(3)(4) forbids asserting personal knowledge or opinion except as a witness.

STANDARD

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 notice.

COMMENT

Delaware practice is in accord with the Standard.

STANDARD

5.10 Comments by prosecutor after verdict.

The prosecutor should not make public comments critical of a verdict,

whether rendered by judge or jury.

COMMENT

While the rule proposed by Standard 5.10 seems a wise one, it is only fair if it applies equally to defense counsel, and if it does not the Committee would not favor adoption of the Standard solely restricting the prosecution.

PART VI. SENTENCING

6.1 Role in sentencing.

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

(b) Where sentence is fixed by the judge without jury participation, the prosecutor ordinarily should 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 should present evidence on the issue within the limits permitted in the jurisdiction, but should avoid introducing evidence bearing on sentence which will prejudice the jury's determination of the issue of guilt.

COMMENT

The Committee favors adoption of Subsection (a) of the Standard and believes that it should be made a policy of the Department of Justice. With respect to Subsection (b), the Committee believes that the prosecutor has an affirmative duty to recommend an appropriate sentence; indeed, such recommendations have frequently been requested by superior court judges. Since juries do not fix any sentences in Delaware, Subsection (c) is inapplicable.

STANDARD

6.2 Information relevant to sentencing.

(a) The prosecutor should assist the court in basing its sentence on complete and accurate information for use in the presentence report. He should 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 should take steps to present the complete and correct information to the court and to defense counsel.

(b) The prosecutor should 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.

COMMENT

The prosecutor has a duty to disclose evidence material to punishment. Brady v. Maryland, 373 U.S. 83 (1963). The Attorney General's office has not been able to comply readily with the requirement that it examine the pre-sentence report for completeness, because copies of the pre-sentence report have not been made available. The Attorney General's office makes its files available to the pre-sentence officer. The broadened rules of discovery suggested in the Comparative Study on Discovery and Procedure Before Trial should assist in making information relevant to sentence generally more available to the defense.

CHAPTER 17

THE DEFENSE FUNCTION

PART I. GENERAL STANDARDS

1.1 Role of defense counsel; function of standards.

(a) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.

(b) The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate, with courage, devotion and to the utmost of his learning and ability, and according to law.

COMMENT

The Standard sets forth the ideal arrangement, which is consistent with the Code of Professional Responsibility as adopted in Delaware. See Canon 1 and related ethical considerations and disciplinary rules. While this Standard undoubtedly represents the prevailing rule, some members of the Committee feel that individual trial judges may view defense counsel, particularly the public defender, as a public servant whose function it is to serve the convenience of the court. The Committee believes that the status of defense counsel and the importance thereof in the administration of criminal justice should be clearly recognized. The Committee does not believe that there has been a problem in Delaware with respect to defense counsel not devoting wholehearted efforts to the defense of a client. The Code of Professional Responsibility clearly recognizes that counsel's duty is to his client as a zealous advocate, while his duty to the court is as an officer of the court with a duty to maintain competence and integrity of the legal profession.

STANDARD

1.1(c) The defense lawyer, in common with all members of the bar, is subject to 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 does not comport with law or such standards; he is the professional representative of the accused, not his alter ego.

COMMENT

Over-representation of criminal defendants by attorneys has not proven to be a problem in Delaware. There are doubtless occasions when counsel may, in the heat of combat, become emotionally involved in the handling of a case, but the trial bench has proven to be reasonably understanding

in this matter and has maintained good control of conduct during trial.

STANDARD

1.1(d) It is unprofessional conduct for a lawyer intentionally to misrepresent matters of fact or law to the court.

COMMENT

Code of Professional Responsibility DR 1-102(A)(4) prohibits lawyers from engaging in conduct "involving dishonesty, fraud, deceit, or misrepresentation." Delaware law is in accord with the Standard.

STANDARD

1.1(e) It is the duty of every lawyer to know the standards of professional conduct as defined in codes and cannons of the legal profession and in this report, 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.

COMMENT

Delaware practice is in accord with the Standard. The Committee recommends frequent programs of continuing education to alert practicing members of the bar to the Code of Professional Responsibility.

STANDARD

1.1(f) In this report the term "unprofessional conduct" denotes conduct which is or should be made subject to disciplinary sanctions. Where other terms are used, the standard is intended as a guide to honorable professional conduct and performance. These standards are not intended as criteria for the judicial evaluation of the effectiveness of counsel to determine the validity of a conviction; they may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

STANDARD

1.2 Delays; punctuality.

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

COMMENT

It is difficult to reconcile the duty of an attorney to represent his client and interpose all necessary legal defenses and the Standard. The question of what is "unnecessary" is a matter of professional judgment. It is, therefore, suggested that unless the abuse is clear and convincing, well beyond a reasonable doubt, defense counsel should be indulged in the filing of motions, the handling of matters, requests for continuances and the like. Notwithstanding the huge increase in crime and the connected problems of overflow into the judicial system, the court should be cognizant of the fact that it is trying one defendant at a time and that defendant has rights which are by no means restricted by the fact that there may be double or triple the number of defendants that there were several years ago. While it is not suggested that the system grind to a halt while there be careful determination of each application each defense counsel makes, courts should be aware of the heavy responsibility defense counsel has in representing a criminal defendant especially in serious cases.

STANDARD

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

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

COMMENT

Code of Professional Responsibility DR 1-102(A)(4)(5) prohibits conduct involving dishonesty, fraud, deceit and misrepresentation and other conduct prejudicial to the administration of justice. The Committee believes that any violation of this disciplinary rule should be promptly remedied. The Committee has greater difficulty with the administration of Standard 1.2(c). Courts should be very hesitant to substitute their own view of proper defense strategy for that of defense counsel. What some judges may refer to as "mere technicalities" may, in fact, be constitutionally guaranteed rights which should not lightly be abrogated.

STANDARD

1.2(d) A lawyer should not accept more employment than he can discharge within the spirit of the constitutional 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.

COMMENT

The matters covered by the Standard have represented something of a problem, especially in the superior court. Several lawyers have, on occasion, taken more cases on than they canlegitimately handle, and the Committee believes that the court should be more active in prohibiting this. While it would be impractical and possibly unconstitutional for a court to deny a particular criminal defendant his choice of counsel, the court can discipline an attorney who habitually overschedules himself to the point where he cannot try cases legitimately scheduled for trial. However, it should be noted that heretofore the scheduling of cases was handled by the Attorney General. The Attorney General has, on occasion, overschduled particular lawyers on particular days where they could not try the number of cases given them. It is hoped that with scheduling now a function of the court and hopefully computerized to some degree, overloading of a particular lawyer can be avoided. Computerizing will also enable the court to inventory the number of cases that individual counsel have and when more experience is available as to what one lawyer can legitimately handle during a particular period of time, the court can then develop accurate guidelines as to when an attorney has overscheduled himself and when he should be required to divest himself of a case, or at least be subject to professional discipline if he goes beyond the particular guideline.

STANDARD

1.3 Public statements.

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

(b) The lawyer should comply with the ABA Standards on Fair Trial and Free Press. In some instances, as defined in the Code of Professional Responsibility, his failure to do so will constitute unprofessional conduct.

COMMENT

This Standard seems to be unnecessarily vague. Certainly an attorney should be professionally disciplined for using publicity to in any way further the interest of his case or the interest of a particular defendant. Further, the Code of Professional Responsibility prohibits attempts at personal publicity through undue calling of attention to himself. Thus, a lawyer who habitiually manages to reach the front pages of the newspaper because of attempts at personal publicity should be subject to professional discipline. On the other hand, the public should not be prevented from access to information about pending criminal matters and indeed about the entire administration of justice, so lawyers should not be intimidated in talking to

members of the press or media about a pending case as long as they do not violate the Code of Professional Responsibility in so doing.

STANDARD

1.4 Advisory councils on professional conduct.

(a) In every jurisdiction an advisory body of lawyers selected for their experience, integrity and standing at the trial bar should be established as an advisory council on problems of professional conduct in criminal cases. This council should provide prompt and confidential guidance and advice to lawyers seeking assistance in the application of standards of professional conduct in criminal cases.

(b) Communications between a lawyer and such an advisory council should have the same privilege for protection of the client's confidences as exist between lawyer and client. The council should be bound by statute or rule of court in the same manner as a lawyer is bound not to 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.

COMMENT

The Delaware State Bar Association maintains an ethics committee which provides advisory service to attorneys who have questions regarding the application of the Code of Professional Responsibility with respect to all aspects of practice. This committee promptly renders opinions when requested to do so by members of the bar. It is suggested that a subcommittee be formed within this same committee to render advice on strictly criminal matters, since the problems in this area are probably unique and the committee would be better served by having a small panel composed of experienced criminal attorneys of integrity who could render advisory opinions on the problems that criminal attorneys have. A small subcommittee might be able to respond more quickly than a larger committee to ethical problems arising at or very near trial.

The practice of the ethics committee is in accord with subsection (b) of the Standard. The Committee would recommend formal adoption of the language contained in the Standard.

STANDARD

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

(a) The bar should encourage through every available means the

widest possible participation in the defense of criminal cases by experienced trial lawyers. Lawyers active in general trial practice should be encouraged to qualify themselves for participation in criminal cases both by formal training and through experience as associate counsel.

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

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

COMMENT

The Standard suggests that participation in criminal defense matters by civil trial lawyers be voluntary, yet widespread and systematic. The Committee does not believe that this is presently the case in Delaware. On occasion, in certain meritorious cases, members of the civil trial bar have been most generous with their time, but this is usually done on the urging of a particular judge and by particular appointment. The Committee believes that all civil trial counsel of experience should be placed on the court appointed list maintained by the superior court, and their services rotated so that prestigious members of the civil trail bar take their turns trying criminal cases. Of course, lawyers should not be placed on such a list until they are experienced; this would avoid the intrusion in the trial process of unqualified lawyers seeking trial experience and the associated publicity when they are not adequately prepared to handle criminal cases at the trial level.

The Committee believes that the Delaware Bar has been above reproach with respect to the handling of unpopular cases. Prior to the implementation of the public defender system, private counsel were appointed and responded dutifully to the call of their profession. Unfortunately, the courts have been reluctant (and in some cases unable) properly and adequately to compensate counsel for taking on such cases. For example, when four members of the private bar took on representation of the so-called "Smyrna Five" extremely ungenerous compensation was provided for these lawyers, and it took a legal action brought on their behalf for adequate compensation to be paid to them. The Committee believes that qualified trial lawyers who are appointed to cases should be adequately compensated for their professional services.

The Committee has also found that certain large law firms seem to discourage participation in criminal cases, probably because there is enough work to keep them busy without volunteering their time in such matters. The Committee believes that rotation of representation in criminal cases should be mandatory and that no lawyer or firm of lawyers otherwise qualified should be permitted to avoid representation of criminal defendants.

STANDARD

1.6 Client interests paramount.

Whether privately engaged, judically 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.

COMMENT

Code of Professional Responsibility DR 7-101 provides that a lawyer should not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules. This formulation appears to the Committee to be preferable to the formulation in the Standard, which vaguely refers to "considerations of personal and professional advantage." In many cases, the Committee believes, such considerations are legitimate so long as they do not interfere with the proper representation of the client.

PART II. ACCESS TO COUNSEL

2.1 Communication.

Every jurisdiction should guarantee by statute or rule of court the right of an accused person to prompt and effective communication with a lawyer and should require that reasonable access to a telephone or other facilities be provided for that purpose.

COMMENT

Delaware practice is in accord with the Standard, and the Committee would recommend its implementation by rule of court. The Committee does note that an important impediment to communication by criminal lawyers with their clients is the inaccessibility of the Delaware Correctional Center which is located in the middle of the State rather than near the principal population center. One way to alleviate this problem would be to construct a pre-trial detention facility in or near Wilmington to facilitate pre-trial communication between counsel and client.

STANDARD

2.2 Referral service for criminal cases.

(a) To assist persons who wish to retain counsel privately and who do not know a lawyer or how to engage one, every jurisdiction should have

a referral service for criminal cases. The referral service should maintain a list of lawyers willing and qualified to undertake the defense of a criminal case; it should be so organized that it can provide prompt service at all times.

(b) The availability of the referral service should be publicized. In addition, notices containing the essential information about the referral service and how to contact it should be posted conspicuously in police stations, jails and wherever else it is likely to give effective notice.

COMMENT

The Delaware Bar Association maintains a lawyer referral service. However, this service does not make an effort to segregate the names of "qualified" criminal defense lawyers. It has been suggested that the Delaware Bar Association publish a directory of lawyers in which lawyers would, under appropriate standards and guidelines, be allowed to assert professional specialties. In addition to the suggestions contained in this Standard, it is further suggested that the Delaware Bar Association publish a list of qualified criminal attorneys and that list be made available in police stations, jails and the like, and that such list contain sufficient biographical data and the Martindale-Hubbell ratings (with the permission of that organization) so as to enable a criminal defendant to make an intelligent choice as to counsel to represent him. No person should be on this list who has not established his qualification as a criminal lawyer.

STANDARD

2.3 Prohibited referrals.

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

(b) Regulations and licensing requirements governing the conduct of law enforcement personnel, bondsmen, court personnel and others in similar positions should prohibit their referring an accused to any particular lawyer and should require them, when asked to suggest the name of an attorney, to direct the accused to the referral service or to the local bar association if no referral service exits.

COMMENT

Code of Professional Responsibility DR 2-103 forbids an attorney to give compensation or anything of value to a person or orgainzation to recomment or secure his employment, or to reward a person or organization for having made a recommendation resulting in his employment.

It has come to the attention of the Committee that certain defense

lawyers give their professional cards to correctional and law enforcement personnal for distribution to persons they apprehend. The Committee is not aware of any instances of fee splitting in such a situation, but the Committee understands that the ethics committee of the Delaware Bar Association has advised one of the members of the Committee that this consititutes prohibited conduct and is a violation of the Code of Professional Responsibility. The Committee recommends that appropriate steps be taken to prevent future occurrences of this misconduct.

STANDARD

2.4 Recommendation of professional employment.

The lawyer should be alert to and comply with the requirements of the Code of Professional Responsibility regarding recommendation of professional employment.

PART III. LAWYER-CLIENT RELATIONSHIP

3.1 Establishment of relationship.

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

(b) The conduct of the defense of a criminal case requires trained professional skill and judgment; therefore, 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, as delineated in section 5.2.

(c) To insure the privacy essential for confidential communication between lawyer and client, adequate facilities should 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 should be prohibited by law or administrative regulations from examining or otherwise interfering with any communication or correspondence between a client and his lawyer relating to legal action arising out of charges or incarceration.

COMMENT

Code of Professional Responsibility Canon 4 provides that a lawyer should preserve the confidences and secrets of his client. Delaware practice is generally in accord with the Standard. Adequate facilities are available for

conferences with clients, and the regulations of the Delaware Correctional Center are in compliance with Subsection (b) of the Standard.

STANDARD

3.2 Interviewing the client.

(a) As soon as practicable the lawyer should seek to determine all relevant facts known to the accused. In so doing, the lawyer should 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.

COMMENT

The Committee believes that the practice of the Delaware Bar is in accord with the Standard.

STANDARD

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.

COMMENT

The matter of appropriate fees is dealt with by Code of Professional Responsibility DR 2-106 which prohibits the charging of a "clearly excessive fee" and provides that a fee is "clearly excessive when, after a review of the facts, a lawyer or ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." The Disciplinary Rule goes on to outline eight factors which are relevant in determining the reasonableness of the fee:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
3. The fee customarily charged in the locality for similar legal services.
4. The amount involved and the results obtained.
5. The time limitations imposed by the client or by the circumstances.
6. The nature and length of the professional relationship with the client.
7. The experience, reputation, and ability of the lawyer or lawyers performing the services.
8. Whether the fee is fixed or contingent.

The Standard is in agreement with the Disciplinary Rule in this case. However, the Committee recognizes that there may be a wide degree of latitude in setting a reasonable and proper fee in consideration of the factors enumerated.

STANDARD

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.

COMMENT

While the Committee is not aware that any incident of the sort covered by the Standard has occurred in Delaware, the Committee recommends adoption of the Standard. Code of Professional Responsibility DR 5-104

(B) states that "Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement 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."

STANDARD

3.5 Conflict of interest.

(a) At the earliest feasible opportunity defense counsel should 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 should 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. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants 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. In some instances, as defined 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 should 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.

COMMENT

The subject matter of the Standard is covered by Code of Professional Responsibility DR 5-105 which prohibits a lawyer to accept or continue employment if the interest of another client may impair the independent professional judgment of the lawyer. The Public Defender's Office and private defense counsel in Delaware observe the conduct specified in Sub-

section (b) of the Standard. In Hill v. State, Del. Supr., 316 A.2d 557 (1974), the Supreme Court of Delaware, citing DR 5-105 and Standard 3.5, reaffirmed the general rule that joint representation of clients violates the Sixth Amendment right to effective counsel only if it can be shown that an actual conflict exists.

STANDARD

3.6 Prompt action to protect the accused.

(a) Many important rights of the accused can be protected and preserved only by prompt legal action. The lawyer should inform the accused of his rights forthwith and take all necessary action to vindicate such rights. He should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial 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 should not act as surety on a bail bond either for the accused or others.

COMMENT

Delaware practice is in accord with the Standard. Since it is entirely appropriate for defense counsel to take such of the steps as are outlined in Subsection (a) as appear appropriate in order to protect the rights of the accused, courts should recognize that defense counsel has a professional obligation to take such steps. Subsection (b) should apply, not only to the lawyer himself, but to members of his immediate family and persons with whom he has any business interests.

STANDARD

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 acitivity.

(d) Except as provided in section 7.7, a lawyer may reveal the expressed intention of his client to commit a crime and the 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.

COMMENT

Delaware practice is in accord with the Standard. The Code of Professional Responsibility DR 7-102 (A)(7) prohibits a lawyer in his representation of a client, from counselling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent. DR 4-101(C)(3) permits a lawyer to reveal the intention of his client to commit a crime and the information necessary to prevent the crime.

STANDARD

3.8 Duty to keep client informed.

The lawyer has a duty to keep his client informed of the developments in the case and the progress of preparing the defense.

COMMENT

While Delaware practice is generally in accord with the Standard, the Committee would favor the adoption of an appropriate rule to give effect to the Standard.

STANDARD

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.

COMMENT

The Committee favors adoption of the Standard. At present, the court treats attorneys who are public defenders somewhat differently and expects more of them than privately retained counsel. Specifically, the court expects public defenders to interchange cases even on the day of trial when, because of scheduling problems, a public defender has more than one case. The court does not expect this to be done among attorneys in private practice. There-

fore, it is not unusual for a public defender to be required to represent an unfamiliar client because his original public defender is engaged in another case that is carried over from the previous day. On the other hand, it is unheard of for the court to require a private criminal attorney to call in one of his partners or associates to represent someone because he has a carry-over case.

PART IV. INVESTIGATION AND PREPARATION

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 should always 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.

COMMENT

Delaware practice is generally in accordance with the Standard, and the recommendations contained in the Comparative Study on Discovery and Procedure Before Trial will, if adopted, materially assist defense counsel in the investigation recommended by the Standard. It should be clearly understood that the prosecution should not induce any of its witnesses in any case to refuse to speak to the defendant's counsel or his investigator. The Committee is advised that, particularly in rape cases, there appears to be a general pattern of advice by the Attorney General's office that victims need not and should not talk to defense counsel. While the Committee recognizes that certain safeguards may need to be placed upon such investigations, they are an important part in preparing the defense case, particularly where the defendant is unable or unwilling to provide any information about the alleged incident.

STANDARD

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.

COMMENT

Delaware practice is in accord with the Standard. Code of Professional Responsibility DR 1-102(A)(4) prohibits an attorney from engaging in

conduct involving dishonesty, fraud, deceit, or misrepresentation. It is clear that this prohibition applies both to prosecution and defense counsel, and it should be uniformly enforced.

STANDARD

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.

COMMENT

Delaware law is in accord with the Standard. Code of Professional Responsibility DR 7-109 forbids a lawyer from paying, offering to pay, or acquiescing in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of expenses reasonably incurred by a witness in attending or testifying, reasonable compensation for his loss of time in attending or testifying, and a reasonable fee for the professional services of an expert witness.

STANDARD

4.3(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.

COMMENT

The Committee would favor making mandatory the duty of cautioning witnesses about possible self-incrimination and need for counsel.

STANDARD

4.3(c) A lawyer should 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 to the prosecutor or counsel for co-defendants information which he has a right to give.

COMMENT

The Committee favors adoption of the Standard.

STANDARD

4.3(d) Unless the lawyer for the accused is prepared to forego 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.

COMMENT

Code of Professional Responsibility DR 5-102 requires a lawyer to withdraw from conduct of the case if, after accepting employment, he learns that he or a lawyer in his firm ought to be called as a witness on behalf of his client. The Committee recognizes that the procedure of having third persons present during witness interviews may be impractical, but notes that there are other devices for recording a conversation, such as a tape recording, which would provide a feasible substitute.

STANDARD

4.4 Relations with expert witnesses.

(a) A lawyer who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject. To the extent necessary, the lawyer should explain to the expert his role in the trial as an impartial witness called to aid the fact-finders and 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 fix the amount of the fee contingent upon the testimony he will give or the result in the case.

COMMENT

Delaware practice is in accord with the Standard. Code of Professional Responsibility DR 7-109(c) provides that a lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of expenses reasonably incurred by a witness in attending or testifying, reasonable compensation

for his loss of time in attending or testifying, and a reasonable fee for the professional services of an expert witness.

STANDARD

4.5 Compliance with discovery procedure.

The lawyer should comply in good faith with discovery procedures under the applicable law.

COMMENT

The Committee favors adoption of the Standard. The whole area of discovery in criminal cases should be greatly improved if the recommendations in the Comparative Study on Discovery and Procedure Before Trial are adopted.

PART V. CONTROL AND DIRECTION OF LITIGATION

5.1 Advising the defendant.

(a) After informing himself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including his candid 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 should 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.

COMMENT

Delaware practice is in accord with the Standard.

STANDARD

5.2 Control and direction of the case.

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf.

(b) The decisions on 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 are the exclusive province of 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 should make a record of the circumstances, his advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relation.

COMMENT

The Standard represents the general practice in Delaware. The Committee notes, however, that in certain notorious and disruptive cases, clients have asserted far greater rights to control the course of the trial than the Standard would allow. The Committee believes that the Standard should be codified by an appropriate rule and that counsel should be permitted to withdraw from a case if the client is unwilling to accept the tactical judgment of his attorney in accordance with the Standard.

STANDARD

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.

COMMENT

Superior Court Criminal Rule 11 does not require an admission of guilt as a prerequisite for a plea of guilty, but only a factual basis for the entry of a guilty plea. The Committee, therefore, believes that the Standard should be worded so as to make it clear only that a guilty plea should not be entered if there is no factual basis for such a plea. As discussed in the Comparative Study on Pleas of Guilty, a defendant may wish to plead guilty in order to avoid the ordeal and expense of a lengthy tiral, or for other tactical reasons, which decision should not be discouraged if it is based upon a proper understanding of the situation.

PART VI. DISPOSITION WITHOUT TRIAL

6.1 Duty to explore disposition without trial.

(a) Whenever the nature and circumstances of the case permit, the lawyer for the accused should 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 should so advise the accused and seek his consent to engage in plea discussions with the prosecutor, if such appears desirable.

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

COMMENT

Delaware practice is generally in accord with the Standard. The Committee favors adoption of the Standard, except that subsection (b) should be limited to a requirement that the defense counsel candidly advise defendant as to the opportunities or risks of trial. Thereafter, the client should be allowed to make his own decision as to whether he should plead guilty or not.

STANDARD

6.2 Conduct of discussions.

(a) In conducting discussions with the prosecutor the lawyer should keep the accused advised of developments at all times and all proposals made by the prosecutor should 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.

COMMENT

The Committee favors adoption of the Standard. Under Code of Professional Responsibility DR 1-102 and DR 5-106 the conduct specified in Subsection (b) and (c) is unprofessional conduct, subject to discipline.

PART VII. TRIAL

7.1 Courtroom decorum.

(a) As an officer of the court the lawyer should 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, witnessess and jurors.

(b) When court is in session defense counsel should 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 should 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 rulings.

(e) Lawyers should cooperate with courts and the organized bar in developing codes of decorum and professional etiquette for each jurisdiction.

COMMENT

Delaware practice is generally in accord with the Standard. Code of Professional Responsibility DR 7-106(C) provides that in appearing in his professional capacity before a tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to the tribunal, nor ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person. The Committee favors adoption of the Standard. However, the Committee sees no need for any special code of decorum as recommended by Subsection (e).

STANDARD

7.2 Selection of jurors.

(a) The lawyer should 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 should restrict himself to investigatory methods which will not harass or unnecessarily embarrass potential jurors or invade their privacy and, whenever possible, he should restrict his investigation to records and sources of information already in existence.

(c) In jurisidictions where counsel is permitted personally to question jurors or voir dire, the opportunity to question jurors should be used solely to obtain information for the intelligent exercise of challenges. A lawyer should 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.

COMMENT

It should be noted that in Delaware counsel's participation in the investigation and selection of the jury is strictly limited. This matter is more fully discussed in the Comparative Study on Trial by Jury.

STANDARD

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 should avoid the reality or appearance of any such improper communications.

(b) The lawyer should 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 should 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 the that limited purpose, upon notice to opposing counsel and the court.

COMMENT

Delaware practice is generally in accord with the Standard. Code of Professional Responsibility DR 7-108 prohibits communication before or during trial with a juror or prospective juror as well as comments after trial to a member of the jury which are calculated merely to harass or embarass the juror or influence his actions in future jury service. Although there is no specific rule on the subject, any contact with a juror after trial is discouraged by informal practice in Delaware. There should, however, be no prohibition on contact with jurors for legitimate research purposes after the juror has been discharged from the panel.

STANDARD

7.4 Opening statement.

In his opening statement a lawyer should 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.

COMMENT

Delaware practice is in accord with the Standard. Code of Professional Responsibility DR 7-106(C)(1) forbids an attorney in court to "state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence."

STANDARD

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 tendor 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.

COMMENT

In general, Delaware practice is in accord with the Standard. Code of Professional Responsibility DR 7-102(A)(4) provides that in his representation of his client, a lawyer shall not knowingly use perjured testimony or false evidence. DR 7-106(C)(1) forbids stating or alluding to any matter that an attorney has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence. Some members of the Committee believe that Subsection (b) goes unwisely far in its use of the phrase "inadmissible matter." Evidence is admissible or inadmissible largely as a result of whether it is objected to or not. Therefore, the admissibility of evidence can often only appear after the question is asked, unless it is so

clearly wrong that it offends the conscience or the equitable sensibilities of the court.

STANDARD

7.6 Examination of witnesses.

(a) The interrogation of all witnesses should 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. Proper cross-examination can be conducted without violating rules of decorum.

(b) A lawyer's belief that the witness is telling the truth does not necessarily preclude appropriate cross-examination in all circumstances, but may affect the method and scope of cross-examination. He should not misuse the power of cross-examination or impeachment by employing it to discredit or undermine a witness if he knows the witness is testifying truthfully.

(c) A lawyer should 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. In some instances, as defined in the Code of Professional Responsibility, doing so 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.

COMMENT

Delaware practice is generally in accord with the Standard, much of which is covered by the Code of Professional Responsibility, including DR 1-102(A) and DR 7-106(C). Wide latitude should be given to counsel in cross-examination, and it will very seldom if ever be the case that counsel will be absolutely certain that a particular witness is telling the truth.

STANDARD

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 must 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 must 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 some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to indentifying 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.

COMMENT

Delaware law is generally in accord with the Standard. Code of Professional Responsibility DR 7-102(A)(4) and (6) forbids the knowing use of perjured testimony or false evidence and the participation in the creation or the preservation of evidence when the attorney knows or it is obvious that the evidence is false. This rule should prevail even in light of the attorney-client privilege because the attorney is an officer of the court and should not be a party to perjured testimony. Some members of the Committee feel that a lawyer should have a duty, if the defendant takes the stand against the advice of his attorney and testifies falsely, to point out immediately the fact that the crime of perjury has been committed.

STANDARD

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 the attribute the crime to another person unless such an inference is warranted by the evidence.

(c) A lawyer should not make arguments calculated to inflame the passions or prejudices of the jury.

(d) A lawyer should 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.

COMMENT

Delaware practice is generally in accord with the Standard. Code of Professional Responsibility DR 7-106(C)(4) prohibits an attorney from expressing his personal belief in his client's innocence.

STANDARD

7.9 Facts outside the record.

It is unprofessional conduct for a lawyer intentionally to refer to or argue on the basis of facts outside the record, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court can take judicial notice.

COMMENT

Delaware practice is in accord with the Standard. Code of Professional Responsibility DR 7-106(C)(1) forbids stating or alluding to any matter that an attorney has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

STANDARD

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.

COMMENT

Delaware practice is in accord with the Standard. For further information on this subject, see the Comparative Study on Post-Conviction Remedies.

PART VIII. AFTER CONVICTION

8.1 Sentencing.

(a) The lawyer for the accused should be familiar with the sentencing alternatives available to the court and should endeavor to learn its practices in exercising sentencing discretion. The consequences of the various dispositions available should be explained fully by the lawyer to his client.

(b) Defense counsel should present to the court any ground which

will assist in reaching a proper dispostion favorable to the accused. If a presentence report or summary is made available to the defense lawyer, he should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If there is no presentence report or if it is not disclosed, he should 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 should alert the accused to his right of allocution, if any, and to the possible dangers of making a judicial confession in the course of allocution which might tend to prejudice his appeal.

COMMENT

Delaware practice is in accord with the Standard. Defendants are represented by counsel at the sentencing proceeding, and counsel are permitted to participate therein with all relevant information. For further information on this subject, see the Comparative Study on Sentencing Alternatives and Procedures.

STANDARD

8.2 Appeal.

(a) After conviction, the lawyer should explain to the defendant the meaning and consequences of the court's judgment and his right of appeal. The lawyer should 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 should 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 should take whatever steps are necessary to protect the defendant's right of appeal.

COMMENT

Delaware practice is generally in accord with the Standard. For further information on this subject, see the Comparative Study on Criminal Appeals.

STANDARD

8.3 Counsel on appeal.

(a) Trial counsel, whether retained or appointed by the court, should conduct the appeal if the defendant elects to avail himself of that right un-

less new counsel is substituted by the defendant or the appropriate court.

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

COMMENT

The Committee favors adoption of the Standard. The case of Erb v. State, Del. Supr., 322 A. 2d 137 (1974), requires trial counsel to file the notice of appeal and other papers prerequisite to the appeal even if such counsel is not retained to handle the appeal itself. The Committee favors adoption of the Standard.

STANDARD

8.4 Conduct of appeal.

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

(b) Appellate counsel should be scrupulously accurate in referring 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 based on ordinary human exerience or matters of which the court may take judicial notice.

COMMENT

Delaware practice is in accord with the Standard. For further information on this subject, see the Comparative Study on Criminal Appeals.

STANDARD

8.5 Post-conviction remedies.

After a conviction is affirmed on appeal, appellate counsel should 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. In other respects the responsibility of a lawyer in a post-conviction proceeding should be guided generally by the standards governing the conduct of lawyers in criminal cases.

COMMENT

Delaware practice is in accord with the Standard. For further information on this subject, see the Comparative Study on Post-Conviction Remedies.

STANDARD

8.6 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 the 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.

COMMENT

Delaware practice is in accord with the Standard. Code of Professional Responsibility DR 1-103 requires a lawyer who possesses unprivileged knowledge of the violation of DR 1-102 (relating to misconduct) to report such knowledge to an authority in power to investigate or act upon such violation. In practice, Delaware counsel have not been unwilling to seek relief on the basis of poor representation in a prior proceeding by another attorney. The Committee recommends adoption of the Standard, and indeed would favor making it unprofessional conduct for an attorney to proceed to post-conviction relief on the basis of ineffective prior representation if such attorney is satisfied that the prior representation was, in fact, proper.

CHAPTER 18

THE FUNCTION OF THE TRIAL JUDGE

INTRODUCTION

In 1974 Delaware adopted, with minor modifications, the Code of Judicial Conduct sponsored by the American Bar Association's Committee on Standards of Judicial Conduct. The standards of conduct therein are substantially in accord with the Standards on the Function of the Trial Judge, the Comparative Study of which follows.

PART I. BASIC DUTIES

1.1 General responsibility of the trial judge.

(a) The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his own initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial. The only purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose.

(b) The trial judge should require that every proceeding before him be conducted with unhurried and quiet dignity and should aim to establish such physical surroundings as are appropriate to the administration of justice. He should give each case individual treatment; and his decisions should be based on the particular facts of that case. He should conduct the proceedings in clear and easily understandable language, using interpreters when necessary.

(c) The trial judge should be sensitive to the important roles of the prosecutor and defense counsel; and his conduct towards them should manifest professional respect and be courteous and fair.

DELAWARE LAW

Code of Judicial Conduct, Canon 3A provides that:

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

COMMENT

The practice of the Delaware judiciary is in accord with the Standard.

STANDARD

1.2 Adherence to standards.

The trial judge should 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.

COMMENT

The Committee recommends adoption of the Standard. Publication of this and other Comparative Studies should make the Standards more readily available to the Delaware judiciary.

STANDARD

1.3 Appearance and demeanor of the judge.

The trial judge should reflect the dignity of his office and enhance public confidence in the administration of justice by his personal appearance and demeanor. The wearing of the judicial robe in the courtroom will contribute to these goals.

COMMENT

The practice of the Delaware judiciary is in accord with the Standard.

STANDARD

1.4 Obligation to use judicial time effectively.

The trial judge has the obligation to avoid delays, continuances and extended recesses, except for good cause. In the matter of punctuality, the observance of scheduled court hours, and the use of working time, the trial judge should be an exemplar for all other persons engaged in the criminal case. He should require punctuality and optimum use of working time from all such persons.

COMMENT

Present Delaware practice permits continuances only for good cause. The practice of the Delaware judiciary is in accord with the Standard.

STANDARD

1.5 Duty to maintain impartiality.

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

DELAWARE LAW

Code of Judicial Conduct, Canon 2 requires a judge to "respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. . . . A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness."

COMMENT

The practice of the Delaware judiciary is in accord with the Standard.

STANDARD

1.6 Duty to prevent ex parte discussions of a pending case.

The trial judge should insist that neither the prosecutor nor the defense counsel nor any other person discuss a pending case with him ex parte, except after adequate notice to all other parties and when authorized by law or in accordance with approved practice.

DELAWARE LAW

Superior Court Criminal Rule 49 requires written notices and petitions "other than those which are heard ex parte" to be served upon each of the parties. In addition, the Rule requires the prothonotary to mail to each party a notice of entry of any order made by the court.

COMMENT

Delaware law is partially in accord with the Standard, but the Committee recommends revision of Rule 49 to clarify the situations in which an ex parte application to the court would be appropriate and to clarify the procedures for notifying the affected party when an ex parte proceeding has occurred.

STANDARD

1.7 Circumstances requiring recusation.

The trial judge should 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.

DELAWARE LAW

Code of Judicial Conduct, Canon 3C requires a judge to "disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he has previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

COMMENT

Delaware law is in accord with the Standard.

PART II. FACILITIES AND STAFF

2.1 Necessity to provide judicial manpower.

A sufficient number of trial judges should be provided for each judicial district to assure the prompt and fair administration of justice.

COMMENT

Delaware practice is generally in accord with the Standard. Assignments of judges to hear cases are made by the chief judge of each court. The chief justice can appoint sitting judges to preside in all constitutional courts, and judges of the constitutional courts can sit in courts created by statute. Therefore, there is opportunity for assignment of judges who are not members of a particular court to a court where there is an unusual backlog of cases.

STANDARD

2.2 Adequacy of courtroom facilities and supporting staff.

The trial judge should be provided with court facilities which are dignified and functional, and adequate to discharge his responsibilities. There should be adequate supporting staff to assure the prompt and fair administration of justice.

STANDARD

2.3 Trial court's obligation to seek or compel adequate support.

(a) The trial court has an obligation to seek the cooperation of the executive and legislative departments to provide judicial manpower, supporting staff, physical facilities, and budget adequate to attain the objectives set forth in section 2.2.

(b) The trial court should be familiar with the nature and extent of the inherent power of the judiciary to compel other agencies of government to provide for staff, facilities, and funds to attain these objectives. Where the cooperation under subsection (a) is sought and not obtained, the trial court should exercise this inherent power.

COMMENT

The Delaware judiciary has not yet had to face squarely its powers as an

independent third branch of government to compel necessary funding by the legislature. Instead, an attempt has been made to secure adequate funding by persuasion. The Long-Range Courts Planning Committee, appointed by the chief justice and consisting of lawyers and judges, is responsible for planning for court organization, facilities and manpower. It should be noted that significant support for the courts comes from the counties. For example, the prothonotary is a county official and many court employees are county employees.

Nevertheless, Chancellor Quillen, in a letter opinion in the matter of Family Court of the State of Delaware v. Department of Labor and Industrial Relations, May 15, 1974, has stated that there is "persuasive authority to the effect that the Legislature is without power to limit the constitutional power of the Judiciary as a separate branch of government to run its own house . . ." This statement, while directed at the question of whether an administrative department could certify a bargaining representative for court employees, certainly is broad enough to cover the judiciary's power to obtain necessary funding.

STANDARD

2.4 Duty to have staff properly trained.

The trial judge has the duty to have the courtroom personnel properly instructed in the performance of their duties, and to support them in the proper exercise of their authority.

COMMENT

Delaware practice is in accord with the Standard.

STANDARD

2.5 Judge's duty concerning record of judicial proceedings.

The trial judge has a duty to see that the reporter makes a true, complete and accurate record of all proceedings. He should at all times respect the professional independence of the reporter, but may challenge the accuracy of the reporter's record of the proceedings. The trial judge should not change the transcript without notice to the prosecution, the defense and the reporter, with opportunity to be heard. The trial judge should take steps to insure that the reporter's obligation to furnish transcripts of court proceedings is promptly met.

COMMENT

While there is no doubt as to the authority of the trial court to control

the conduct of a court reporter, matters relating to the professional conduct and capability of court reporters are routinely administered by the chief court reporter. This official has sufficient administrative powers to compel compliance with the Standard on the part of court reporters. As to the integrity of the transcript, the Committee favors adoption of the Standard.

PART III. PRETRIAL DUTIES

3.1 Issuance or review of warrants.

Whenever a trial judge is called upon to issue a warrant for arrest or for search, or to review the issuance of such a warrant or the execution thereof, he should carefully observe constitutional and statutory norms and not permit these procedures to become mechanical or perfunctory. Where the trial court has supervisory jurisdiction over other judicial officers who perform these functions, the court should insure that this standard is observed.

COMMENT

Delaware practice is in accord with the Standard. Warrants are normally issued by the municipal court and common pleas judges, and in limited instances by the justices of the peace. The conduct of the judges is subject to the supervisory jurisdiction of the superior court and ultimately the supreme court.

STANDARD

3.2 Inquiries concerning all jail population.

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

COMMENT

Delaware practice is in accord with the Standard. Bi-weekly reports on the jail population in New Castle County are made to the chief justice and the superior court criminal office judge, and monthly reports are made on the jail population of Kent and Sussex Counties. These reports cover both detentioners awaiting trial and prisoners awaiting trials for other offenses. A special "problem list" of cases needing prompt trial is regularly compiled. Reference is also made to the chief justice's directive on speedy trial, discussed in the Comparative Study of the Standards on Speedy Trial.

STANDARD

3.3 Ruling on pretrial release.

Whenever the trial judge is called upon to make a decision concerning release on bail, he should first give consideration to the law's preference for release of defendants pending determination of the accusation of guilt. When the trial judge decides to order release of the accused, he should set the conditions of release to meet the special circumstances relating to the accused and should be guided by ABA Standards, Pretrial Release §5.1.

COMMENT

Through the services of the State Pretrial Release Office, which is under the jurisdiction of the Department of Probation and Parole, an impartial report on each defendant is available to all courts determining the conditions of pretrial release. This report covers such matters as employment, residency and financial resources. The superior court holds a weekly motion day to consider motions for bail reduction. Thus, Delaware practice is in accord with the Standard.

STANDARD

3.4 Protecting the accused's right to counsel.

(a) The trial judge should inquire whether the accused is represented by counsel at the earliest time an accused appears before him. If an accused is unrepresented, the trial judge should inquire into the eligibility of the accused for assigned counsel and, if eligibility is found, assign counsel to represent him, in accordance with ABA Standards, Providing Defense Services §§6.1, 6.2 and 6.3

(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 should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel.

COMMENT

As discussed in the Comparative Study on the Standards on Providing Defense Services, there may be criticisms of the practice of certain lower courts in protecting the rights of an indigent defendant to the services of counsel. However, at the trial stage Delaware practice is in accord with the Standard.

STANDARD

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.

COMMENT

Delaware practice, although not committed to writing, is in accord with the Standard.

STANDARD

3.6 Pretrial procedures.

The trial court should establish, by court rule or otherwise, efficient procedures for dealing with pretrial matters as recommended in ABA Standards, Discovery and Procedure Before Trial, including such features as:

(i) broad discovery to be conducted between the prosecutor and defense counsel without the need for application to the court;

(ii) submission of motions without papers, at least initially, at a single hearing using a check list or similar means to assure that all issues have been raised as early as possible in the proceedings, and requiring submission thereafter only of such papers as the court deems necessary or helpful.

COMMENT

The current Delaware rules on pretrial discovery in criminal cases are discussed in the Comparative Study on Discovery and Procedure Before Trial, together with the Committee's recommendations for improvements in these rules.

STANDARD

3.7 Prejudicial publicity.

(a) The trial court should adopt a rule prohibiting 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 should 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 and should otherwise be familiar with ABA Standards, Fair Trial and Free Press, and implement them as required.

COMMENT

There is no existing Delaware rule on the conduct of court personnel with respect to publicity. However, the practice of informal discussion with court personnel on such matters is followed by individual Judges. The Committee would favor adoption of a rule implementing paragraph (a) of the Standard. For a discussion of present Delaware practice with respect to paragraph (b), see the Comparative Study on Fair Trial and Free Press.

STANDARD

3.8 Responsibility for the criminal docket.

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

(b) Whenever feasible, there should 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 should give preference to the trial of criminal cases over civil cases, and to the trial of defendants in custody and defendants whose pretrial liberty is reasonably believed to present unusual risks over other criminal cases.

COMMENT

Delaware practice was formerly not in accord with paragraphs (a) and (b) of the Standard. The Attorney General had original scheduling responsibility, subject to control by the criminal office judge of the superior court, who had the power to list cases for trial despite the Attorney General's schedule. Chief Justice Daniel L. Herrmann, in a directive issued Jan-

uary 14, 1975, directed the superior court to assume control of its criminal trial docket effective June 1, 1975, pursuant to rules to be promulgated by the superior court. This date was subsequently postponed until October 1. See Rule 721, Uniform Rules of Criminal Procedure (Proposed Final Draft 1974). Individual dockets, employed in some jurisdictions to encourage judges to keep current with caseloads, are not considered necessary in Delaware in view of the existing strong pressure for efficient judicial performance. Preference is given to the trial of criminal cases and to the trial of cases involving pretrial detentioners in accordance with paragraph (c) of the Standard.

STANDARD

3.9 Ordering severance on judge's own motion.

The trial judge should 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.

COMMENT

Delaware practice is in accord with the Standard. Judicial power to order severance of offenses and defendants is granted by Superior Court Criminal Rule 14. See the Comparative Study on Joinder and Severance.

PART IV. ACCEPTING PLEAS AND WAIVERS

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

(a) The trial judge should 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 should 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 should:

(i) unless he then and there grants such concessions, inform 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.

(d) The trial judge may decline to give consideration to a plea agreement until after completion of a presentence investigation or may, in accordance with ABA Standards, Pleas of Guilty §3.3(b), indicate his conditional concurrence prior thereto.

COMMENT

Delaware practice is in accord with the Standard, except that the trial judge does not become involved in approving charge concessions. Charge concession are solely within the discretion of the Attorney General and the Committee does not favor any change in this practice. The trial judge is not involved in the plea negotiations, but once an agreement is reached between the Attorney General and defense counsel, the plea agreement is made a matter of record. No agreement is permitted as to possible sentence, although the State can agree to recommend a particular sentence, which agreement is not binding on the court. For further discussion of this subject, see the Comparative Study on Pleas of Guilty.

STANDARD

4.2 Acceptance of pleas of guilty or nolo contendere.

(a) Whether or not the plea is tendered as a result of a plea agreement, the trial judge should 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 certain constitutional rights, primarily his 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 trial judge'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, the trial judge should not enter a judgment upon such plea without making such inquiry as may satisfy him that there is a factual basis for the plea.

(c) In addition to complying with the foregoing standards, the trial judge should be aware of and comply with local requirements. If the plea is not accepted, the judge should state the reasons. The judge should require a verbatim record of the proceedings to be made and preserved.

COMMENT

Delaware practice is in accord with the Standard. Extensive direct interrogation of a defendant who proposes to plead guilty is required by the supreme court decision in Brown v. State, Del. Supr., 250 A.2d 503 (1969).

STANDARD

4.3 Waiver of right to trial by jury.

The trial judge should 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.

COMMENT

As discussed in the Comparative Study on Trial by Jury, Delaware law is not in accord with the Standard in that it requires consent by the State as well as consent by the trial judge for a waiver of the right to jury trial. The waiver must be in writing and must be consented to by the trial judge. See Superior Court Criminal Rule 23 (a).

PART V. PROCEDURES DURING TRIAL

5.1 Conduct of voir dire examination of jurors.

The judge should 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 should also permit such additional questions by the defendant or his attorney and the prosecutor as he deems reasonable and proper.

COMMENT

Present Delaware practice is fully discussed in the Comparative Study on Trial by Jury.

STANDARD

5.2 Control over and relations with the jury.

(a) The trial judge should take appropriate steps ranging from admonishing the jurors to sequestration of them during trial, 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.

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

COMMENT

Delaware practice is in accord with the Standard. For the present Delaware practice with respect to shielding the jury from adverse publicity, see the Comparative Study on Fair Trial and Free Press; Smith v. State, Del. Supr., 317 A.2d 20(1974). The superior court judges have a practice of sharing all communications from the jury involving the case with counsel. Since this procedure is not mandated by any rule, the Committee would favor promulgation of a rule in accordance with paragraph (b) of the Standard. The practice of jury sequestration is not widely followed in Delaware, and the Committee is of the opinion that sequestration should be avoided because of its interference with the freedom of the jurors, unless it is necessary to shield the jurors from prejudicial publicity during the trial.

STANDARD

5.3 Custody and restraint of defendant and witness.

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

(b) The trial judge should 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 should enter into the record the reasons therefore, and

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

COMMENT

Present Delaware practice with respect to this Standard is fully discussed in the Comparative Study on Trial by Jury.

STANDARD

5.4 Duty to protect witnesses.

(a) The trial judge should permit full and proper examination and cross-examination of witnesses, but should 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 should not permit examination or cross-examination of witnesses at the witness stand, but should require counsel to examine them from counsel table or the lectern or other designated location, except as permission is granted for counsel to present a document or an object to the witness for observation or inspection.

STANDARD

5.5 Duty to control length and scope of examination.

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

COMMENT

Delaware practice is in accord with Standards 5.4 and 5.5. Clearly the judge has a duty to protect the witness from questions designed merely to harass, annoy or humiliate him. Alfred v. United States, 282 U.S. 687 (1931).

STANDARD

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

(a) The trial judge should 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 or the applicability of the evidence to the issues. This should be done only when the jurors could not be effectively advised by postponing the explanation to the time of giving final instructions.

COMMENT

Delaware practice is in accord with the Standard. An expression of personal opinion regarding guilt is tantamount to directing a verdict of guilty which is, of course, improper. The Committee believes that the judge should intervene only to clarify an issue or to instruct on an issue. He should not seek to prove the State's case nor to provide a case for the defendant.

STANDARD

5.7 Duty of judge on counsel's objections and requests for rulings.

The trial judge should 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 should be permitted to state succinctly the grounds of his objections or requests; but the judge should nevertheless control the length and manner of argument.

COMMENT

The Committee recommends adoption of the Standard. While most judges adhere to this Standard, it should be formally adopted. The general practice with respect to objection to jury instructions is that they are made after the jury retires, and the jury returns if the objections are sustained.

STANDARD

5.8 Duty of judges to respect attorney-client relationship.

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

COMMENT

The Committee recommends adoption fo the Standard, Judges are generally aware of the attorney-client privilege and do not make unreasonable demands of counsel. However, the concept should be formally adopted.

STANDARD

5.9 Requests for conferences outside hearing of the jury.

The trial judge should be alert to the distracting effect on the jury during the taking of evidence of frequent bench conferences between counsel and the judge out of the hearing of the jury, and should postpone the requested conference to the next recess except when an immediate conference appears necessary to avoid prejudice.

COMMENT

While Delaware practice is in accord with the Standard in that bench conferences are kept to a minimum, the Committee believes that it is impractical to postpone conferences. Counsel cannot be expected to keep track (at least in a complex case) of all the matters on which they desire to present argument, and the flow of the trial would be impeded if matters are re-opened after each recess. While the Committee agrees that conferences at the bench should be at a minimum, they should be called immediately when they are necessary.

STANDARD

5.10 Final argument to the jury.

The trial judge should 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 record, unless they are matters of common public knowledge or of which the court may take judicial notice, or

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

COMMENT

Delaware practice is in accord with the Standard.

STANDARD

5.11 Requests for jury instructions, and instructions.

(a) The trial judge should afford counsel opportunity to object to any requests for jury instructions tendered by another party or prepared at

the direction of the judge. He should 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 its deliberations, all objections to instructions given or refused should be placed on the record.

(b) The court may call 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.

STANDARD

5.12 Assistance during jury deliberations.

(a) The trial judge should 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 as provided in ABA Standards, Trial by Jury §§ 5.1, 5.2 and 5.3.

(b) In dealing with what appears to be a deadlocked jury, the trial judge should avoid instructions which imply that a majority view is the correct one, by complying with ABA Standards, Trial by Jury § 5.4.

STANDARD

5.13 Judicial comment on verdict.

While it is appropriate for the trial judge to thank jurors at the conclusion of a trial for their public service, such comments should not include praise or criticism of their verdict.

COMMENT

Delaware practice is generally in accord with the Standards, but the Committee would recommend adoption of rules which would formalize the jury instruction process, particularly with respect to requests for instructions and objections thereto. For further information, see the Comparative Study on Trial by Jury.

PART VI. MAINTAINING DECORUM OF COURTROOM

6.1 Special rules for order in the courtroom.

The trial judge, either before a criminal trial or at its beginning, should 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.

COMMENT

The Standard seems to be particularly appropriate for complex cases with substantial public interest. The Committee would favor adoption of the Standard in such cases.

STANDARD

6.2 Colloquy between counsel.

The trial judge should 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.

COMMENT

The Committee recommends the adoption of the Standard. Arguments between counsel serve no purpose at a criminal trial. In order to preserve docorum and ensure the smooth functioning of the courtroom, all communication should go through the judge.

STANDARD

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 form the character of the sanction or the time of its imposition.

COMMENT

The Committee recommends adoption of the Standard. The very nature of judicial proceedings require that a judge use his contempt powers as well as those granted him under the rules of criminal procedure to insure orderly adjudication of the matters before him. However, these sanctions

should be the last alternative rather than the first when difficulties occur. Code of Judicial Conduct, Canon 3 requires the judge to maintain order and decorum in the courtroom.

STANDARD

6.4 Judge's responsibility for self-restraint.

The trial judge should be the exemplar of dignity and impartiality. He should exercise restraint over his conduct and utterances. He should suppress his personal predilections, and control his temper and emotions. He should not permit any person in the courtroom to embroil him in conflict, and he should 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 should 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.

COMMENT

Delaware law is in accord with the Standard. Code of Judicial Conduct, Canon 3 specifies that "A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control."

STANDARD

6.5 Deterring and correcting misconduct of attorneys.

The trial judge should 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 section 6.3, should 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

jurisdiction where the attorney is admitted to practice of the nature of the attorney's misconduct and of any sanction imposed.

COMMENT

Delaware law is in most respects in accord with the Standard. The contempt power of the superior court is specified in Superior Court Criminal Rule 42 which permits summary disposition for a criminal contempt occurring in the presence of the court as well as disposition upon notice and hearing for other types of criminal contempt. Code of Professional Responsibility DR 7-106 (C)(6) provides that a lawyer shall not "Engage in undignified or discourteous conduct which is degrading to a tribunal." DR 1-102 (A) provides that a lawyer shall not violate a disciplinary rule. The Committee believes that the remedy suggested in subsection (iv) because of the serious nature thereof, should not be utilized without full opportunity for a hearing.

STANDARD

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

A defendant should 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 he

(i) has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he 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.

COMMENT

Delaware practice is in accord with the Standard.

STANDARD

6.7 Standby counsel for defendant representing himself.

When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should 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 should always be appointed in

cases expected to be long or complicated or in which there are multiple defendants.

COMMENT

Delaware courts follow the practice of routinely appointing standby counsel for a defendant who elects to proceed pro se. Thus, Delaware practice goes further than the Standard requires.

STANDARD

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 should 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 should be summoned to the courtroom at appropriate intervals, with the offer to permit him to remain repeated in open court each time.

COMMENT

A defendant can lose his right to be present at trial if, after having been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of court and judicial proceedings. Illinois v. Allen, 397 U.S. 337 (1970).

The Committee recommends the adoption of the Standard. While the Supreme Court in Allen did not rule out the use of shackles or gags, the Court did state that they should be used as a last resort. If the defendant must be removed, some method of communication between counsel and the defendant should be maintained. Some methods have been suggested including audio and visual links between the courtroom and anteroom where the obstreperous defendant has been taken. The cost of these technological methods of communication is great and the need for them seldom arises. While the Committee is concerned about the problem of the removed defendant, like the A B A Advisory Committee, it does not believe that the court has a duty to provide extraordinary measures to protect the rights

of a defendant who has voluntarily caused his removal from the courtroom.

STANDARD

6.9 Misconduct of defendant representing himself.

If a defendant permitted to proceed without the assistance of counsel engages in conduct which is so disruptive that the trial cannot proceed in an orderly manner, the court should, after appropriate warnings, revoke the permission and require representation by counsel. If standby counsel has previously been appointed, he should be asked to represent the defendant. In any event, the trial should be recessed only long enough for counsel to prepare himself to go forward.

STANDARD

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.

COMMENT

The court has criminal contempt power pursuant to Superior Court Criminal Rule 42. The powers recommended in the Standard are inherent in the court to control proceedings. Obviously, if the defendant can be removed, spectators who interfere with the State's and defendant's right to a fair trial can be removed.

STANDARD

6.11 Arrangements for the news media.

Although 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 should, nevertheless, require that the conduct of their representatives not jeopardize the order and decorum of the courtroom. He should make reasonable arrangements to accommodate them consistent with the opportunity of other members of the public to attend the trial.

COMMENT

Delaware practice is in accord with the Standard, Superior Court Criminal Rule 53 prohibits the taking of photographs in the courtroom during a trial and prohibits radio or television transmission of the proceedings.

PART VII. USE OF THE CONTEMPT POWER

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 by assuring 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.

COMMENT

Delaware law is in accord with the Standard. Superior Court Criminal Rule 42 provides the court with contempt power in order to enforce the inherent power of the court described in the Standard. Likewise, 11 Del. C. § 1271 provides misdemeanor penalties for criminal contempt, including disorderly conduct "during the sitting of a court, in its immediate view and presence, and directly tending to interrupt its proceedings or to impair the respect due to its authority."

STANDARD

7.2 Admonition and warning.

No sanction other than censure should be imposed by the 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 the conduct is impermissible and that specified sanctions may be imposed for its repetition.

COMMENT

The Committee recommends adoption of the Standard. The Standard seeks to codify a suggestion made by the Supreme Court in Illinois v. Allen, 397 U.S. 337 (1970), that the defendant should be warned by the trial judge before he is cited for contempt.

STANDARD

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

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

COMMENT

Delaware law and practice are in accord with the Standard. See Superior Court Criminal Rule 42(b) which provides that criminal contempt cases, other than those dealt with summarily, are dealt with upon notice and hearing.

STANDARD

7.4 Notice of charges and opportunity to be heard.

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

COMMENT

The Committee recommends adoption of the Standard.

STANDARD

7.5 Referral to another judge.

The judge before whom courtroom misconduct occurs may impose appropriate sanctions, including punishment for contempt, but should refer the matter to another judge if his conduct was so integrated with the contempt that he contributed to it or was otherwise involved, or his objectivity can reasonably be questioned.

COMMENT

The Committee recommends adoption of the Standard.

PART VIII. SENTENCING AND POST-CONVICTION REMEDIES

8.1 Duties of judge in sentencing.

The trial judge, and not the jury, should be empowered to determine sentence, except possibly in capital cases. Whenever feasible, the sentence should be imposed by the judge who presided at the trial or who accepted the plea of guilty or nolo contendere, in accordance with ABA Standards, Sentencing Alternatives and Procedures, and ABA Standards, Probation.

COMMENT

As more fully discussed in the Comparative Study on Sentencing Alternatives and Procedures, all sentencing in Delaware is done by the trial judge. Under present Delaware practice, the judge who presided at trial is responsible for sentencing a convicted defendant. In the case of a guilty plea, sentence is not necessarily passed by the judge who accepted the plea, but there appears to be no policy reason requiring this. Thus, Delaware law is in accord with the Standard.

STANDARD

8.2 Duties of judge administering post-conviction remedies.

The trial judge having jurisdiction of applications for post-conviction relief should 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. He should be familiar with the should adhere to ABA Standards, Post-Conviction Remedies.

COMMENT

This subject is dealt with in detail in the Comparative Study on Post-Conviction Remedies.

PART IX. PROCEDURES REGARDING JUDICIAL MISFEASANCE, NONFEASANCE AND DISABILITY

9.1 Procedures for disciplining judges.

(a) Each jurisdiction should establish an independent commission, composed of lay citizens, lawyers and judges, to investigate complaints of judicial misconduct or incompetence against judges in all courts of the jurisdiction. The commission should be empowered to investigate any such complaint received by it, to employ the subpoena power, appoint hearing officers to examine complaints and receive evidence, and to make findings

and recommendations to the highest court in the jurisdiction. Such court should be empowered to remove any judge found by it and the commission to be guilty to gross misconduct or incompetence in the performance of his duties. Provision for censure or suspension should be made for less serious misconduct. In order to protect the participants, provision should be made for keeping all complaints and commission proceedings confidential unless the commission recommends discipline by the highest court, at which time the commission's record, upon being filed with the court, should become public.

(b) The trial judge should cooperate with such a commission in upholding and enforcing standards of judicial conduct and canons of judicial ethics.

COMMENT

Delaware constitution Article IV, Section 37, provides for a court on the judiciary consisting of the chief justice and the associate justices of the supreme court, the chancellor and the president judge of the superior court. The section provides for censure or removal from office of a judicial officer for willful misconduct in office, willful and persistent failure to perform his duties, the commission after an appointment of an offense involving moral turpitude or other persistent misconduct in violation of the canons of judicial ethics. This section also provides procedures for notice and hearing of charges of judicial misconduct. Delaware law is not in accord with the Standard to the extent that lawyers and lay persons are not involved in the process.

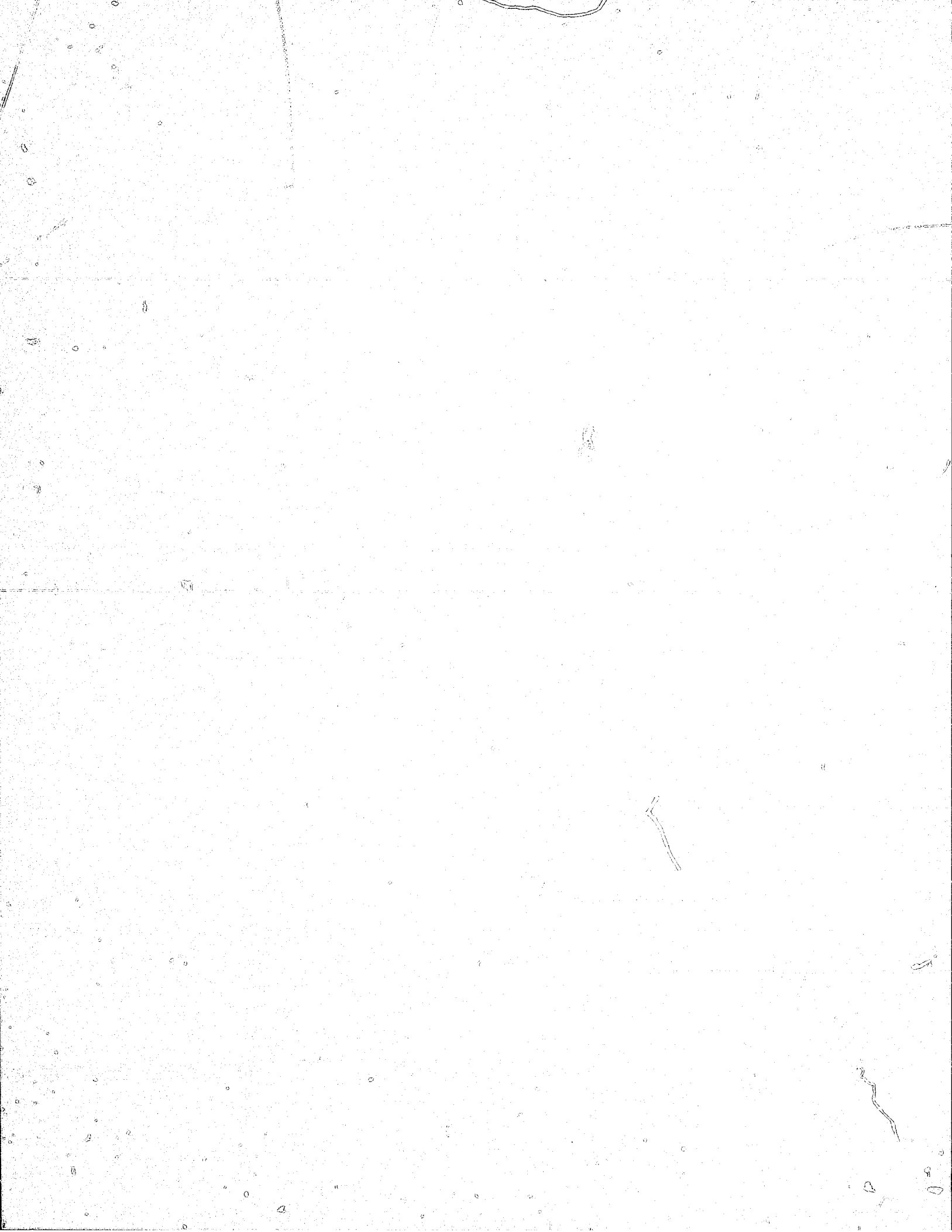
STANDARD

9.2 Retirement of judges for disability.

Each jurisdiction should make appropriate provision for the prompt retirement on equitable terms of judges who become physically or mentally disabled from the proper fulfillment of the ordinary obligations of the judicial office.

COMMENT

Delaware Constitution, Article IV, § 37, provides that a judicial officer may be retired for perminent mental or physical disability interfering with the proper performance of the duties of his office. Such matters are within the jurisdiction of the court on the judiciary discussed in the comment to Standard 9.1. Delaware law is in accord with the Standard.



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