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2011

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### Recommended Citation

Lissa Griffin & Stacy Caplow, Changes to the Culture of Adversarialness: Endorsing Candor, Cooperation and Civility in Relationships Between Prosecutors and Defense Counsel, 38 Hastings Const. L.Q. 845 (2011), <http://digitalcommons.pace.edu/lawfaculty/789/>.

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# Changes to the Culture of Adversarialness: Endorsing Candor, Cooperation and Civility in Relationships Between Prosecutors and Defense Counsel

by LISSA GRIFFIN and STACY CAPLOW\*

## Introduction

Relationships between prosecutors and defense counsel are infamously rocky. Despite the common ground of law school and the shared experience of practicing in the criminal justice system, these relationships tend to be riddled with a level of distrust and disrespect that hardens over time. Rarely do these feelings become unmanageable, although a recent assault by a public defender on a prosecutor suggests that even professionals have their limits.<sup>1</sup> More typical is the enduring culture of adversarialness and suspicion that sometimes seems to justify prosecutorial shortcuts, self-serving interpretations of procedural rules, and self-justification in the name of obtaining convictions. On the defense side, lawyers might rationalize their behavior as nothing more than zealous representation needed to balance an unequal distribution of power. Most prosecutors and defense counsel work on opposite sides of the courtroom on a daily basis, for many years, developing and calcifying these habits.

No doubt many of today's elected and appointed prosecutors try to set a more professional tone that emphasizes values of fairness and honesty. But too often the top-down message is diluted by the daily grind. Some of this antagonistic conduct occurs only between the

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\* We would like to thank Prof. Bruce A. Green, Chair of the ABA Criminal Justice Section, for his invitation to participate in this project; Vicki Gannon and Sandra Spennato (Pace Law School), and Jason Lee (Brooklyn Law School) for their research support; and to express appreciation for the support of the Pace Law School and Brooklyn Law School Summer Research Stipends.

1. *Cook County Public Defender Charged in Attack on Prosecutor*, DAILY HERALD, ASSOCIATED PRESS, June 4, 2010, <http://67.151.102.46/story/?id=385596>.

lawyers or behind closed office doors. Unless decisions and behavior surface in the courtroom or other public forum, they are invisible and thus unregulated, subject only to the self-policing constraints of training, supervision, individual choice, or office policy. Much of the criminal justice system takes place in the courtroom, however, so many interactions between counsel necessarily include judges who not only preside over the process, but also oversee and mediate the work of these adversaries in more routine matters, such as scheduling. These judges are sometimes drawn into the fray as witnesses to or even victims of intransigent, impolite or argumentative conduct. When relations between lawyers deteriorate or when legal or ethical impropriety occurs, judges may be forced to intervene.

For more than thirty years, the Standards have attempted to constrain these differences and place criminal practice on a relatively high ethical plateau. The admittedly aspirational Standards, part of the larger work of the ABA Standards for Criminal Justice, serve a valuable educational and normative function.<sup>2</sup> Yet, like any ethical regulation, they have to be general enough to speak across jurisdictions and types of criminal practice all over the country while remaining specific enough to provide some workable guidance. Despite their lack of direct enforceability, they can be referenced as guidelines or models for behavior,<sup>3</sup> and perhaps even incorporated into local ethical rules that are enforceable in a particular state.

The most recent effort to revise the Standards is underway, wending its way through the ABA drafting and approval process. As of this writing, most of the work has concentrated on the prosecution function, resulting in several drafts and proposed changes. Comparably extensive work has not yet taken place on the defense function, so this article focuses on the more evolved revisions concerning prosecutors while alluding to some of the parallel provisions in the proposed revisions to the defense standards that have been crafted so far.

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2. The Standards for the Prosecution and Defense Function must be read in conjunction with the multivolume ABA Standards for Criminal Justice. Also, the Model Rules of Professional Responsibility impose specific obligations on prosecutors and general rules on all attorneys applicable to both prosecutors and defense counsel. See e.g. MODEL RULE PROF'L CONDUCT R. 4-3.8 (2002) [hereinafter MODEL RULES].

3. For example, as of 2009, the Supreme Court had cited the Standards 120 times and they were cited by the federal circuit courts 700 times. Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 WTR CRIM. JUST. 10 (2009), 11-12.

One prominent aspect of the Proposed Standards—and the subject of this article—is a notable shift from an adversarial to a more cooperative model, emphasizing candor, cooperation, and civility.<sup>4</sup> While the existing Standards were never rigidly adversarial, the latest version offers an even more explicit endorsement of problem-solving, collegiality, and joint efforts to reform and improve the criminal justice system. The burden to achieve this goal is not borne evenly, of course. Their justice mission and greater power to impact the system obligates prosecutors to move in that direction but now with the greater involvement of the defense. Some of the proposed revisions undoubtedly reflect many of the changes in the criminal justice system that have occurred in recent years so the Proposed Standards may simply be catching up with the existing momentum toward cooperation. By introducing these norms into the Proposed Standards, these revisions articulate a clear endorsement for continuing movement in that direction.

Following a brief history of prior versions of the relevant Standards in Part I, Part II describes the current draft of the proposed Prosecution and Defense Functions, focusing on new requirements for candor, civility, and cooperation. The article concludes that the proposed revisions represent a healthy step toward a more reliable, trustworthy, and efficient criminal justice system. The revisions explicitly recognize the central, powerful, and multidimensional role of the prosecutor and attempt to respond accurately and realistically to the needs and demands of that role. As the drafting and approval process continues, certain specific areas need greater clarification and thus should be discussed and contextualized in accompanying commentary. This would better inform prosecutors and defense counsel about how the Standards apply to specific circumstances.

## I. Prior Versions of the Standards

The first edition of the Standards, published in 1970, barely referenced relationships between counsel.<sup>5</sup> In the introduction to the Prosecution Function section of the original Standards, the drafters

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4. Kevin McMunigal argues that neither the adversarial nor cooperative model prevails, but that most rules of professional conduct “embody compromises between them.” Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453, 1458 (2000).

5. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION 9–10 (1st ed. 1970) [hereinafter 1970 ABA STANDARDS FOR CRIMINAL JUSTICE].

stated a concern that “the conduct of lawyers involved in the administration of criminal justice is neither supervised nor disciplined adequately in this country.”<sup>6</sup> Their goal, therefore, was to provide a yardstick against which to measure attorney conduct.

Only one rule in this early iteration, Standard 2.8, concerned relationships of any kind and that was addressed to the relationship between prosecutors and judges. Standard 2.8 prohibited intentional misrepresentation of matters of fact or law to the court, urged the preservation of the reality and appearance of propriety in relations between prosecutors and judges, and barred unauthorized *ex parte* discussions. In addition, this Standard urged the prosecutor to “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.”<sup>7</sup> Although the Standard itself did not indicate the situations to which this applied, the commentary reveals that the principal concern behind this admonition was the fear that defense counsel might engage in conduct that could imply to potential clients that the attorney had influence with the prosecution. While hardly an insignificant concern, this singular focus today seems archaic and limited. The commentary generously observed that the “prosecutor need not avoid friendly contacts with fellow lawyers on the opposing side in criminal cases and participation in the social and professional activities of bar groups.”<sup>8</sup>

This narrow set of concerns clearly reflects their historical context. By 1970, prosecutors had begun recognizing the value of professionalization and repudiating political influences. The Supreme Court increasingly addressed the scope of prosecutorial authority, sometimes imposing constraints on the behavior of prosecutors, in addition to the police, in areas such as disclosure of evidence,<sup>9</sup> speedy trial,<sup>10</sup> and jury selection.<sup>11</sup> At the same time, courts were increasingly deferential to the discretion of the prosecutor in other areas, such as charging.<sup>12</sup> Given the need to create standards addressed to specific conduct responsive to the more pressing developments emerging

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6. *Id.* at 23.

7. *Id.*; Commentary to 1970 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra*, note 5, § 2.8.

8. 1970 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 5.

9. *See, e.g.,* Brady v. Maryland, 373 U.S. 83 (1963).

10. *See, e.g.,* Barker v. Wingo, 407 U.S. 514 (1972).

11. *See, e.g.,* Batson v. Kentucky, 476 U.S. 79 (1986).

12. *See, e.g.,* Town of Newton v. Rumery, 480 U.S. 386 (1987).

from doctrine and practice, “soft” relationship-focused standards took a back seat. It is not even clear from the introductory materials in the first edition that any need for such general behavioral standards was acknowledged.

The current version of the Standards, published in 1993,<sup>13</sup> focused primarily on the bilateral relationship between prosecutors and the courts and did not noticeably depart from its predecessor. The key sections and their corresponding commentary were largely unchanged with respect to the critical aspects of deliberate misrepresentation, the reality and appearance of impartiality in relations with judges, and the ban on unauthorized ex parte contacts. This version added a command that the prosecutor disclose adverse authority in the controlling jurisdiction, a provision already found in the Model Rules of Professional Conduct (“Model Rules”).<sup>14</sup>

Two sections of the 1993 version, Standards 3-1.2: The Function of the Prosecutor, and Standard 3-2.8: Relations with the Court and Bar, speak to the role and general behavior of the prosecutor. The language of Standard 3-1.2 tracks its counterpart in the 1970 version, Standard 1.1, almost verbatim. Prosecutors continue as administrators of justice, advocates, and officers of the court empowered to exercise sound discretion who must seek justice not merely convict. There were two notable changes, however. First, the 1993 version added to the function of the prosecutor the responsibility to “reform and improve the administration of criminal justice and to stimulate efforts for remedial action when confronted by injustices in substantive or procedural law.”<sup>15</sup> The second change is a major deletion. The original Standards provided that the standards could be used as a basis for disciplinary sanctions against a prosecutor engaged in “unprofessional conduct” according to other subsections.<sup>16</sup> This provision was deleted in the 1993 version in which

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13. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993) [hereinafter 1993 ABA STANDARDS FOR CRIMINAL JUSTICE].

14. MODEL RULES, *supra* note 2, at R. 3.3(a)(3).

15. *Id.*, 1993 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 13, § 3-1.2(d). This language had appeared in another section of the Second edition of the Standards, but was moved here in the Third. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 3-1.4 (2d ed. 1980).

16. For example, Standard § 2.8 states, “It is ‘unprofessional conduct’ for a prosecutor intentionally to misrepresent fact or law to the court.” 1970 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 5, § 2.8. Under former Standard 2.2, that misconduct could be subject to sanction. *Id.* § 2.2.

the standards are transformed into simply a “guide to professional conduct and performance” rather than “criteria for judicial evaluation of alleged misconduct of the prosecutor” and are silent with respect to disciplinary actions.<sup>17</sup>

By 1993, Standard 3-2.8, governing relations with the courts and bar, also did not noticeably modify its predecessor. The key sections and their corresponding commentary were largely unchanged with respect to the critical aspects of candor, the reality and appearance of impartiality in relations with judges, and the ban on unauthorized ex parte contacts with judges. This edition added a command that the prosecutor disclose adverse authority in the controlling jurisdiction, a provision already found in the Model Rules.<sup>18</sup>

## **II. The Proposed Revisions**

### **A. The Role of the Prosecutor**

As noted above, commands and constraints relating to professional roles and relationships between lawyers and the courts are, in effect, meta-standards that should influence and pertain to all of the other Standards. Proposed Standard 3-1.2 is such a standard, setting forth a considerably expanded vision of the role of the prosecutor. The 1993 Standards describe the prosecutor as “an administrator of justice, an advocate and an officer of the court,” and require that the prosecutor use “sound discretion,” “seek justice,” and “reform and improve the administration of criminal justice.”<sup>19</sup> The Proposed Standard describes the prosecutor with more nuance and complexity as:

- An administrator of justice
- An advocate
- An officer of the court
- A seeker of justice
- A servant of both justice and the public interest
- A problem-solver, not merely an advocate
- A community relations assistant
- A reformer of the criminal justice system

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17. 1993 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 13, § 3-1.1.

18. MODEL RULES, *supra* note 2, at R. 3.3(a)(3).

19. 1993 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 13, § 3-1.2.

- An ethical lawyer<sup>20</sup>

The much more diverse and elaborate descriptions and directives about the prosecutor's duties inform and shape the entire document. The revision certainly stacks many longstanding and some new responsibilities on the plate of the prosecutor. While the admonition to understand the job as meaning more than just a mandate to convict had been voiced for a long time, this list makes that duty more concrete and discernable. Of course, in carrying out all of these high principles and grave duties, the prosecutor still has enormous discretion and great advantages of power, information and resources, yet only professional pride, self-respect, and an internal moral compass can truly induce compliance.

The newly articulated dimensions of the prosecutorial role undoubtedly recognize some significant recent changes to the modern office. Prosecutors have been part of the well-established movement toward "problem-solving courts" and their more nuanced approach to crime prevention and law enforcement.<sup>21</sup> Community courts and specialized courts dealing with narcotics, prostitution, domestic violence, and mental hygiene, for example, are an increasingly popular option and could not be effectuated without prosecutorial cooperation. While these reforms are not without critics, often coming from the defense perspective,<sup>22</sup> they do represent efforts to address the problem of crime by looking at root problems and causes rather than simply obtaining convictions. The recognition of the prosecutor as "problem solver" certainly dovetails with the prosecutor's role in solving the problems of crime, not just prosecuting.

A second meta-section of the Proposed Standards is section 3-3.3, entitled "Relationships with the Court and Counsel." Like

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20. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.2 (Proposed Revisions 2010) [hereinafter PROPOSED PROSECUTION STANDARDS]; Rory K. Little, *The ABA's Project to Revise the Prosecution and Defense Function Standards*, 62 HASTINGS L.J. 1113 (Appendix: ABA Standards for Criminal Justice: Proposed Revisions to Standards for the Prosecution Function) (2011) [hereinafter Little, App.: Proposed Prosecution Standards].

21. For a discussion of the creation and evolution of these courts, see, e.g., Symposium Panel, *Problem Solving Courts: A Conversation with the Experts*, 10 U. MD. LAW J. RACE, RELIGION, GENDER & CLASS 137 (2010); Tom Perrotta, *As Specialized Courts Come of Age, Experts Extol Benefits but See Pitfalls*, N.Y. L.J., Mar. 15, 2005, at 1.

22. See, e.g., *id.*; Robert V. Wolf, *Race, Bias, and Problem-Solving Courts*, 21 NAT'L BLACK L.J. 27 (2009); Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417 (2009).



Proposed Standard 3-1.2, this Standard applies generally to all stages of a case and any interactions with judges or defense attorneys.<sup>23</sup> While the proposed section restates some venerable principles, it also expresses some new values, particularly with respect to general relations with defense counsel. This section seems to be the “how-to” execute the “must-dos” of other prosecutorial functions. Its language and message suggest that the “gladiatorial” model of litigation is ameliorated by the special role of the prosecutor. While there are many similarities between the current and the Proposed Standard, this paper will spotlight the differences that change both its overall spirit and emphasis, as well as some details.

Following a summary of the revisions, we will discuss the major changes in more detail.

Proposed Standard 3-3.3 begins with a new caution about the duty not to “knowingly” make a false statement of fact or law, or offer false evidence not only to a judge, but also, for the first time, to a “lawyer or third party.”<sup>24</sup> This introductory sentence expresses explicitly a prosecutor’s responsibility to truth to all concerned parties, not just the court.<sup>25</sup>

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23. Proposed Standard 3-3.3 supplements other parts of the proposed Standards with respect to several important ethical issues that are specifically addressed elsewhere: presentation of false evidence, PROPOSED PROSECUTION STANDARDS, *supra* note 20, § 3-6.6(b); correction of false evidence by disclosure or otherwise, § 3-7.6(d); timely disclosure of evidence; *Id.* § 3-5.5(c); conduct during plea discussions, *Id.* § 3-5.7(d); and professional courtroom conduct, *Id.* § 3-6.2. As such, this Standard, and any discussion of it, does not draw upon “hard law” generated by cases, ethical rulings, or legislation. It is a “soft” standard that is aspirational, and perhaps inspirational. Also, like all other Standards, it lacks an independent enforcement mechanism unless the transgression involves a legal or ethical rule that otherwise would be remediable or sanctionable in either a court or disciplinary proceeding. Nevertheless, its normative message raises the bar quite a bit for prosecutorial forthrightness and thus a more open and trustworthy process. Little, App.: Proposed Prosecution Standards, *supra* note 20.

24. PROPOSED PROSECUTION STANDARDS, *supra* note 20, § 3-3.3; Little, App.: Proposed Prosecution Standards, *supra* note 20.

25. *Id.* There has been some effort on the part of the drafters of the revised Standards to extend this duty even further and to give it more depth. In a revision that apparently has not gained traction, a separate proposed Standard 3-1.3 sets forth a “Special Duty of Candor” which likely must be read in conjunction with 3-3.3 since it moves much of the text of the 1993 standard it seems to revise. See 1993 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 13, § 3-2.8. This revision posits that the prosecutor should “err on the side of candor.” Section 3-1.3 denominates the prosecutor’s duties as “special,” i.e., beyond those of other lawyers, and cautions that a prosecutor should “err on the side of candor.” PROPOSED PROSECUTION STANDARDS, *supra* note 20, § 3-1.3. Little, App.: Proposed Prosecution Standards, *supra* note 20. Prosecutors might chafe at the idea that their duty of candor exceeds that owed by other lawyers. For

The prosecutor not only is cautioned to both refrain from making false statements to the court, defense counsel, and others, but also to “correct any material false statement” when its falsity comes to light.<sup>26</sup> This tracks ABA Model Rule 3.3(3). Next, the Proposed Standard recognizes a prosecutor’s responsibility to assist the court in reaching correct and fair results in two ways: first, in its substantive legal decisions, by requiring that prosecutors explicitly discuss directly contrary authority, and, second, in resolving scheduling, ethical and administrative matters that impact on the fairness of an individual case or of the criminal justice process generally.<sup>27</sup> The prosecutor is urged to maintain both the appearance and reality of professional conduct particularly with respect to *ex parte* conversations with a judge relating to a pending case.

Finally, with respect to the prosecutor’s relationship with both the court and defense counsel, Proposed Standard 3-3.3 prescribes a new obligation “with regard to generalized matters requiring judicial discussion (for example, case management or administrative matters),” that would require a prosecutor to “invite a representative defense counsel” to join the discussion “to the extent practicable.”<sup>28</sup> Similarly, the revision prescribes a more collegial, cooperative, and collaborative relationship in resolving “ethical, scheduling, and other issues that may arise in particular cases or generally in the criminal justice system.” The corresponding 1993 version urged merely a general effort at cooperation, and only with respect to resolving ethical problems.

The Proposed Standard delivers a message about the day-to-day relationships of the prosecutor to the court and opposing counsel that suggests a new, more open collaborative approach, particularly when read in conjunction with the problem-solving, reformer role contained in 3-1.2. This may not be very controversial in many places where efforts at problem-solving courts, law enforcement initiatives, or rule revisions have increasingly involved stakeholders from many communities, including the defense. But, the official ABA blessing

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that reason, perhaps this section is very tentative since these specific provisions were not part of the Task Force draft and ultimately may not be included in the final version.

26. PROPOSED PROSECUTION STANDARDS, *supra* note 20, § 3-3.3. Little, App.: Proposed Prosecution Standards, *supra* note 20.

27. PROPOSED PROSECUTION STANDARDS, *supra* note 20, § 3-3.3. Little, App.: Proposed Prosecution Standards, *supra* note 20.

28. PROPOSED PROSECUTION STANDARDS, *supra* note 20, § 3-3.3. Little, App.: Proposed Prosecution Standards, *supra* note 20.

undoubtedly will have an impact on prosecutors who are less open to these kinds of initiatives.

By endorsing a responsibility to avoid misrepresentations of fact or law, (possibly) to enhance that responsibility by correcting misstatements, the Proposed Standards appear to recognize a paramount systemic interest in promoting truth and reliable outcomes. The next sections examine the new language in some detail.

### *1. Duty of Candor beyond the Tribunal*

A lawyer's general duty of candor is articulated in the ABA Model Rules of Professional Conduct Rule 3.3, which requires candor toward the tribunal.<sup>29</sup> The Model Rule strikingly omits extending this duty to anyone else, including opposing counsel. Proposed Standard 3-3.3(a) takes a major step beyond the current Model Rule and the current Standard to extend the duty of candor to relationships with other "lawyers or third parties" in all contexts, with the exception of false statements that might be part of an investigation. Presumably, this enhanced duty of candor reflects the different role played by the prosecutor and the fact that a prosecutor's lack of candor may cause unjust punishment or discredit the integrity of the criminal justice system.<sup>30</sup> Courts have long recognized that the prosecution's duty "is not that it shall win a case but that justice shall be done."<sup>31</sup> In investigating and prosecuting crime, prosecutors do a unique kind of work and have unique and in some areas constitutionally required, obligations. The prosecutor does not have an individual client and represents the government—with a full range of objectives that private clients do not have: fairness, justice, accuracy, deterrence. Normative expectations for prosecutors are different, and summed up in the requirement that they "do justice."

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29. PROPOSED PROSECUTION STANDARDS, *supra* note 20, § 3-3.3. Little, App.: Proposed Prosecution Standards, *supra* note 20. Section 3-6.8(a) mandates candor specifically in the context of plea negotiations, albeit in slightly different terms. ("A prosecutor should deal honestly, reasonably, and in good faith with defense counsel in plea discussions . . ."). PROPOSED PROSECUTION STANDARDS, *supra* note 20, § 3-6.8; Little, App.: Proposed Prosecution Standards, *supra* note 20.

30. See generally, Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1576–78 (2003); Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEG. ETHICS 309, 311–13 (2001); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?* 26 FORDHAM U. L.J. 607, 615–16 (1999).

31. *Berger v. United States*, 295 U.S. 78, 88 (1935).

2. *Duty Not to Make False Statements or Knowingly Offer False Evidence*

Current Standard 3-2.8(a) states that, “[a] prosecutor should not intentionally misrepresent matters of fact or law to the court.”<sup>32</sup> The Proposed Standard prohibits “knowing” misrepresentation.<sup>33</sup> As defined by the Model Rules, “knowledge” means actual knowledge, but, as is usually the case, actual knowledge can be inferred from the circumstances.<sup>34</sup> The change in language to prohibit false statements made “knowingly” can be viewed as an improvement over the prior standard for several reasons. From an ethical perspective, given a prosecutor’s virtual monopoly over the facts and tremendous power, making a statement that a prosecutor knows is false is a violation of the proper role of the prosecutor, whether intentional or not. Indeed, intentionally making false statements or presenting false evidence that prejudices a defendant are already prohibited by the Due Process Clause.<sup>35</sup> Moreover, it is extremely difficult to prove intent, and, in this context, there is not much difference between knowingly making a false statement and intentionally making one: if a prosecutor knows a statement is false, and makes it, he or she is most likely making it intentionally. Finally, since the “knowing” standard governs the obligations of all lawyers,<sup>36</sup> it would be improper to impose a less demanding standard of candor on prosecutors, who have no client loyalties and have a supervening obligation to do justice. The Proposed Standard now conforms to the profession-wide scienter requirement.

Some of the revision drafters would have increased the duty prohibiting statements of fact or law to proscribe the making of statements where the prosecutor “reasonably believes” they are untrue.<sup>37</sup> “Reasonably believes,” as defined in the Model Rules, means the lawyer believes the fact in question and under the circumstances that belief is reasonable.<sup>38</sup> It does not require actual knowledge of falsity, however. Such a scienter standard would create

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32. 1993 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 13, § 3-2.8(a).

33. PROPOSED PROSECUTION STANDARDS, *supra* note 20, § 3-2.8. Little, App.: Proposed Prosecution Standards, *supra* note 20.

34. MODEL RULES, *supra* note 2, at R. 1.0(f).

35. *Mooney v. Hollohan*, 294 U.S. 103 (1935).

36. *Id.*; MODEL RULES, *supra* note 2, at R. 3.3.

37. A parenthetical to revised Standard 3-3.3 indicates that the Standards Committee has not reviewed this issue yet.

38. MODEL RULES, *supra* note 2, at R. 1.0(i).

a much broader range of unethical behavior than either the Model Rules or the Proposed Standards. Circumstances may exist where a prosecutor did not actually know a statement was false, but where, under the circumstances, whether because of its source, lack of corroboration, or inherent unreliability, a prosecutor might reasonably believe a statement is untrue. Under the broader suggested Standard, offering the statement would be unethical. Given the prosecutor's unique power and quasi-judicial status, it can be argued that the Proposed Standards should require the higher duty.

A few examples might illustrate this difference:

A defendant is charged with murder. The prosecutor tells defense counsel, "We recovered a gun and the ballistics evidence shows it's the murder weapon." In fact, the ballistics evidence is consistent with the weapon being the murder weapon, but the weapon is fairly common and the testing does not exclude a large range of other weapons. The prosecutor knows from his expert that using the phrase "consistent with" may be misleading. Defendant was not arrested at the scene of the murder, and there is no other evidence that connects the defendant with the murder weapon. It turns out that the gun is not the murder weapon.

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One of the prosecutor's witnesses has several pending criminal charges. To avoid having a negative impact on the witness's credibility, the prosecutor has refused to make any explicit deal with the witness for leniency. However, the prosecutor believes that the witness expects some benefit from his testimony and that he will probably get some benefit. The prosecutor instructs the witness before trial as follows: When asked on cross-examination if he has made any deals with the prosecution, the witness should answer "No."

If the Proposed Standard required only a "reasonable belief," would that change the result? Assuming that the prosecutor believes the gun is the murder weapon, if there is no other evidence to connect the weapon to the murder that belief could be unreasonable, in which case the prosecutor probably has violated the suggested Standard. Similarly, since the prosecutor believes the witness expects a benefit, and that belief is reasonable, the witness preparation would violate the suggested Standard. As long as the Proposed Standard requires actual knowledge of a misstatement of fact, even if a prosecutor has

reason to believe a statement is false, the prosecutor can continue to represent it as true and can rely on it.

With this outcome, the shift to a duty of candor based on subjective knowledge does not represent a particularly significant change; nor does it require more diligence from a prosecutor to ascertain the truth. The stricter standard for prosecutors that would require disclosure or correction without actual knowledge of falsity might create an incentive for prosecutors to be more cautious about relying on uncorroborated but otherwise seemingly reliable information.<sup>39</sup> On the other hand, as a quasi-judicial officer with a duty to do justice, a prosecutor should not make a factual assertion that she disbelieves or mislead about the strength of her belief.

Finally, should there be a discussion in the Proposed Standard or its commentary about the prosecutor's obligation to investigate or corroborate information? Can the prosecutor be accountable for willful blindness? What if this ignorance is the product of negligence? Do the special duties of a prosecutor to seek justice necessitate a higher duty of care? If so, should the degree or level of the duty of care differ depending on the kind of evidence at issue? If the proposed revision remains the same, the drafters will need to answer these important questions in commentary.

### 3. *Duty to Correct Material False Statements*

The current Standard does not reference a remedial obligation at all. Since 2002, however, Model Rule 3.3(a)(3) has imposed a duty on all lawyers to take "reasonable remedial measures" when they later become aware of a false statement. But the Model Rule is limited to false statements made to a tribunal. Proposed Standard 3-3.3 follows and increases this responsibility.

The Proposed Standard differs from the Model Rule in two respects. First, it requires correction of material false statements made to others in addition to the court, presumably including defense counsel, witnesses, defendants, and other third parties.<sup>40</sup> Second, it requires actual correction, not merely reasonable remedial measures.

39. See generally Fred C. Zacharias and Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B. U. L. REV. 1 (2009).

40. "A prosecutor should correct a representation of material fact or law that the prosecutors knows is, or later learns was, false, and should disclose a material fact or facts when necessary to avoid assisting a fraudulent or criminal act or to avoid misleading a judge or factfinder." PROPOSED PROSECUTION STANDARDS, *supra* note 20, § 3-3.3(a). Little, App.: Proposed Prosecution Standards, *supra* note 20.

This difference can be explained by the special role of the prosecutor who has no client confidences to protect. The prosecutor should (meaning must) correct, not merely make a good faith effort.

The second duty set forth in the Proposed Standard but not in the current Standard requires disclosure of "a material fact . . . when necessary to avoid assisting a fraudulent or criminal act."<sup>41</sup> This duty applies to all lawyers under ABA Model Rule 4.1(b), except that the prosecutor is not constrained by client confidentiality.

Essentially, any analysis of the new duty to correct false statements focuses on the issue of materiality. A precise understanding of this term is elusive and largely contextual. *Webster's Dictionary* defines "material" as "having real importance or great consequences."<sup>42</sup> *Black's Law Dictionary* says "material" means that knowledge of the fact "would affect a person's decision-making; significant; essential."<sup>43</sup> The Restatement (Second) of Torts § 538 instructs that a matter is material if:

- (a) A reasonable man would attach importance to its existence or nonexistence in determining his choice of action; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.<sup>44</sup>

The Federal Rules of Evidence do not define "material," but they do require that, to be relevant, evidence must relate to a fact that is "of consequence to the determination."<sup>45</sup> This is probably the broadest prevailing definition of the term "material."

Where a conviction for false testimony before a grand jury requires the testimony to be "material," that term is defined broadly to include testimony that "has the natural effect or tendency to impede, influence or dissuade [the grand jury from pursuing its investigation]."<sup>46</sup> In the context of determining the prejudicial value of false testimony in criminal cases, a falsehood is material only if

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41. PROPOSED PROSECUTION STANDARDS, *supra* note 20, § 3-3.3(a). Little, App.: Proposed Prosecution Standards, *supra* note 20.

42. WEBSTER'S NEW COLLEGIATE DICTIONARY 709 (1974).

43. BLACK'S LAW DICTIONARY (8th ed. 2004).

44. RESTATEMENT (SECOND) OF TORTS § 538 (1977).

45. FED. R. EVID. 401.

46. *People v. Davis*, 53 N.Y.2d 164, 171 (1981), *quoting* *United States v. Stone*, 439 F.2d 138, 140 (2d Cir. 1970).

correcting it creates a reasonable probability of a different result or plea.<sup>47</sup> That would be the narrowest interpretation. Under the Model Rules, the term has been interpreted more broadly to include any statement that would or could have “influenced the decision-making process significantly.”<sup>48</sup>

The following examples expose the challenge of this requirement:

A defendant is charged with robbery. The prosecutor announces ready for trial and tells defense counsel that his complaining witness, a drug addict, is drug free, is ready to testify, and will offer credible and convincing testimony. Just before trial, the prosecutor learns that the witness 1) has recently been arrested on a drug charge; or 2) has recently been admitted to residential drug treatment facility; or 3) cannot be located. The defendant and his lawyer must decide whether to accept a plea or go to trial.

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As above, one of the prosecutor's witnesses has several pending criminal charges. To avoid having a negative impact on the witness's credibility, the prosecutor has refused to make any explicit deal with the witness for leniency. However, the prosecutor believes that the witness expects some benefit from his testimony and that he will probably get some benefit. The prosecutor instructs the witness before trial as follows: When asked on cross-examination if he has made any deals with the prosecution, the witness should answer “No.” When asked if he expects any benefit from his testimony, the witness should answer, “Yes, I hope to receive a benefit.” Instead, at trial, the witness answers the latter question by stating, “No.”

In the first hypothetical, the fact that the witness has been arrested may not be material because it is only an arrest. On the other hand, the availability and impeachability of the witness may be important to the defendant's decision on how to proceed. The same arguments can be made about the fact that the witness is in residential treatment, only stronger. The fact that she cannot be located may be most material of all in the defendant's calculus about how to proceed and in developing trial strategy. The second hypothetical presents a situation where there is a false statement that clearly is material to the

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47. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

48. *In re Conduct of Merkel*, 138 P.3d 847, 850 (Or. 2006) (per curiam), *citing* *In re Gustafson*, 968 P.2d 367, 375 (Or. 1998) (per curiam).



witness's credibility. The prosecutor certainly "reasonably believes" the statement is false and, under the circumstances, also "knows" it is false. Accordingly, the prosecutor would have a duty to correct this evidence because it is "necessary to avoid misleading [the] factfinder." Presumably, that correction could be done explicitly or on further redirect examination.

Issues of timing and duration are entirely omitted from the revision. When should a prosecutor correct a false statement? Obviously, a delay in correcting could have a substantial impact on a defendant's decision whether to go to trial, or on defense counsel's strategy at trial. There would appear to be little legitimate reason for a prosecutor to delay correcting a material false statement other than to gain a tactical advantage. On the other hand, there will be times when a prosecutor does not learn of the falsity of a statement or evidence until long after the statement has been made or does not realize it until he or she begins to prepare for trial. This indefiniteness is a weakness in the Proposed Standard.

Various possibilities present themselves. The Proposed Standard could require correction "immediately," "upon discovery of the falsehood," "as soon as reasonably possible" or "as soon as practicable," "before entry of a plea or trial" or "in time for use at trial." Any of these time frames would provide more guidance than the current version. This is similar to the standard used by the courts in the context of delays in disclosing exculpatory material, where delay is reversible if the material is not received in time to allow defense counsel to use the information to prepare and present the defense case.<sup>49</sup> Another alternative would be to have different time periods depending on when the falsity is recognized: pre-trial, during trial, at time of sentencing, post-trial proceedings, or even long after the final judgment.

Similarly, how long does the obligation to correct exist? Model Rule 3.8(g) addresses the prosecutor's post-conviction obligation to correct if there is newly discovered evidence of innocence. Does the obligation to correct here end with a verdict or continue post-conviction? If it continues, how is materiality judged once the defendant is convicted and sentenced?

Finally, the revision does not say how correction should be accomplished. Under the Model Rules, correction is accomplished if

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49. See, e.g., Bennett L. Gershman, PROSECUTORIAL MISCONDUCT 244 n.1 (2d ed. 2006) (collecting cases).

an attorney takes “reasonable remedial measures,” including disclosure to the court.<sup>50</sup> It may be sufficient to disavow a statement (“We no longer rely on . . .”). Alternatively, the duty to “correct” would appear to require that the true facts be revealed. To whom is the correction made? The Proposed Standard seems to assume the correction will be made directly to the recipient of the false statement. Should the prosecutor be given some other acceptable method of correction, for example, informing the court? Should the method of correction be explicit to help prosecutors do the right thing, and to make it more difficult to side-step the duty? Again, the Proposed Standards fail to provide much guidance; commentary would be very helpful here.

#### 4. *Duty to Reveal Contrary Authority*

The obligation of candor applies to law as well as fact. Included in the prosecutor’s duty not to make false statements of law is the explicit obligation to disclose contrary legal authority to the court. Most prosecutors’ offices have appellate departments where the lawyers are fully aware of the law and their ethical obligations in relation to it. These appellate lawyers rarely violate this rule. The real impact of this rule may be on trial level prosecutors who are often pressed for time and may feel they are unable to do comprehensive research. They may also have less familiarity with the ethical rule.

Under the current Standard, and under Model Rule 3.3(a)(2), the prosecutor (like all lawyers) has an obligation to disclose only controlling authority that the prosecutor knows to be directly adverse to his or her legal position. The prosecutor may thus claim that he or she did not disclose adverse authority because, in the opinion of the prosecutor, it was not directly adverse. Under the Proposed Standard, however, the prosecutor has a duty to disclose any contrary authority that is in fact directly adverse to the prosecutor’s position of which he is aware. The determination of the impact of the controlling authority is no longer up to the prosecutor but is objective.

This approach would seem to be more consistent with a longstanding ABA ethics opinion which establishes that disclosure of adverse authority is required if “the decision which opposing counsel has overlooked is one which the court should clearly consider in

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50. MODEL RULES, *supra* note 2, at R. 3.3(a)(3).

deciding the case.”<sup>51</sup> However, under the revision, a prosecutor—unlike other lawyers—may avoid violating the Proposed Standard by proving s/he was “unaware” of the authority. This seems to contradict the intent to impose a special ethical obligation on prosecutors insofar as it grants them a special exemption from staying current with the law or conducting reliable legal research. By requiring actual awareness, therefore, the Proposed Standard weakens this responsibility by allowing the prosecutor to claim ignorance of legal authority.

In addition, the Proposed Standard appears to require prosecutors to assist the court by not simply citing directly contrary authority but also by describing it. Presumably, this change would 1) prohibit the hiding of directly contrary authority by citing it in a way that it is difficult to notice, e.g., in a footnote or string cite; and 2) would require that the prosecutor actually discuss any directly contrary authority.

The obligation to disclose adverse authority extends to all lawyers.<sup>52</sup> In light of their justice mission, the duty takes on a somewhat different form for prosecutors who have no client loyalty interest to preserve. The prosecutor has the more neutral job of making sure that the judge does not make mistakes in applying the law. It could be argued that prosecutors thus should be less adversarial when it comes to legal argument and must fully disclose and discuss the law regardless of how it affects the case. In addition, because of the central role they play in the administration of justice, it is arguable that prosecutors have an even higher obligation to assist the court in fully understanding the state of the law and the significance of precedent. The following examples call for an application of the Proposed Standard:

At trial, and after a brief recess to permit the parties to formulate their arguments, a prosecutor argues a relatively unique issue of law but fails to cite a case from the highest appeals court that is directly contrary to his case. He claims he did not know about the case since it was recently decided.

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The defense is appealing the denial of a motion to suppress evidence. The argument is based on U.S. Supreme Court authority. The prosecutor knows that the highest-level appellate

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51. ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 280 (1949).

52. MODEL RULES, *supra* note 2, at R. 3.3(3).

court has issued decisions more favorable to the defense position by relying on the New York State Constitution. The defense attorney has not cited this authority.

In the first hypothetical, the prosecutor does not know the directly contrary authority, so he has not violated the revision. However, he should have known about a precedent from the highest court. The new formulation of the rule, therefore, might excuse lawyers who are too busy or too lazy to find directly contrary authority. It may also encourage lawyers to be uneducated about precedent or to otherwise avoid “knowing” about directly contrary authority. On the other hand, it might have the salutary effect of forcing more prosecutors to fully research an issue and, if there is directly contrary authority, to consider alternative dispositions or arguments. This, in turn, might expedite the criminal process if the prosecutor, realizing that the law contradicts his or her legal position, were to change an argument or position, concede a point, or even dismiss a case.

In the second hypothetical, the prosecutor knows about direct controlling authority, but defense counsel has not cited it. While the authority qualifies under the Proposed Standard, there is an argument that the cases are not really “contrary” because the argument has been waived. In the parenthetical variation, the contradictory case is decided in a court that is not a controlling authority over the trial court in which the case is pending. The language in the revision “legal authority in the controlling jurisdiction” might provide a loophole for the prosecutor inclined to read the Proposed Standard narrowly.

## **B. The Prosecutor's Relationship with the Court**

### *1. Nature and Appearance of the Relationship*

The frequently close quarters of criminal practice creates temptations to engage in casual conversation, allude to shared experiences, or otherwise relax formalities. Whatever the motivation, both the current and Proposed Standard impose a responsibility on prosecutors to observe proprieties in their relationships with judges, even if doing so requires behavior that is stiff or unnatural.

Minor language changes have been made with respect to the prosecutor's duty to preserve the appearance of proper relationships with the court. A prosecutor no longer needs to “carefully” strive to preserve a proper appearance, but now need only “strive,” a small but

significant diminishment of the quality of effort required. The appropriate relationship also has been changed from “the correct relationship which professional traditions, ethical codes, and applicable law require between advocates and judges,” to a vaguer guideline of a “proper and professional” relationship.<sup>53</sup> These changes appear to simplify the description of an appropriate arm’s length relationship and the prosecutor’s obligation to maintain it by being general enough to include a lot of different kinds of interactions. Also, and consistent with other parts of the revision, the changes could be interpreted to suggest a less tradition bound and more flexible relationship needed to respond effectively to the demands of the practice.

A judge was formerly an assistant in the office in which the prosecutor works. At trial, but outside the hearing of the jury, the judge continually calls the prosecutor by his first name and refers to “when I worked in the DA’s office . . .”. In the jury’s presence, the judge is cordial and patient with the prosecutor, but is inflexible and impatient with defense counsel, whom he repeatedly accuses of unnecessary delay.

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During the intervals between cases on the calendar, the judge calls the prosecutor to the bench in front of spectators, defense attorneys and others in the audience. With the prosecutor’s back to the courtroom, the judge is asking the prosecutor administrative questions about the pending calendar off the record. The judge’s questions have nothing to do with a particular matter but neither the defense nor the audience have any way of knowing this.

The first hypothetical reflects a reality of criminal practice: many judges have previously served as prosecutors, many in the same jurisdiction in which they sit. Some judges are part-time lawyers in the community. This relationship may or may not impact the fairness of the judge’s rulings, but frequently it creates an appearance of impropriety and favoritism. Sometimes the appearance is only noticed by the defendant and defense counsel; sometimes it extends to a witness or spectator. In the most serious situations, the interactions are apparent to the jury.

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53. PROPOSED PROSECUTION STANDARDS, *supra* note 20, § 3-3.3(b). Little, App.: Proposed Prosecution Standards, *supra* note 20.

Does the prosecutor have an obligation to ask the judge to stop the unequal treatment of the attorneys, even if he or she does not initiate it? The prosecution actually may have its own reasons for wanting the behavior to stop. The prosecutor may be concerned that the jury will notice it and side with the defense lawyer, who they perceive is being treated unfairly or bullied. But short of this, must the prosecutor take corrective measures? Or would it be acceptable under the Proposed Standards for the prosecutor to acquiesce passively?

The revision directs a prosecutor to “strive to preserve the appearance as well as the reality” of a proper relationship. This exhortation may not go far enough to prevent the kinds of casual and even inadvertent behaviors occurring in the typical institutional setting of a criminal court where a prosecutor may appear daily before a particular judge and thus develop a relationship susceptible to informal contacts. Perhaps inclusion of defense attorneys in the kinds of routine matters that often slip into *ex parte* contacts is one way to redress this concern. But the language of the Proposed Standards should be clearer and unequivocal if it intends to deter such conduct.

While undoubtedly true that the revision is aimed at impropriety that may be created by the prosecutor, the prosecutor’s role should include remedial measures to prevent that appearance even if s/he is not directly responsible for creating it. The prosecutor is in a position to fix judicial behavior that implicates the public’s perception of the criminal justice system and whose impact may go beyond an individual case.

## 2. *More Limited Ex Parte Communication*

The general admonition to avoid unauthorized *ex parte* discussions in individual cases remains unchanged: *ex parte* discussions relating to a specific case are prohibited, even about administrative matters such as scheduling. A new obligation has been added with regard to *ex parte* discussion of generalized matters (for example about case management or administrative matters). A prosecutor is now directed to “seek to invite some defense counsel to join in discussion of such issues to the extent practicable.”

It would appear that the intent here is to include defense counsel as a collaborator in the resolution of systemic issues that traditionally have been addressed by the court and prosecutor *ex parte*, thus ensuring a more efficient and less adversarial practice. It probably contemplates the very reasonable possibility that inviting defense

input would reduce adversarial hostility and might improve the policy, assist in its implementation, and assure greater buy-in and less resistance that could impair the efficiency of the system. But is the prosecutor required to inform the defense about these policies and to discuss their impact on the criminal justice process? Probably not, since the language of the Proposed Standard is aspirational only (“should seek to invite”). But one certainly could argue that it is “practicable” to discuss these issues with the institutional defenders to see if there are any consequences that the prosecutor has not considered that should be taken into account before implementing the policy. The revision does not require that defense counsel agree to the policy, or take part in formulating it, but only that it be discussed. For instance, changes in prosecutorial policies that will impact individual defendants—such as staffing, planned crime sweeps, or guilty-plea policies, about which the court would be informed—now should probably be discussed with a defense representative present as well.

### C. The Prosecutor’s Relationship with Defense Counsel

New dimensions of a prosecutor’s function appear in Proposed Standard 3-1.2: the prosecutor as problem solver and reformer. These new functions dovetail with one version of Proposed Standard 3-3.3 that calls for cooperative problem-solving with the defense in solving issues both in individual cases and throughout the criminal justice system.

Institutionally, prosecutors and defense attorneys have had an uneasy relationship.<sup>54</sup> Over the years, the Model Rules, internal prosecutorial directives, and the Standards have all been amended to address and resolve some of the more heated issues.<sup>55</sup> Moreover, as far as individual cases are concerned, prosecutors and defense lawyers alike probably must concede that a good (or bad) working relationship can have a substantial impact on the quality of justice, both perceived and actually achieved.

To some extent, the more explicit the Proposed Standards can be in addressing and mitigating this problem, the more instrumental they

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54. See, e.g., Nancy J. Moore, *Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities*, 53 U. PITT. L. REV. 489 (1992).

55. See, e.g., MODEL RULES, *supra* note 2, at R. 3.8(e) (limitations on prosecutorial subpoenas of lawyers); *Id.* at R. 4.2 (limiting communication with person represented by counsel).

can be. To the extent that the standards endorse values of honesty and civility they provide a clear message for prosecutors that can be incorporated into training, continuing education, and ongoing supervision. While most prosecutors officially endorse civility, and most lawyers benefit from a reputation for integrity, fair play and honesty, the task of assuring that these values are upheld may depend on internal oversight of daily decisions, a task that may be quite difficult in large offices on either side.

### 1. *Improved Civility and Communication*

First, and most simply, the Proposed Standards urge improved communication between prosecution and defense counsel concerning issues ranging from the lofty (ethics) to the mundane (scheduling) on individual cases. The language describing the hoped-for nature of the working relationship has been changed from “good relations” to the more specific and affirmative “courteous and collegial,” possibly because the former did not provide sufficient guidance about this more cooperative dimension.<sup>56</sup> Surely, anyone aware of a recent incident in which a defense attorney allegedly assaulted a prosecutor over a scheduling issue would agree that this behavior was inappropriate.<sup>57</sup> And that lawyer really did not need ethical standards to know that his conduct was uncivil and wrong (and probably criminal). Yet, the defense attorney apparently was responding to the prosecutor’s course of conduct—on a mere scheduling issue—that he experienced as humiliating.<sup>58</sup> Although extreme, the incident demonstrates the capacity for deterioration of professional relationships between counsel and the dramatic consequences caused by the strains placed on the lawyers in the criminal justice system.

The impetus for the revision’s call for a more effective and collegial relationship between prosecutors and defense attorneys also reflects the gathering momentum of the movement that has resulted in civility standards in many jurisdictions.<sup>59</sup> Members of the bench

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56. PROPOSED PROSECUTION STANDARDS, *supra* note 20, § 3-3.3(d). Little, App.: Proposed Prosecution Standards, *supra* note 20.

57. See Associated Press, *supra* note 1.

58. *Public Defender Choked Prosecutor in Court Hallway, Police Say*. ABA J., June 3, 2010.

59. See, e.g., NYS STANDARDS OF CIVILITY (Oct. 2007), N.Y. Ct. Rules §§ 130-1 and 1200, App. A; see also ABA Center for Professionalism, Professionalism Codes, available at <http://www.abanet.org/cpr/professionalism/profcodes.html> (last visited July 7, 2010) (listing civility codes, rules and guidelines throughout the U.S.); Jonathon Lerner, *Putting the “Civil” Back in Civil Litigation*, NYSBA J. 33 (Mar./Apr. 2009).



and bar are exasperated with gamesmanship and the time it wastes, and are concerned that such conduct deleteriously affects public confidence in the legal system, harms defendants (or parties in general), and creates an appearance of impropriety and unfairness, or all of these. Certainly, lack of cooperation between lawyers can impact the actual fairness and accuracy of a proceeding, not just its efficiency. Improved communication and collaboration could result in expediting cases, more effective solutions, and more accurate results.

While most civility rules or guidelines are largely precatory and rarely enforced on their own,<sup>60</sup> their moral power, and by now, widespread acceptance, make a difference to the quality of practice. To date, most civility guidelines relate to civil litigation. The Proposed Standards take a step toward applying them in the criminal context.

Scenarios of rudeness and disrespect are played out repeatedly between prosecutors and defense lawyers, with fault on both sides. Yet, because the prosecutor has a special position, the incivility and uncooperative behavior of the prosecutor has an increased potential to compromise the fairness of the proceeding, harden the positions of the adversaries, or simply cause unacceptable inconvenience. If the defendant is detained, his detention might be extended for no legitimate reason. Time will be wasted. Materials may not be received in time to be used effectively. If repeated often enough, such conduct may require the attention of the court in order to set the system on proper course. On the other hand, prosecutors are busy, and they must establish priorities with respect to their cases. It may simply be impossible to accommodate defense counsel's requests in all cases. Unintentional incivility may be excusable until it becomes habit. Intentional incivility—for a tactical advantage—however, would probably violate the rule. Arguably the behavior might be treated differently if the tactic is designed to cause direct harm to the

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60. One author claims that a review of case law in the Seventh Circuit where civility Standards have been in effect since 1991 revealed no examples when a judge used the Standards to interfere with zealous advocacy (one objection to such rules) or when a litigant used the civility standards as the basis for a sanction (another objection that rules will give rise to collateral litigation or malpractice suits). Hon. Marvin E. Aspen, *A Response to Civility Naysayers*, 28 STET. L. REV. 253, 258, 263 (1998). Sometimes a judge will refer to civility rules when admonishing a lawyer. More serious infractions are remediable through other sanctions directly related to the case (e.g., costs or contempt) or attorney discipline under the appropriate code or rules.

defense or is simply a strategy to intimidate or inconvenience the defense and thereby increase the greater power of the prosecutor.

## 2. *More Extensive Collaboration*

The revision requires that the prosecutor “cooperate” with defense counsel and the court “in developing solutions to address ethical, scheduling, or other issues that may arise in particular cases or generally in the criminal justice system.” It is reasonable to assume that this section addresses a wide range of potential issues, extending far beyond the *ex parte* communications covered in subsection (b), but the drafters have given very little guidance about the scope of this admonition.

The current version of this Proposed Standard exhorts the prosecutor to “develop good working relationships with defense counsel in order to facilitate the resolution of ethical problems.”<sup>61</sup> Obviously, the revision intends to go beyond ethical problems alone. On what issues should the two sides cooperate? On its face, the revision may be aimed at requiring collaboration in the types of circumstances where the prosecutor’s virtually unreviewable discretion and monopoly on the facts puts it in a position to protect a fair and just result. For example, while is no legal requirement that a prosecutor question grand jurors about publicity at the request of the defense attorney, this “solution” in a high-publicity case problem might be appropriate, either in the individual case or as even an office-wide policy. The same may be said of a decision about how to deal with substantial claims of actual innocence when they are raised pre-trial or post-trial.

Some prosecutors might understand cooperation to require inclusion of the defense bar or the defense perspective when a particular law enforcement initiative is in the public interest. Indeed, this vision may reflect a modern reality that does involve consultation with stakeholders before new and potentially controversial policies are put into place. By assuring more buy-in, the law enforcement goals may be achieved more successfully. Alternatively, by listening to stakeholders with different perspectives, the policies that are adopted may take those interests into account, again with a higher probability of a smooth transition. Even though there may already be examples of increased cooperation between varying parties when

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61. PROPOSED PROSECUTION STANDARDS, *supra* note 20, § 3-2.8. Little, App.: Proposed Prosecution Standards, *supra* note 20.

institutional policies are being considered and put into effect, this section could benefit from some commentary about its intended scope of the kinds of issues where cooperation would be helpful and should be sought.

Absent the revision, there would be no directive to cooperate in resolving individual or systemic issues. The very general language of the Proposed Standard, however, does not provide much framework for figuring out what kinds of issues are susceptible to this collaborative effort. Suppose, for example, a judge sitting in arraignments has developed a well-deserved reputation for releasing defendants on low or no bail. It comes to the attention of a supervisor at the public defender's office that the assistant district attorneys in that part are now routinely making excessive bail or detention requests to compensate for the judge's perceived "cut 'em loose" attitude. The supervisor attempts to discuss this with his or her counterpart at the DA's office. Without more guidance, it is quite likely that prosecutors will balk at this seeing it as an intrusion on their traditional prerogatives. And without the incentive of an explicit obligation, cooperation and civility would depend on the individual prosecutor's personal style and attitude.

A prosecutor's obligation in the face of defense counsel's deficiencies—running the gamut from mere mistakes to incompetence to conflicts to constitutional ineffectiveness—is another potential area for intervention in the interests of justice. This is an extremely complicated subject. As a minister of justice, a prosecutor arguably has an obligation to make sure that the adversary system is working. Thus, some scholars have argued that in the face of defense counsel's constitutional ineffectiveness, the prosecutor should do something to restore the adversarial balance.<sup>62</sup> With respect to incompetence that does not sink to the level of constitutional ineffectiveness, must a prosecutor report a lawyer who violates the duty of competence?<sup>63</sup>

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62. See, e.g., Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" if You're Trying to Put that Lawyer's Client in Jail?*, 69 *FORDHAM L. REV.* 997 (2000) (analysis of the obligation to act in the face of attorney ineffectiveness or incompetence); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors do Justice?*, 44 *VAND. L. REV.* 45 (1991); Ann Poulin, *Conflicts of Interest in Criminal Cases: Should the Prosecution Have a Duty to Disclose?*, 43 *AM. CRIM. L. REV.* 1135 (2010); Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility when Defense Counsel Has a Potential Conflict of Interest*, 16 *AM. J. CRIM. L.* 323 (1989) (duty in the face of defense counsel's potential conflict of interest).

63. MODEL RULES, *supra* note 2, at R. 8.3(a).

Would a prosecutor have the duty to inform opposing counsel of a potentially favorable argument that the attorney has missed completely or of a pre-trial notice requirement that is about to be missed resulting in preclusion of the defendant's proof? Would a prosecutor have to expose a defense counsel's conflict of interest? The potential impact of each of these issues on the integrity of the proceedings is clear. For example, particularly as to conflicts of interest, about which the defendant may be unaware, if the issue is raised pretrial, the judge must resolve it or risk reversal.<sup>64</sup> If it is not raised until after trial, the defendant will be required to carry the much more difficult burden of demonstrating prejudice.<sup>65</sup>

Since most cases result in guilty pleas, there is a risk that the defendant might plead guilty with the advice of a conflicted lawyer. The courts and rules have clearly placed the resolution of such a potential conflict in the hands of the trial judges.<sup>66</sup> If that is the case, does the prosecutor have an obligation to reveal a potential defense conflict when defense counsel does not do so? Should the obligation be different if the conflict arises from an interest in employment, from the existence of criminal charges brought against defense counsel, or from an investigation of defense counsel of which s/he is totally unaware? Does the timing of the investigation matter? Presumably, a conflict of which the defense lawyer is unaware is less likely to compromise the proceedings and, at the same time, warrants greater prosecutorial secrecy. On the other hand, a pending application for employment or an existing criminal charge create very real dangers of a prejudicial conflict of interest, and little need for prosecutorial secrecy. Perhaps the Proposed Standards should be different. If the prosecutor does have an obligation to disclose or reveal a serious incompetency or conflict, how should that disclosure be accomplished? Should the prosecutor deal directly with the defense attorney? Pursuant to the anti-contact rule,<sup>67</sup> the prosecutor cannot discuss these issues with the represented defendant so perhaps disclosure should be made to the court. Should the prosecutor give defense counsel a chance to resolve the problem with the client first? This series of questions and the underlying recurring issues they

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64. *Holloway v. Arkansas*, 435 U.S. 475 (1978).

65. *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

66. See *Holloway v. Arkansas*, 435 U.S. 475; FED. R. CRIM. P. 44.

67. MODEL RULES, *supra* note 2, at R. 4.2.

present would be well-served with extensive commentary if the Proposed Standards are to have any meaningful impact.

Intervention by a judge might seem more appropriate in these circumstances, but too often, particularly in federal criminal cases, the judge is the least knowledgeable person involved, and thus may be reluctant to intercede. The job of preventing a train wreck might well be best delegated to a prosecutor whose own interests in the finality of a conviction would be well-served by intervention in the event that merely promoting the interests of justice was insufficient justification for action.

#### **D. The Defense Function**

The revisions to the proposed Defense Standards are still underway so they are considerably less complete than their prosecution counterparts. It would be premature to comment too extensively on changes that may not occur, or on hypothetical revisions that the drafters should or even might be contemplating. At the moment, the proposed Defense Standards contain far fewer directives and most are phrased much more generally than their analogous prosecution sections.

Proposed Standard 4-1.2(e) reminds defense attorneys that “[d]efense counsel, 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.”<sup>68</sup> Although prosecutors are also members of the bar, and thus subject to general ethical and legal constraints, their “special” role seems to require a more extensive and detailed elaboration of their duties. Basically, the Proposed Standards treat defense counsel in criminal cases as they would any other lawyer. To the extent that defense counsel may have any “special” role, Proposed Standard 4-1.2 (a) sympathetically acknowledges that, “[c]riminal defense counsel have the delicate task of serving both as officers of the court and as loyal and zealous advocates for their client.”<sup>69</sup> Given this duality, the great majority of the duties of defense counsel are circumscribed by the

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68. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-1.2(e) (Proposed Revisions 2010) [hereinafter PROPOSED DEFENSE STANDARDS]; Rory K. Little, *The Role of Reporter for a Law Project*, 38 HASTINGS CONST. L.Q. 747 (Appendix: ABA Standards for Criminal Justice: Proposed Revisions to Standards for the Defense Function) (2011) [hereinafter Little, App.: Proposed Defense Standards].

69. PROPOSED DEFENSE STANDARDS, § 4-1.2 (a); Little, App.: Proposed Defense Standards, *supra* note 68.

rules governing client confidentiality<sup>70</sup> and diligence.<sup>71</sup> All in all, it is much more difficult to establish systemic or institutional objectives for the defense given the overriding duty to the client. As such, cooperation and collaboration, values that seem unquestionably worthy, may come into conflict with this higher duty.

The difference between prosecutors and defense loyalties is even more distinctive when the interests of individual clients take priority over other values, such as vindicating constitutional rights. For example, a prosecutor, as “seeker of justice” and “servant of the public interest,” could not permit a prosecution or conviction that is procured through a constitutional violation. A defense attorney, on the other hand, would not have to seek redress for a constitutional violation if it conflicts with a client’s desire to plead guilty and waive any challenge.

The Proposed Standards may not adequately address these larger role issues. It may be that defense counsel are excluded from consultation or decision-making because their systemic role has been underappreciated or ill-defined. It may be that the call for greater collaboration is meant to remedy this situation by explicitly elevating that perception. If so, it would be helpful in commentary for the drafters to emphasize that defense counsel serve an important systemic role both by representing the interests of all defendants and by representing the individual defendant’s right to a fair and just process.

Briefly, both current and Proposed Standard 4-1.2 emphasize the defense attorney’s supervening duty to the client while including some obligations to preserve the integrity of the system. Like the duties demanded by the proposed Prosecution Function Standards, this Proposed Standard requires truthfulness, disclosure of adverse legal authority, and participation—and even taking the initiative—in efforts to reform and improve the criminal justice system.<sup>72</sup>

### *1. Duty Not to Make False Statements of Fact or Law*

As with the prosecution Proposed Standard 3-3.3, the current version of Standard 4-1.2 (f) has been changed to convert the duty to refrain from misrepresentation to the court from an “intentionally” to

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70. MODEL RULES, *supra* note 2, at R. 1.6.

71. *Id.* at R. 1.3.

72. PROPOSED DEFENSE STANDARDS, *supra* note 68, § 4-1.2; Little, App.: Proposed Defense Standards, *supra* note 68.

“knowingly” state of mind.<sup>73</sup> And, like the proposed Prosecution Standard, the new duty of candor is extended beyond the tribunal to third parties as well as the court.<sup>74</sup>

## 2. *Disclosure of Adverse Legal Authority*

The proposed Defense Standard poses a less demanding burden of disclosure than its prosecution counterpart in two ways.<sup>75</sup> First, the prosecution must disclose any authority that is *objectively* directly adverse authority in the controlling jurisdiction of which the prosecutor is aware, whereas the defense attorney only has to disclose authority that he or she *subjectively knows* is directly adverse. Thus, defense counsel may justify a failure to disclose either because s/he did not know about the authority (a justification also available to the prosecutor) or if, in his or her opinion, the authority was not directly adverse. Furthermore, prosecutors have the extra duty to discuss the adverse authority not just to cite it, presumably to help ensure a just result. That duty is not imposed on defense counsel.

Providing the court with all available legal information best preserves the integrity of any legal decision. The subtle difference between the proposed prosecution and defense Standards may or may not have been intentional given the language of the Model Rule, but a strict reading seems to require the defendant to disclose the authority only if he or she is aware that it actually is adverse. While a prosecutor might claim lack of actual knowledge of the authority, defense counsel is seemingly able to claim both lack of knowledge of the authority, or, even if s/he knows of the authority, lack of knowledge that it is adverse. There is no reason to differentiate the scienter requirement as applied to prosecutors and defense counsel.

A trickier problem arises again from the dual, and occasionally dueling, duties of loyalty to the client and responsibility to the integrity of the system. Suppose a judge instructed relying on an

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73. PROPOSED DEFENSE STANDARDS, *supra* note 68, § 4-1.2; Little, App.: Proposed Defense Standards, *supra* note 68.

74. The only additional duty imposed on the defense arises not under the standards but under the Model Rules when an attorney is aware that his or her client has engaged or intends to engage in criminal or fraudulent conduct. In this instance, defense counsel must take remedial measures, including possible disclosure to the court. MODEL RULES, *supra* note 2, at R. 3.3(a)(1).

75. The construction of the Standard differs slightly from Model Rule 3.3(a)(2) (“A lawyer shall not knowingly fail to disclose . . .”) but the proposed Standard and the Rule both prohibit the failure to disclose adverse authority only where defense counsel actually knows of the authority.

incorrect legal authority that is more favorable to the defense than the correct authority—and the defense attorney realizes this error? Does he or she have to duty to tell the judge the law that is more harmful to the client? The Standard does not address or solve this conundrum.

### 3. *Efforts to Reform the Criminal Justice System*

Standard 4-1.2 (d) is unchanged from its earlier version. This section comes closest to matching the spirit of Proposed Standard 3-3.3(d) in supporting a collaborative problem-solving approach to systemic issues. Interestingly, even under the 1993 Standards, defense attorneys had been encouraged to engage in these efforts even though the earlier prosecution Standards did not impose this cooperative duty on prosecutors. The Proposed Standards send a clear message that both sides should cooperate to improve and reform the criminal adversarial system when appropriate.

This ambition may be difficult for defenders to realize, however. For example, a defense attorney participating in a bar association project to reform court rules may be working on a rule change that could have adverse affects on individual clients despite having a systemic benefit. If this lawyer on that committee feels conflicted or compromised, and thereby constrained, then the defense perspective will not have an appreciable effect on the systemic reform. And, if constrained by too much civility and cooperation, they may fear compromising their capacity to provide zealous representation by participating in a solution that, while perhaps beneficial generally, may harm individual clients. This paradox makes it more difficult for the defense to play a role in these efforts, but it certainly does not require that they be excluded from the discussion.

To some extent, making the system more collaborative serves in a more formal manner to elevate and enlarge the view of the role defense counsel serve in the criminal process and the respect accorded to their advocacy responsibilities. But the reality of the criminal justice system may make it difficult for defense attorneys to be included on a systemic basis. The fact that defense counsel have not been invited to the reform table in the past reflects a general diminution of the value of defense counsel, or, to put it bluntly, distrust. This divide is observable in the daily lives of defense counsel. For example, in full view of potential jurors and others, defense counsel are regularly subjected to shoe removal and brief-case searches as they enter the courthouses, whereas prosecutors are waved through. The proposed Defense Standard currently makes no



mention of civility, courtesy, or collegiality. There is no corollary to the proposed prosecution Standard 3-3.3, "relationships with the court, other counsel and third parties," particularly 3-3.3(d),<sup>76</sup> or to proposed 3-6.2(a).<sup>77</sup> Defense Standard 4-7.1 mandates that defense counsel adhere to codes of professionalism and manifest "a courteous and professional attitude" toward all of the other courtroom participants.<sup>78</sup>

Again, the reality of the criminal justice system may explain this difference. An uncivil defense counsel will not have the same effect on the system as an uncivil prosecutor, except perhaps to be perceived as offensive or aggressive and thus damage his or her reputation. On the other hand, if constrained by too much civility, defense attorneys may fear compromising their capacity to provide zealous representation by participating in a solution that, while perhaps beneficial generally, may harm individual clients.

### Conclusion

The proposed revisions represent a substantial step toward a more reliable, trustworthy, and efficient criminal justice system. The revisions explicitly recognize the central, powerful, and multi-dimensional role of the prosecutor and attempt to respond accurately and realistically to the needs and demands of that role. To the extent that these changes capture some transformations to the traditional adversary system, they should be greeted with acceptance and approval by both prosecutors and defense counsel. To the extent that they require prosecutors to shoulder even more responsibilities and to shift candor higher on the list of their priorities, the changed Standards may seem constraining, idealistic, and unworkable to some prosecutors. By the same token, if too many compromises are imposed on defense attorneys at the expense of their mission to

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76. "A prosecutor should strive to develop and maintain courteous and collegial working relationships with judges and defense counsel." PROPOSED PROSECUTION STANDARDS, *supra* note 20, § 3-3.3(d); Little, App.: Proposed Prosecution Standards, *supra* note 20.

77. "As an officer of the court, the prosecutor should support the authority of the court and the dignity of the courtroom by adherence to codes of professionalism and civility, and by manifesting a professional and courteous attitude toward the judge, opposing counsel, witnesses, defendants, jurors, court staff, and others." PROPOSED PROSECUTION STANDARDS, *supra* note 20, § 3-7.2; Little, App.: Proposed Prosecution Standards, *supra* note 20.

78. PROPOSED DEFENSE STANDARDS, *supra* note 68, § 4-7.1; Little, App.: Proposed Defense Standards, *supra* note 68.

provide undiluted representation to the individual client, the revisions will require thoughtful balancing. Yet the call for greater collaboration and civility will undoubtedly lead to a fairer and more efficient criminal justice system. As a work in progress, the Proposed Standards have so far made great strides to accomplish important goals.

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