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Suggested Guidelines For

REDUCING ADVERSE EFFECTS OF
CASE CONTINUANCES AND DELAYS ON
CRIME VICTIMS AND WITNESSES

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U.S. Department of Justice
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American Bar Association/Victim
Witness Project

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**ABA SUGGESTED GUIDELINES FOR REDUCING
ADVERSE EFFECTS OF CASE CONTINUANCES AND
DELAYS ON CRIME VICTIMS AND WITNESSES**

Prepared by
the Case Continuance Advisory Board
Criminal Justice Section
American Bar Association

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TABLE OF CONTENTS

FOREWORD vi

SUGGESTED GUIDELINES FOR REDUCING ADVERSE
EFFECTS OF CASE CONTINUANCES AND DELAYS ON
CRIME VICTIMS AND WITNESSES 1 - 7

GENERAL COMMENTARY 8 - 10

POLICE GUIDELINES AND COMMENTARY 11 - 14

PROSECUTOR GUIDELINES AND COMMENTARY 15 - 20

DEFENSE COUNSEL GUIDELINES AND COMMENTARY 21

COURT GUIDELINES AND COMMENTARY 22 - 29

APPENDIX 30 - 43

FOREWORD

During a series of public hearings in 1982, the President's Task Force on Victims of Crime heard crime victims all over the country voice concern with criminal justice scheduling practices which placed heavy, unpredictable, and long-lasting demands on victims without any consideration of their personal circumstances. At best, they charged, case continuances, delays, and rescheduled hearings were frustrating and inconvenient. At worst, such delays were economically and psychologically devastating.

In response to these charges, the Final Report of the Task Force recommended that the number of case continuances be reduced and that victims be involved in the scheduling decisions which affect them. In November, 1983, the United States Department of Justice Office of Justice Programs, through its Victims of Crime Office, funded the ABA Criminal Justice Section to develop guidelines for criminal justice practitioners to meet these goals and, at the same time, to ensure that the rights of defendants are respected, and that the needs of the criminal justice system as a whole are met.

The guidelines project was overseen by an Advisory Board consisting of members of the Criminal Justice Section's Victims Committee, Prosecution Function Committee, Defense Function Committee, and the ABA Judicial Administration Division. Drafts were circulated and revised several times. The final version was approved by the Section's Council in December, 1985 and by the ABA's policymaking House of Delegates in February, 1986.

The case continuance guidelines follow up on a number of other Victim Committee efforts to bring the influence and prestige of the organized bar to bear on balanced and fair victim/witness reforms. These include the initiation of ABA policies, such as recommendations to reduce victim/witness intimidation approved in 1980, and a set of "Guidelines for Fair Treatment of Crime Victims and Witnesses" approved in 1983. The Committee also oversees special projects, such as those resulting in publications on Victim/Witness Legislation: Considerations for Policymakers, Bar Leadership for Victim Witness Assistance, and a special 1984 "Victims' Rights" symposium edition of the Pepperdine Law Review.

We trust these suggested guidelines will be a valuable addition to the efforts of countless criminal justice practitioners and victim advocates throughout the country who have worked so diligently to improve the plight of crime victims and witnesses.

David T. Austern
Chairperson, Victims Committee
ABA Criminal Justice Section
April, 1986

ABA SUGGESTED GUIDELINES FOR REDUCING
ADVERSE EFFECTS OF CASE CONTINUANCES AND
DELAYS ON CRIME VICTIMS AND WITNESSES

POLICE

Police Guideline 1

The police officer who makes the initial contact with a crime victim should provide the victim or the victim's representative printed information containing a police contact and telephone number for:

- (a) reporting further information about the case;
- (b) requesting further information about the progress of the case including, but not limited to, information about required or permitted attendance at official proceedings;
- (c) reporting address or telephone changes with respect to temporary shelter or residence, permanent residence, place of business, or other place of contact; and
- (d) reporting intimidation and requesting police intervention or protection.

Police Guideline 2

The police officer who makes the initial contact with a crime victim should provide the victim or the victim's representative printed information containing names, addresses and telephone numbers of sources of assistance with financial, emotional, and physical consequences of the crime.

Police Guideline 3

The police officer who makes the initial contact with a crime victim should, to the extent possible, obtain from the victim, the victim's family, or others who know the victim the telephone number and address where the victim may be contacted in the period immediately following the crime as well as telephone numbers and addresses of the victim's permanent residence and place of business. Names and telephone numbers shall also be obtained for one or several individuals or organizations through whom the police or prosecutor may contact the victim.

Police Guideline 4

[The detective assigned to the case] [A specially-designated headquarters official] should be encouraged to contact the victim shortly after the crime to confirm the availability information obtained by the officer who made the initial contact with the victim, to update such information, and to request additional information to facilitate the victim's cooperation with the investigation and prosecution of the case.

PROSECUTOR

Prosecutor Guideline 1

To ensure that case continuances and delays initiated by prosecutors do not unnecessarily cause inconvenience or harm to victims and witnesses, jurisdictions and prosecutors should implement ABA Standard for Criminal Justice 3-2.9 which provides:

- (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. The prosecutor 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.

Prosecutor Guideline 2

The prosecutor should not require victims and witnesses to attend criminal proceedings unless their testimony is essential to the state's case or is required by law. When their attendance is required, the prosecutor should seek to reduce to a minimum the time they must spend at the proceedings.

Prosecutor Guideline 3

Throughout the duration of a criminal case and insofar as practicable, the prosecutor should seek to remain informed of impediments to attendance by victims and witnesses at in-court and out-of-court proceedings.

Prosecutor Guideline 4

Victims and witnesses should be provided with the name and telephone number of an individual in the prosecutor's office assigned responsibility for receiving information about their availability and ensuring that the information is transmitted to the prosecutor(s) assigned to the case.

Prosecutor Guideline 5

As soon as feasible after its receipt, the prosecutor should transmit to the court a victim or witness request for a continuance, unless the prosecutor finds that the requested continuance would adversely affect the state's case or unduly disrupt the prosecutor's caseload.

Prosecutor Guideline 6

The prosecutor should consider impediments to victim and witness attendance when scheduling out-of-court proceedings and should make recommendations regarding in-court scheduling which take into account such impediments. Where there is a conflict between the concerns of the state and the concerns of victims and witnesses, the prosecutor should weigh the potential adverse effects on each prior to making a scheduling decision or a recommendation concerning a scheduling decision.

Prosecutor Guideline 7

Prosecutors should provide services to victims and witnesses to alleviate the burdens associated directly and indirectly with the crime including, but not limited, to:

- (a) prompt notice regarding initial scheduling, continuances, and rescheduling of the case, particularly if their attendance is likely to be required or if they have made known their desire to be notified of such decisions;
- (b) a telephone system which victims and witnesses may use to check or verify the date, time and place of forthcoming proceedings;
- (c) an "on call" system whereby witnesses who can assure the prosecutor that they can be contacted at a given telephone and be available at a proceeding within a period of time after receiving a call need not appear at the proceeding until called by the prosecutor;
- (d) upon request of witnesses, notification to their employers of their required attendance at criminal proceedings; and

- (e) other services such as transportation to and from proceedings, child care during proceedings, and assistance with completing forms requesting crime victim compensation.

Prosecutor Guideline 8

To encourage the speedy disposition of cases, thereby eliminating or reducing the adverse impact of extended proceedings on victims and witnesses, jurisdictions and prosecuting attorneys should implement that portion of ABA Standard for Criminal Justice 3-5.1 which provides:

. . . 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 the prosecuting attorney 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.

DEFENSE COUNSEL

Defense Counsel Guideline 1

To ensure that case continuances and delays initiated by defense counsel do not unnecessarily cause inconvenience or harm to victims and witnesses, defense counsel should implement ABA Standard for Criminal Justice 4-1.2 which provides:

- (a) Defense counsel should avoid unnecessary delay in the disposition of cases. Defense counsel should be punctual in attendance upon court and in the submission of all motions, briefs, and other papers. Defense counsel should emphasize to the client and all witnesses the importance of punctuality in attendance in court.
- (b) It is unprofessional conduct for defense counsel intentionally to misrepresent facts or otherwise mislead the court in order to obtain a continuance.
- (c) Defense counsel should not intentionally use procedural devices for delay for which there is no legitimate basis.
- (d) A lawyer should not accept more employment than the lawyer can discharge within the spirit of the constitutional mandate for speedy trial and the limits of the lawyer's capacity to give each client effective representation. It is unprofessional conduct to accept employment for the purpose of delaying trial.

COURTS

Court Guideline 1

To ensure that the trial calendar reflects the legitimate concerns of victims and witnesses as well as the legitimate concerns of the parties, jurisdictions and courts should implement ABA Standard for Criminal Justice 12-1.2 which provides, in part:

Control over the trial calendar should be vested in the court....

Court Guideline 2

To ensure that cases move through the courts with all due speed so as to eliminate or reduce victim and witness problems associated with unnecessary delays, jurisdictions and courts should implement ABA Standard Relating to Trial Courts 2.50 which provides:

The court should supervise and control the movement of all cases on its docket from the time of filing through final disposition. Its management procedures should be applied impartially to all litigants, afford adequate attention to the merits of each case, and facilitate prompt determination of all cases.

Court Guideline 3

To reduce the amount of waiting time victims and witnesses must spend in connection with court proceedings, jurisdictions and courts should implement ABA Standard for Criminal Justice 6-1.4 which provides:

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. The judge should require punctuality and optimum use of working time from all such persons.

Court Guideline 4

In reviewing requests for extension of deadlines for filing pretrial motions, the court should consider the potential impact of the requested extension on the overall scheduling of the case.

Court Guideline 5

The court has an obligation to insure that all continuances are made in a timely manner, whether they are court-initiated or requested by one of the parties.

Court Guidelines 6

Every request for a continuance must be approved or disapproved by a judicial authority.

Court Guideline 7

To ensure that victims and witnesses are not inconvenienced or harmed by unnecessary or unnecessarily lengthy continuances, jurisdictions and courts should implement ABA Standard for Criminal Justice 12-1.3 which provides:

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.

Court Guideline 8

In initiating a continuance or considering a request for a continuance, the court should take into account:

- (a) the timeliness of the continuance;
- (b) specific reason(s) for the continuance;
- (c) the impact which denial of the continuance is likely to have on the case;
- (d) the impact which grant of the continuance is likely to have on the scheduled movement of the case and the earliest possible time for rescheduling the hearing to accommodate the reason(s) for the continuance (, and an indication of whether or not it would be satisfactory to the moving party for the court to reschedule the case when an opening occurs on the court calendar rather than at the time the continuance is approved);
- (e) the effect the continuance is likely to have on the complaining witness;
- (f) the effect the continuance is likely to have on the defendant;

- (g) if the request for the continuance has been initiated by defense counsel, whether the defendant is aware and agrees with the request; and
- (h) previous continuances granted in the case.

Court Guideline 9

The court should state for the public record its reason(s) for granting a continuance or denying a request for a continuance.

Court Guideline 10

To reduce victim and witness problems caused by attorney overuse or misuse of case continuances and extensions and court overindulgence in granting them, jurisdictions and courts should implement ABA Standard Relating to Trial Courts 2.56 which provides:

Requests for continuances and extensions, and their disposition, should be recorded in the file of the case. Where continuances and extensions are requested with excessive frequency or on insubstantial grounds, the court should adopt one or a combination of the following procedures:

- (a) Cross-referencing all requests for continuances and extensions by the name of the lawyer requesting them;
- (b) Requiring that requests for continuances and stipulations for extension be endorsed in writing by the litigants as well as the lawyer;
- (c) Summoning lawyers who persistently request continuances and extensions to warn them of the possibility of sanctions and to encourage them to make necessary adjustments in management of their practice. Where such measures fail, restrictions may properly be imposed on the number of cases in which the lawyer may participate at any one time.

Where a judge is persistently and unreasonably indulgent in granting continuances or extensions, the presiding judge should take appropriate corrective action.

COMMENTARY*

The purpose of the proposed guidelines is to alleviate victim and witness problems with case continuances and delays by reducing the number of postponements, increasing consideration of victim and witness concerns in the scheduling and rescheduling of criminal proceedings, and promoting assistance to victims and witnesses who face continuances and delays.

At present, most practitioners appear to give little, if any, thought to the impact of case continuances and delays on victims and witnesses. This omission is rarely attributed to deliberate callousness. More likely, it is due to lack of awareness of the impact or, in some cases, to a narrow view of the criminal justice system which does not recognize--and may even prohibit--any special practitioner responsibility to victims and witnesses. One of the major expectations for the guidelines, therefore, is that they will impress upon criminal justice practitioners the fact that victims and witnesses do have very real problems resulting from scheduling practices which they have virtually no opportunity to influence. Another is that they will impress upon practitioners that sensitivity to victim and witness concerns is within the ambit of their professional responsibility. Finally, the guidelines are expected to provide practitioners practical suggestions for reducing unnecessary adverse effects of scheduling practices on victims and witnesses without adversely affecting the constitutional rights of defendants or unduly disrupting existing criminal justice practices and procedures.

As discussed in the Final Report of the President's Task Force on Victims of Crime, case continuances are a major source of victim and witness dissatisfaction with the criminal justice system.

Their own victimization or demonstrated inability to prevent the victimization of others commonly leaves victims and witnesses feeling vulnerable and powerless. Practitioners unwittingly reinforce such feelings by scheduling and rescheduling proceedings without consulting--or even promptly notifying--victims and witnesses about plans which will unintentionally but necessarily extend the crimes' demands upon

*ABA approval of the "Suggested Guidelines for Reducing Adverse Effects of Case Continuance and Delays on Crime Victims and Witnesses" included only the "black letter" guidelines. The commentary which accompanies them is for explanatory purposes only.

their lives.

Even if not required to attend certain proceedings, victims or their families may wish to exercise their rights to attend and participate. Failing to provide prompt and accurate scheduling information can cause them to feel alienated from the criminal justice system.

Continuances are almost always frustrating and inconvenient to victims and witnesses. Plans are disrupted--sometimes repeatedly. Jobs and relationships are often adversely affected. Substantial economic hardship, both in terms of direct costs and lost wages, is not an infrequent result.

The subject of the proceedings notwithstanding, the act of testifying itself may be traumatic to victims and witnesses unaccustomed to speaking in public. While continuances may appear to offer temporary relief, in fact, they require victims and witnesses to endure extended periods of anxiety.

Perhaps the worst consequences of continuances for many victims and witnesses is that they force them to choose between being good witnesses or well persons. Each time a scheduled proceeding is imminent, those who wish to cooperate prepare by calling forth the details of the crime. When the case is continued, they may try hanging on to elusive factors thought to be crucial to the prosecution while putting the emotional implications of those facts behind them. What is more likely to happen, however, is that with each continuance, the emotional impact will increase and the factual recall will diminish.

Continuances are unquestionably necessary in some cases if justice is to be done. However, too often they are used as safety nets for sloppy case preparation or as personal conveniences for attorneys. Such continuances are rarely malicious. In fact, those who request them, those who acquiesce to them, and those who approve them rarely even consider the impact on victims and witnesses.

Some defendants and defense attorneys have been known to seek delays and continuances to discourage victims and witnesses from participating in the criminal process or to diminish their ability to participate effectively. However, postponements are not appropriate for such tactical purposes. In fact, a balanced system of justice requires efficient and speedy resolution of cases, and practitioner efforts toward this end are not only proper, but essential.

The proposed guidelines contain a number of suggestions for reducing unnecessary continuances and pretrial delay and for alleviating the adverse effects of those which are necessary.

Additional suggestions address related problems attendant to unnecessary demands which the criminal justice system unwittingly imposes on victims and witnesses. These may be adopted in whole or in part, by formal rule or informal practice. They may be supplemented or even supplanted by other strategies better suited to the circumstances of particular jurisdictions. Thus, in no way are the guidelines to be looked upon as a "take it or leave it" proposition. If jurisdictions use them as a starting point to examine the problems which continuances pose to crime victims and witnesses and to seek good faith means by which to ameliorate these problems, they will have used them well.

POLICE

The speed, efficiency and thoroughness with which cases are handled in their initial stages are likely to affect the need for continuances in later stages. It is therefore important for the police to elicit the confidence and cooperation of victims and witnesses early in the investigation and to maintain it throughout. Those made to feel the system appreciates their personal concerns as well as their contribution to the investigation are likely to be more responsive to the needs of the state than those who see themselves as mere pawn in the state's case. Police can encourage a positive attitude on the part of victims and witnesses by taking measures to facilitate their participation and by sharing certain information with them.

Police Guideline 1

The police officer who makes the initial contact with a crime victim should provide the victim or the victim's representative printed information containing a police contact and telephone number for:

- (a) reporting further information about the case;
- (b) requesting further information about the progress of the case including, but not limited to, information about required or permitted attendance at official proceedings;
- (c) reporting address or telephone changes with respect to temporary shelter or residence, permanent residence, place of business, or other place of contact; and
- (d) reporting intimidation and requesting police intervention or protection.

Victims and witnesses whom the police question and then leave with no instructions about how to provide or request additional information often feel the system is not interested in their active involvement and, in fact, sees no legitimate reason for their wanting to be involved. This perceived insensitivity may be detrimental to the healing process of the individuals directly concerned. It may also be detrimental to the success of the case.

Whether the initial police contact is made at the crime scene or elsewhere, the police office should ensure that victims, victim representatives, and witnesses are provided names, addresses, and telephone numbers of specific individuals in the police department to contact for specific purposes.

Victims and witnesses may recall facts of importance to the case subsequent to their initial police interview. Their sense of obligation to report these will certainly be enhanced if the police have made it easy for them to do so. Similarly, their incentive to keep the police advised of their whereabouts will be enhanced if they have been provided printed materials with specific instructions for relaying address and telephone changes.

Police department designation of an individual or individuals to provide information to victims and witnesses is likely to be viewed by victims and witnesses as reflective of a sympathetic attitude toward them. Of course, the police need not share with victims and witnesses information about all aspects of a case, especially if it would compromise the investigation or prosecution. However, where information of significant interest to victims and witnesses is readily available and would not harm the case or the defendant, its release is probably warranted. Whether the suspect is incarcerated or at large is one example of such information. The scheduling of forthcoming proceedings which may result in the release of the suspect is another. Victims and witnesses also have a significant interest in knowing about forthcoming proceedings where their own participation is required or allowed.

The police should not unduly alarm victims and witnesses about the possibility of intimidation. However, as anxiety about it is extremely common, providing a specific telephone number to report it and request assistance will be reassuring to many victims and witnesses.

Police Guideline 2

The police officer who makes the initial contact with a crime victim should provide the victim or the victim's representative printed information containing names, addresses and telephone numbers of sources of assistance with financial, emotional, and physical consequences of the crime.

Immediately following the crime, it is highly likely that the victim's priorities and those of the criminal justice system will not coincide. Before turning attention to the concerns of the criminal justice system the victim may need to deal with a number of direct consequences of the crime, including physical and psychological injuries and financial difficulties. Any assistance the system can give in this regard is likely to enhance the cooperative spirit so important to an effective investigation. The police department is in an excellent position to gather general information about various sources of assistance in the community and to provide it to

victims. This can be easily done by means of preprinted cards or fliers listing names, addresses and telephone numbers of facilities such as hospitals, sources of emergency food, shelter and financial assistance, psychological counseling centers, and compensation agencies.

Police Guideline 3

The police officer who makes the initial contact with a crime victim should, to the extent possible, obtain from the victim, the victim's family, or others who know the victim the telephone number and address where the victim may be contacted in the period immediately following the crime as well as telephone numbers and addresses of the victim's permanent residence and place of business. Names and telephone numbers shall also be obtained for one or several individuals or organizations through whom the police or prosecutor may contact the victim.

A speedy resolution of criminal proceedings requires a speedy and efficient investigation which, in turn, requires ready access to victims and witnesses. Since it is not uncommon for victims and witnesses to relocate following a crime, police who take down availability information should also ascertain alternative contact points (e.g., relatives, friends, place of business). In addition to yielding useful information, this approach will help impress upon victims and witnesses the importance attached to their whereabouts, thereby encouraging them to contact the police if they change their plans subsequent to the initial police contact. Sensitivity to victim and witness concerns is, of course, important. For example, if victims and witnesses do not wish to be contacted at their places of business, this fact should be highlighted in the police report and, to the extent possible, honored by investigating authorities.

Police Guideline 4

[The detective assigned to the case] [A specially-designated headquarters official] should be encouraged to contact the victim shortly after the crime to confirm the availability information obtained by the officer who made the initial contact with the victim, to update such information, and to request additional information to facilitate the victim's cooperation with the investigation and prosecution of the case.

Victims at the scene of the crime may be unrealistic in discussing their future plans with the police officer taking the initial report. Their psychological reaction--and hence their personal plans--may change considerably within

twenty-four or forty-eight hours. Moreover, the true extent of physical injuries may not be correctly ascertained immediately following the crime, but may bear considerably on where the victim may be contacted throughout the course of the forthcoming criminal proceedings. Thus, the police department should encourage a specified police official to verify the original availability information and update it where necessary. The police department may make this a routine responsibility of detectives or it may appoint a headquarters individual responsible for making such contacts in all serious cases involving victims.

PROSECUTOR

Prosecutors have an obligation to pursue the state's case with due diligence. In doing so they are in an excellent position to make a substantial and direct contribution to alleviating victim and witness problems associated with scheduling. For example, in interviews with victims and witnesses, they can be sensitive to the demands on the time of those whose information they are seeking. Where continuances would adversely affect victims and witnesses, they can limit requests for them to instances in which they are truly required. They can object to defense requests for continuances when these are not accompanied by compelling reasons. Prosecutors may also moderate many of the adverse affects of continuances which are granted.

Since the interests of defense witnesses are generally looked after by defense counsel, the following guidelines are intended primarily for prosecution witnesses, victims and victim survivors.

Prosecutor Guideline 1

To ensure that case continuances and delays initiated by prosecutors do not unnecessarily cause inconvenience or harm to victims and witnesses, jurisdictions and prosecutors should implement ABA Standard for Criminal Justice 3-2.9 which provides:

- (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. The prosecutor 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.

The commentary which accompanies ABA Standard for Criminal Justice 3-2.9 is excerpted in the Appendix on page 30.

Prosecutor Guideline 2

The prosecutor should not require victims and witnesses to attend criminal proceedings unless their testimony is essential to the state's case or is required by law. When their attendance is required, the prosecutor should seek to reduce to a minimum the time they must spend at the proceedings.

Many prosecutors routinely subpoena victims and witnesses to attend proceedings even though there is little reason to believe their participation will be required. The practice results in unnecessary hardship for untold numbers of victims and witnesses. This guideline requires that before issuing or requesting subpoenas, prosecutors make considered judgments as to whether the likelihood of the state's potential need for the victims or witnesses outweighs the inconvenience, financial cost, and psychological difficulties which their attendance may cause the victims or witnesses.

The guideline also requires that when prosecutors decide that certain witnesses are needed for the state's case, they not demand their presence until it is likely to be needed and they take the initiative in arranging for them to be excused after they have testified. Such efforts will not entirely eliminate witness waiting. It is often difficult for prosecutors to forecast just when particular witnesses should be called. Sometimes prosecutors must have witnesses on hand should the defense seek to cross-examine them. Nevertheless, a great deal of wasted witness time would undoubtedly be saved if prosecutors would view the value of witnesses' time from the witnesses' perspective as well as from their own or the state's perspective. Nor surprisingly, witnesses required to be present early in the morning but not called upon to testify until late afternoon or witnesses who testified in the morning but remained in the courthouse until evening because no one excused them often feel the system is insensitive to their needs.

Prosecutor Guideline 3

Throughout the duration of a criminal case and insofar as practicable, the prosecutor should seek to remain informed of impediments to attendance by victims and witnesses at in-court and out-of-court proceedings.

Even victims and witnesses who are eager to cooperate with the prosecution may have personal and professional concerns which, for them, take precedence over the case. Knowledge of potential impediments to attendance at criminal justice proceedings is of course necessary before prosecutors can take them into account in scheduling or rescheduling out-of-court

proceedings or making recommendations regarding the scheduling or rescheduling of in-court proceedings.

In preparing the state's case, it is appropriate for prosecutors to propose times and places for out-of-court meetings with victims and witnesses. However, prosecutors should provide victims and witnesses the opportunity to express concerns regarding proposed meetings and, depending upon the relative merits of such concerns vis-a-vis prosecutorial considerations, try to schedule meetings at mutually agreeable times and places.

As noted previously, rescheduling of in-court proceedings can be particularly distressful to victims and witnesses. The fact that the adverse effects are not intentional is of little solace to victims and witnesses who were never consulted about the implications of scheduling changes on their personal and professional lives. While continuances are sometimes unavoidable, the initial scheduling of cases in light of foreseeable circumstances will substantially reduce the need for them. Prior to the court's scheduling of criminal cases, therefore, prosecutors should seek to determine from the witnesses the state expects to call any impediments likely to result in their unavailability. (In soliciting this information, prosecutors should take care not to convey the impression that expressed concerns necessarily will determine the scheduling of the case.) Since unavailability of police witnesses is especially common, police duty rosters might be checked to obtain advance information about dates and times police witnesses definitely will not be available. Any relevant availability information prosecutors are able to obtain should be forwarded to the court prior to the scheduling of specific cases.

As cases progress, prosecutors should solicit views of victims and witnesses before asking the court for continuances or acquiescing in defense requests for continuances.

Prosecutor Guideline 4

Victims and witnesses should be provided with the name and telephone number of an individual in the prosecutor's office assigned responsibility for receiving information about their availability and ensuring that the information is transmitted to the prosecutor(s) assigned to the case.

The specific prosecutor handling a given case may not be available to take telephone calls or receive visits from witnesses wishing to report availability information concerning forthcoming proceedings. If the case is being handled

horizontally--i.e., by different prosecutors at different stages of the case--witnesses may not know which prosecutor to contact. To ensure that messages may be left in confidence that they will be passed along to the appropriate prosecutor, the prosecutor's office should designate a member of the staff to be responsible for receiving and forwarding them. A written notice of this individual's name, address and telephone number should be provided to victims and witnesses during their first in-person contact with the prosecutor's office. If the initial contact is by telephone, the name, address and telephone number should be provided orally and immediately confirmed in a follow-up letter or postcard.

Prosecutor Guideline 5

As soon as feasible after its receipt, the prosecutor should transmit to the court a victim or witness request for a continuance, unless the prosecutor finds that the requested continuance would adversely affect the state's case or unduly disrupt the prosecutor's caseload.

While victims and witnesses generally look with disfavor upon continuances, they may sometimes request prosecutors to seek them. For example, a witness may have suffered a recent death in the immediate family or may have a major professional obligation at the time the case is scheduled to commence. It is difficult for victims and witnesses to understand why such circumstances are considered sufficient justification for continuances if they affect defendants and attorneys, but not if they affect themselves. Therefore, when witnesses request continuances, prosecutors should consider the requests and the bases for them, bearing in mind speedy trial considerations and other effects the continuances, if granted, might have on the state and the defendants. Unless the prosecutors are aware of compelling reasons for not doing so, they should direct the requests to the court so that the court may take them into account as scheduling considerations.

While the guideline does not address recourse of victims or witnesses if prosecutors decide not to direct their requests to the court, some jurisdictions may wish to consider including a provision for such situations--for example, requiring prosecutors to notify victims and witnesses of their right to take their concerns directly to the court.

Prosecutor Guideline 6

The prosecutor should consider impediments to victim and witness attendance when scheduling out-of-court proceedings and should make recommendations regarding in-court scheduling which

take into account such impediments. Where there is a conflict between the concerns of the state and the concerns of victims and witnesses, the prosecutor should weigh the potential adverse effects on each prior to making a scheduling decision or a recommendation concerning a scheduling decision.

Soliciting information as required in Guideline 3 is of little use unless the information is considered by prosecutors when they schedule out-of-court proceedings or make recommendations regarding in-court proceedings. The guideline in no way implies that victim concerns should be the only--or even the major--factor in scheduling decisions. Its significance lies in its recognition of an obligation on the part of prosecutors to include such concerns in the decisionmaking process, assign to them a proper weight, and where they are not outweighed by other concerns to accommodate or seek to have the court accommodate them in scheduling decisions.

Prosecutor Guideline 7

Prosecutors should provide services to victims and witnesses to alleviate the burdens associated directly and indirectly with the crime including, but not limited, to:

- (a) prompt notice regarding initial scheduling, continuances, and rescheduling of the case, particularly if their attendance is likely to be required or if they have made known their desire to be notified of such decisions;
- (b) a telephone system which victims and witnesses may use to check or verify the date, time and place of forthcoming proceedings;
- (c) an "on call" system whereby witnesses who can assure the prosecutor that they can be contacted at a given telephone and be available at a proceeding within a period of time after receiving a call need not appear at the proceeding until called by the prosecutor;
- (d) upon request of witnesses, notification to their employers of their required attendance at criminal proceedings; and
- (e) other services such as transportation to and from proceedings, child care during proceedings, and assistance with completing forms requesting crime victim compensation.

Since case continuances are likely to compound the already substantial difficulties faced by victims and witnesses in the criminal justice system, it is imperative that prosecutors seek to reduce the number of continuances which are granted. At the same time, however, they should not lose sight of the fact that even when the number of continuances is reduced to a minimum, other problems will remain. The prosecutor's appropriate response will, of course, depend on the nature of the specific problems. Prompt notification of scheduling changes is especially important. The more time victims and witnesses have to prepare for specific criminal justice system demands on their time, the less disruptive those demands are likely to be. Given adequate notice, business appointments may be changed, alternative arrangements to meet family obligations may be made, and personal plans may be revised. It is also important for prosecutors to facilitate victim and witness attendance once the case is ready to proceed. For example, some witnesses may find an official explanation of their absences will mollify upset employers. Others may find invaluable procedures which enable them to reduce the time they must spend at proceedings. Helping victims and witnesses deal with other unfamiliar aspects of bureaucracy, even if not directly connected with the prosecution of the case--e.g., completing victim compensation forms--can go along way toward forging a sense of cooperation between the justice system and victims and witnesses.

Prosecutor Guideline 8

To encourage the speedy disposition of cases, thereby eliminating or reducing the adverse impact of extended proceedings on victims and witnesses, jurisdictions and prosecuting attorneys should implement that portion of ABA Standard for Criminal Justice 3-5.1 which provides:

. . . 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 the prosecuting attorney 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.

The commentary which accompanies ABA Standard for Criminal Justice 3-5.1 is excerpted in the Appendix on page 32.

DEFENSE COUNSEL

Defense counsel are of course obliged to represent their clients with all due diligence. This obligation, however, must be exercised in conjunction with a corresponding responsibility to promote the fair and efficient administration of criminal justice. While defense attorneys need not take the same sort of affirmative steps that these guidelines require of police, prosecutors and judges, any deliberate actions they take to discourage the testimony or frustrate the participation of victims and witnesses in the criminal process is antithetical to this responsibility.

Defense Counsel Guideline 1

To ensure that case continuances and delays initiated by defense counsel do not unnecessarily cause inconvenience or harm to victims and witnesses, defense counsel should implement ABA Standard for Criminal Justice 4-1.2 which provides:

- (a) Defense counsel should avoid unnecessary delay in the disposition of cases. Defense counsel should be punctual in attendance upon court and in the submission of all motions, briefs, and other papers. Defense counsel should emphasize to the client and all witnesses the importance of punctuality in attendance in court.
- (b) It is unprofessional conduct for defense counsel intentionally to misrepresent facts or otherwise mislead the court in order to obtain a continuance.
- (c) Defense counsel should not intentionally use procedural devices for delay for which there is no legitimate basis.
- (d) A lawyer should not accept more employment than the lawyer can discharge within the spirit of the constitutional mandate for speedy trial and the limits of the lawyer's capacity to give each client effective representation. It is unprofessional conduct to accept employment for the purpose of delaying trial.

The commentary which accompanies ABA Standard for Criminal Justice 4-1.2 is excerpted in the Appendix on page 33.

COURTS

Courts, as recognized in the ABA Standards for Criminal Justice and the ABA Trial Court Standards, are ultimately responsible for control over the trial calendar and should avoid delays, continuances, and extended recesses, except for good cause. As long as courts fail to take a leadership role, little hope exists for significant reform in this area. Even well-intentioned prosecutors and defense attorneys cannot, by themselves, sufficiently reform current continuance practices. These attorneys represent interests which are often advanced by postponed proceedings. When there is a dispute between them as to the propriety of requested continuances, an impartial arbiter is required. Even when prosecutors and defense attorneys are willing to acquiesce to each other's requests, courts should not passively accept the parties' informal arrangements. They must take a broader view and examine the effect of continuances on the administration of justice for all concerned, including crime victims and witnesses.

In 1983, a National Conference of the Judiciary on the Rights of Victims and Witnesses was held at the National Judicial College in Reno, Nevada. The group, comprised of two judges from nearly every state, recognized a legitimate victim interest in the scheduling of court proceedings and in continuances and delays. As a result, a statement of recommended judicial practices the conference adopted calls for allowing victim participation in the scheduling of court proceedings and requiring judges to state on the record the reason for granting continuances.

Court Guideline 1

To ensure that the trial calendar reflects the legitimate concerns of victims and witnesses as well as the legitimate concerns of the parties, jurisdictions and courts should implement ABA Standard for Criminal Justice 12-1.2 which provides, in part:

Control over the trial calendar should be vested in the court....

The commentary which accompanies ABA Standard for Criminal Justice 12-1.2 is excerpted in the Appendix on page 35.

Court Guideline 2

To ensure that cases move through the courts with all due speed so as to eliminate or reduce victim and witness problems associated with unnecessary delays, jurisdictions and courts

should implement ABA Standard Relating to Trial Courts 2.50 which provides:

The court should supervise and control the movement of all cases on its docket from the time of filing through final disposition. Its management procedures should be applied impartially to all litigants, afford adequate attention to the merits of each case, and facilitate prompt determination of all cases.

The commentary which accompanies ABA Standard Relating to Trial Courts 2.50 is excerpted in the Appendix on page 37.

Court Guideline 3

To reduce the amount of waiting time victims and witnesses must spend in connection with court proceedings, jurisdictions and courts should implement ABA Standard for Criminal Justice 6-1.4 which provides:

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. The judge should require punctuality and optimum use of working time from all such persons.

The commentary which accompanies ABA Standard for Criminal Justice 6-1.4 is excerpted in the Appendix on page 40.

Court Guideline 4

In reviewing requests for extension of deadlines for filing pretrial motions, the court should consider the potential impact of the requested extension on the overall scheduling of the case.

On their face, pretrial motions for extended deadlines may appear to have little, if any, effect on the trial schedule. However, once a delay is approved for one purpose, the party's time to devote to other requirements is likely to be reduced, resulting in requests for additional deadline changes, including, ultimately, the commencement date of the trial itself. Depending on the nature and number of such motions, the case may be delayed for a considerable period. Not only does this significantly extend the time victims and witnesses must plan their lives around the uncertain demands of the criminal justice system, it also significantly extends the time

the case hangs over them psychologically. Judges should therefore view every motion for a time extension not only in light of its intrinsic merits or demerits, but also in light of the ultimate impact its approval is likely to have on the overall timeframe of the case.

Court Guideline 5

The court has an obligation to insure that all continuances are made in a timely manner, whether they are court-initiated or requested by one of the parties.

As discussed previously, the sooner victims and witnesses know about scheduling changes, the greater the likelihood that they can rearrange their own lives to accommodate them satisfactorily. Whether continuances are initiated by the court or by one of the parties, it is important for the court to ensure that they are initiated and acted upon as soon as the necessity for them becomes apparent. To facilitate this, the court may set a cut-off date (e.g., 10 days before the scheduled hearing or trial) after which continuances will not be granted unless the reasons for them did not arise or were unknown until after the cut-off date. Such a policy will discourage the use of continuances as last minute delay tactics or as remedies for sloppy calendar control.

Court Guidelines 6

Every request for a continuance must be approved or disapproved by a judicial authority.

It is common practice in many jurisdictions for continuances to be stipulated--i.e., agreed to by the prosecutor and defense attorney and, without ever being brought before a judicial authority, simply noted on the court calendar by a clerk or other staff person. Such informality contributes to the prevailing attitude that case continuances are not serious matters for the criminal justice system--that they are a matter of logistics rather than of justice. By confining their participation to reconciling attorneys' mutually agreed upon dates with available slots on the court's calendar, courts abdicate responsibility in an area where they could alleviate a substantial amount of unnecessary victim and witness suffering and, at the same time, ensure that justice is administered with all due speed. This guideline, therefore, requires judicial authorities to include within their overall responsibility the specific responsibility for granting or denying continuances.

Court Guideline 7

To ensure that victims and witnesses are not inconvenienced or harmed by unnecessary or unnecessarily lengthy continuances, jurisdictions and courts should implement ABA Standard for Criminal Justice 12-1.3 which provides:

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.

The commentary which accompanies ABA Standard for Criminal Justice 12-1.3 is excerpted in the Appendix on page 42.

Court Guideline 8

In initiating a continuance or considering a request for a continuance, the court should take into account:

- (a) the timeliness of the continuance;
- (b) specific reason(s) for the continuance;
- (c) the impact which denial of the continuance is likely to have on the case;
- (d) the impact which grant of the continuance is likely to have on the scheduled movement of the case and the earliest possible time for rescheduling the hearing to accommodate the reason(s) for the continuance (, and an indication of whether or not it would be satisfactory to the moving party for the court to reschedule the case when an opening occurs on the court calendar rather than at the time the continuance is approved);
- (e) the effect the continuance is likely to have on the complaining witness;
- (f) the effect the continuance is likely to have on the defendant;
- (g) if the request for the continuance has been initiated by defense counsel, whether the defendant is aware and agrees with the request; and
- (h) previous continuances granted in the case.

To determine whether specific continuances are appropriate or inappropriate, the court should take into account a number of factors. One of these, contained in subsection (a) and discussed in Court Guideline 5 above, is timeliness of the proposed continuance. Another, subsection (b), pertains to the specific reasons for the proposed continuance. When the postponement has been initiated by someone other than the court, the court should require that individual to provide detailed reasons, e.g., unavailability of a particular witness due to hospitalization for emergency surgery or unavailability of the attorney due to recent notification that another specified case demands his or her presence at the time in question. Generalities such as "attorney conflict" or "witness availability" should be viewed with skepticism by the court. In certain instances, continuances may affect the outcome of cases and subsection (c) imposes on the court a responsibility for trying to ascertain when this is likely to be the situation. For example, a postponement may mean that injured or ill witnesses may die or become too weakened to appear in court. Harrassed or threatened witnesses may become too frightened to cooperate. Parents may decide that allowing their children to testify well after their victimization is likely to be unjustifiably upsetting to them and detrimental to any recovery process which has begun.

Since every continuance potentially affects the overall scheduling of the case, subsection (d) requires the court to examine proposed continuances in light of such implications. Short postponements will generally be less painful to victims and witnesses than long ones. When an originally timely-scheduled case proceeds after a short continuance, victims and witnesses probably will still have the crime very much in the forefront of their minds. Victims and witnesses faced with lengthy continuances, however, may have to dredge up disturbing but quiescent memories. Doing so is likely to interrupt and substantially set back a healing process which had begun to relieve them of the crime's dominance over their lives. As a general rule, therefore, when continuances are warranted, they should be granted for the minimum time necessary to accomplish the purpose for which they were sought. However, when the time required for the continuance is out of proportion to its anticipated benefits, its granting may not be warranted at all.

Because the court's own calendar may affect the length of continuances, an optional provision has been included as part of subsection (d) for courts which wish to consider rescheduling continued cases as vacancies occur on the calendar, rather than rescheduling them in advance at the end of the calendar. The advantage to this system is that cases are likely to be heard at an earlier time than if tacked onto the end of the calendar. The disadvantage, of course, is the

uncertainty of the schedule which may be more unsettling to all concerned, including victims and witnesses, than a further delay for a definite court date.

Subsections (e) and (f) require the court to consider the potential impact of the proposed continuance on the complaining witness and on the defendant. A continuance which would result in considerable hardship to the complaining witness or the defendant might be justified if the court is convinced of its necessity to the substantive preparation of the case. However, when continuances would be for the personal convenience of the court or attorneys, the court must weigh the hardship posed to the complaining witness or the defendant by the proposed continuance against the hardship posed to itself or the attorneys by the scheduled proceeding.

The purpose of subsection (g) is to limit continuances which are requested by defense counsel without the concurrence of the defendants they represent. Defendants who are incarcerated pending the outcome of their case often have a particular interest in having the case move forward as rapidly as possible. Therefore, when their attorneys request continuances, it is important for the court to know if they are in accord with the requests or whether the attorneys are seeking continuances for their own convenience against the wishes or without the knowledge of their clients. In general, defendants on pretrial release pending the outcome of their cases are less eager to move forward than those who are incarcerated--in fact, some even welcome delays. However, at least some of these defendants may wish to put their case behind them and even here the court should not presume that all continuance motions made by defense attorneys have the backing of their clients. Judicial authorities should therefore ask defense attorneys if they have informed their clients of the proposed continuance and, if so, what their position is. Of course, in some instances, defense counsel-initiated continuances may be warranted even if defendants would prefer they not be granted, and nothing in this guideline prohibits attorneys from seeking to convince the court of such justification. However, knowing that requests for continuances will receive this type of scrutiny is expected to discourage defense attorneys from routinely requesting continuances which are not in their clients' better interests and which, in addition, impose hardships on victims and witnesses.

Subsection (g) of the guideline expands upon ABA Standard for Criminal Justice 12.1.3 (Court Guideline 7) which exhorts courts to grant continuances "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."

In requiring the court to consider previous continuances, subsection (h) recognizes that each continuance may be only one in a series of delays which individually extend the length of the case only minimally but which together extend it significantly. The subsection also recognizes that as the number of continuances increases the effect of each is likely to be compounded. In at least some instances, therefore, an otherwise appropriate continuance might not be appropriate if its expected benefit would not outweigh the cumulative adverse impact of all continuances on victims and witnesses.

Court Guideline 9

The court should state for the public record its reason(s) for granting a continuance or denying a request for a continuance.

The requirement that the court state for the record its reason(s) for deciding to approve or deny a motion for a continuance is intended to encourage more thoughtful decisions regarding motions for continuances and to increase the accountability for those decisions. In addition, it is expected to provide victims and witnesses with a source of information about the decisionmaking process which affects their own lives so directly, and which too often appears to do so arbitrarily.

Court Guideline 10

To reduce victim and witness problems caused by attorney overuse or misuse of case continuances and extensions and court overindulgence in granting them, jurisdictions and courts should implement ABA Standard Relating to Trial Courts 2.56 which provides:

Requests for continuances and extensions, and their disposition, should be recorded in the file of the case. Where continuances and extensions are requested with excessive frequency or on insubstantial grounds, the court should adopt one or a combination of the following procedures:

- (a) Cross-referencing all requests for continuances and extensions by the name of the lawyer requesting them;
- (b) Requiring that requests for continuances and stipulations for extension be endorsed in writing by the litigants as well as the lawyer;

- (c) Summoning lawyers who persistently request continuances and extensions to warn them of the possibility of sanctions and to encourage them to make necessary adjustments in management of their practice. Where such measures fail, restrictions may properly be imposed on the number of cases in which the lawyer may participate at any one time.

Where a judge is persistently and unreasonably indulgent in granting continuances or extensions, the presiding judge should take appropriate corrective action.

The commentary which accompanies ABA Standard Relating to Trial Courts 2.56 is excerpted in the Appendix on page 43.

This guideline serves as a reminder that sanctions are appropriate when attorneys cause or try to cause unnecessary and excessive delays and continuances or when judges grant excessive or unreasonable continuances. Courts have at their disposal a number of sanctions to help ensure that attorneys appearing before them adhere to established standards for the fair and efficient administration of criminal justice. In addition to restricting the number of cases in which the lawyer may participate at any one time, these might include removing the attorney from the case, sending a letter of complaint to the authority which assigned the attorney to the case, assessing the court costs and costs to the opposing party which have resulted from the delay, initiating disciplinary hearings, and ordering the attorney held in contempt of court.

APPENDIX

ABA Standard for Criminal Justice 3-2.9 (The Prosecution Function)

Commentary

Exploitation of Delay for Unjustified Tactical Advantage

For centuries lawyers have been portrayed satirically as employing dilatory tactics with the indulgence of judges. The problem must be attacked both on the level of improved procedures and on the level of professional ethics.¹ The problem must also be attacked by direct sanctions against both prosecutors and defense counsel who exploit or abuse delay as a tactical weapon.² The cost in the time of judges, court personnel, witnesses, and jurors is too great to permit the continuance of practices that allow lawyers to jockey for a particular judge or to exert pressure on their adversary by delay. Judges are best able to detect these abuses, and a heavy responsibility rests on them to separate legitimate use of procedural devices from abusive use calculated to obtain an unjustified delay.

Prompt Disposition

Independent of statutory and constitutional requirements, the interests of the public and defendants are best served by prompt disposition of criminal charges. The prophylactic effect of criminal sanctions is dissipated by delay in bringing them to bear upon offenders. Congestion in the courts is often of such magnitude that, notwithstanding the priority given to criminal cases, the instrumentalities of the administration of criminal justice — the courts, prosecuting agencies, and the bar — encounter extreme difficulty in disposing of criminal charges with the promptness that an effective system of criminal justice requires. The causes of court congestion and the consequent delays in the processing of criminal cases are familiar ones: increasing population, increasing crime rates, and greater complexity in the processes of enforcing the criminal law, including the trial of criminal cases, as a result of judicial and legislative reinforcements of the protections of the rights of persons accused of crime. At the same time, the agencies of criminal justice are frequently handicapped in their attempts to keep pace with the phenomenon of increased criminal activity by society's reluctance to provide the necessary resources for the prompt processing of criminal charges. Consequently, prosecutors and the courts are sometimes burdened with backlogs of untried criminal cases. In many prosecution offices, trial assistants are charged with caseloads of as many as sixty or seventy cases. This is an intolerable and unmanageable burden. Among other adverse consequences, cases are not adequately prepared and the prosecutor tends to consent to unwarranted continuances, simply because of insufficient time to prepare for trial.

Whether viewed from the standpoint of the accused or the public, it is desirable that the criminal justice system try criminal charges promptly. Some states have implemented the constitutional guarantee of a speedy trial by statute or rule requiring trial within a fixed period unless the accused enters a waiver.³ To meet these standards, it may be

necessary to enlarge some prosecution offices. The intent of paragraph (b) is to advance the efficiency of prosecution offices in all aspects of their work and to ensure that they are provided with sufficient resources to enable them to bear their share of the responsibility for the prompt and effective disposition of criminal charges, whether by trial or otherwise.

Continuances; Misrepresentation

Heavy caseloads in most prosecution offices sometimes have led to abuses in obtaining continuances of proceedings prior to trial and of the trial itself. With adequate staff and resources, it should be unnecessary for the prosecutor to ask for continuances except for good cause arising from unforeseen circumstances. Such cause should be presented to the court without equivocation. It is never permissible, however, for a prosecutor to make a misrepresentation for the purpose of obtaining a continuance.⁴

1. The chapters on Discovery and Procedure Before Trial and Speedy Trial include proposals to reduce delay in criminal cases. *See* standards 11-1.1, 11-1.2, 12-1.1 to 12-1.3, 12-3.1, 12-4.1.

2. *See* ABA, CODE OF PROFESSIONAL RESPONSIBILITY DR7-102(A) (1).

3. *See, e.g.*, CAL. PENAL CODE §1382 (West Cum. Supp. 1979); ILL. REV. STAT. ch. 38, §103-5(a) (1977); MASS. ANN. LAWS ch. 277, §72 (Michie/Law. Co-op 1968); PA. R. CRIM. P. 1100; WASH. SUPER. CT. CRIM. R. 3.3(b).

4. *See* ABA, CODE OF PROFESSIONAL RESPONSIBILITY DR7-102(A)(5).

ABA Standard for Criminal Justice 3-5.1 (The Prosecution Function)

Commentary

The vesting of calendar control in the court avoids even the appearance of a lack of fair and evenhanded administration of the docket. Ultimate responsibility for determining which cases are to be tried and when should be recognized as a judicial function, although the court obviously should receive relevant information from both the prosecution and the defense in establishing its priorities. The instant standard is based on a similar recommendation contained in the chapter on Speedy Trial, which should be consulted for additional commentary on this provision.¹

1. See standard 12-1.2.

Commentary

Prompt Disposition; Punctuality

Lack of punctuality in attendance at court disturbs the orderly processes of the court and inconveniences others waiting to be heard. It is costly in terms of wasted time of lawyers, witnesses, jurors, and the judge and staff. It is also a disservice to the client because of the risk that it may irritate the court or the jury. Failure to be punctual in court appearances may sometimes be grounds for punishment for contempt.¹ Punctuality in the filing of briefs and motions is also important.² As a corollary to counsel's obligation to be punctual, it is incumbent on counsel to do everything possible to see to it that the client and witnesses are punctual in their attendance at court. Where additional time is needed properly to prepare a case, the correct course is to seek a continuance.³

Misrepresentation to Obtain a Continuance

Paragraph (b) recognizes that it is "unprofessional conduct for defense counsel intentionally to misrepresent facts or otherwise mislead the court in order to obtain a continuance." This position is fully consistent with provisions in the ABA Code of Professional Responsibility⁴ and with court decisions.⁵ Equivocation in stating the grounds for a continuance also has been held to warrant disciplinary censure.⁶

Delay for Tactical Advantage

A frequent complaint of the public against our system of justice is that excessive delays are permitted, which undermine the enforcement of law. This is perhaps as true today as when Roscoe Pound wrote about the problem around the turn of the century.⁷ Because it is essential that legal procedures be calm and deliberative rather than hasty and unreflective, to some extent the legal process could never be as expeditious as popular sentiment might wish it, especially when that sentiment is inflamed by an outrageous crime or during a period of crisis in law enforcement.

One of the great temptations that befall a lawyer is to abuse procedure and employ dilatory tactics in order to gain time for the advantage of a client. Delays sought in the hope that testimony will be lost or become stale or that the prosecuting parties will be inconvenienced until they abandon the case, or to continue illegal activity or for other corrupt purposes, undermine the entire system. These practices also bring the bar into disrepute. Such tactics may backfire when judge and prosecutor realize they are being employed; stern judicial response may then operate to the disadvantage of an accused.⁸ The abuse of procedure for purposes of delay ultimately leads to procedural restrictions that are harmful to those with legitimate needs. Thus, there is an obligation on the lawyer to "do everything possible to avoid delays and to expedite the trial."⁹

Since the reasons for invoking procedural devices that result in delay are buried in the mental processes of the lawyer, it is understandably difficult to enforce sanctions for the use of such devices. Indeed, an overly aggressive concern for delay may impel a lawyer to eschew a remedy which in good faith the lawyer believes should be pursued in the client's interest. It may also tend to imply that the law is more concerned with expedition than with justice, an implication that inevitably will cause disrespect for its processes and thus undermine its efficacy. To the extent that the procedural rules permit dilatoriness by the taking of certain procedural steps, the fault is in the procedure and in lax judicial administration, not alone in the lawyer's conduct. The remedy must come through reform of the procedural system. But instances undoubtedly do occur in which lawyers blatantly demand and courts grant delays without substantial cause, sometimes for crass motivations. Such conduct demeans the administration of justice. The responsibility must rest with counsel not to seek such favors¹⁰ and with the courts to refuse to grant them.

Accepting an Excessive Volume of Work

Although lawyers, like other people, vary in their capacity for effective performance, there is a limit to how much work any one lawyer can effectively perform. Some sophisticated defendants have been known to engage a lawyer because the lawyer had so many cases on the calendar that normal priorities of the docket would preclude an additional case from trial for an inordinate period. Obviously it is improper for a lawyer to participate in such a fraud on the courts; apart from that, the lawyer has a duty to accept no more employment than can be effectively performed without unreasonable delay. Elsewhere these standards provide that "[n]either defender organizations nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations."¹¹

1. See, e.g., *United States v. Lesprier*, 558 F.2d 624 (1st Cir. 1977); *In re Allis*, 531 F.2d 1391 (9th Cir. 1976).

2. See AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT §21(d).

3. For a standard dealing with continuances, see standard 12-1.3.

4. "In his representation of a client, a lawyer shall not . . . [k]nowingly make a false statement of . . . fact." ABA, CODE OF PROFESSIONAL RESPONSIBILITY DR7-102(A)(5).

5. "The court has a right to expect that attorneys appearing before it in the matter of postponements, as in other matters, will tell the truth and not, through false representations, trifle with the court's dignity and interfere with its business." *Albano v. Commonwealth*, 53 N.E.2d 690, 692 (Mass. 1944).

6. *In re Sala*, 11 App. Div. 2d 425, 207 N.Y.S.2d 322 (1960).

7. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906).

8. Cf. Seymour, *Some Trade Secrets About Federal Criminal Proceedings*, 15 REC. ASSN. B. CITY N.Y. 447, 449 (1960).

9. AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT §21(d).

10. "In his representation of a client, a lawyer shall not . . . delay a trial . . . when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." ABA, CODE OF PROFESSIONAL RESPONSIBILITY DR7-102(A)(1).

11. Standard 5-4.3.

Commentary

Although it is sometimes argued that control of the calendar should be vested in the prosecutor,¹ in most jurisdictions this responsibility is given by statute to the court or the clerk of court.² The view of this standard that there is an "inherent residual power of the court over its own calendars"³ is also found in an NAC standard and the Uniform Rules of Criminal Procedure.⁴ The NDAA standard differs in that control of the trial calendar would be vested jointly in the prosecutor and the court, with the court allocating blocks of time for criminal cases and the prosecutor determining the order in which cases are to come to trial.⁵ One argument for such a system is that the prosecutor "is more familiar than the court with the complexities of each case."⁶

The trial court should be vested with absolute (not merely ultimate) responsibility over the trial calendar. This judicial responsibility should not be delegated in any way to the prosecutor, even if the ultimate responsibility clearly remains with the court. Because the prosecutor is an adversary party, any degree of direct prosecutorial participation in case scheduling can lead to an appearance of abuse.

Experience over the past decade has indicated that courts can handle case scheduling. As a consequence of recent advancements (especially computerization), judicial administration is being treated as a science. Accordingly, the ultimate goal of case scheduling should be that it is the responsibility of the courts. If, however, a particular trial court is incapable of handling case scheduling, the NDAA approach could be followed, but only as an intermediate step.

To the extent that the prosecutor has a superior knowledge of the complexities of each case, the prosecutor should bring these facts (and other relevant facts, such as the public interest in a speedy trial as to certain cases) to the attention of the court.⁷ Some prosecutors currently take an active role in ensuring that the public is protected by prompt disposition of cases involving defendants whose pretrial liberty is believed to present unusual risks.⁸ Where the trial judge must hear cases in many localities, it is incumbent upon the prosecutor and the clerk of court to advise the judge a reasonable time in advance so that the judge may determine the calendar.

If the prosecutor does not take steps to dispose of an outstanding charge, the case may remain untried for a substantial period of time. The standard would require the prosecutor to file periodic reports with the court on all cases for which trial has not been requested within a prescribed time after a charge⁹ has been filed. Thus, public accountability is imposed upon the prosecutor. The details of such a requirement, of course, will depend on court structure and other unique circumstances in each jurisdiction. It is desirable, however, that the reporting requirement extend to all cases, not merely those of defendants held in custody. The NAC and NDAA standards differ in that they do not require the prosecutor to file reports with the court documenting the reasons for any delays.¹⁰ Rule 721(a) of the Uniform Rules of Criminal Procedure is generally consistent with the standard, but states that an "[appropriate official] shall file a written report. . . ."

The Speedy Trial Act of 1974,¹¹ which provides for a three-year plan for the creation of a ninety-day limit between indictment and trial by 1979, requires each district court to adopt an interim plan for achieving prompt disposition of criminal cases. Each plan must contain a procedure for reports to the court concerning the progress of cases.¹²

Paragraph (b) adopts a preference, in multijudge courts, for an individual calendar system over the master calendar system, still used in many courts, where the docket is controlled by a presiding judge or court clerk. Experience indicates that assignment of cases at the outset to a particular judge who has responsibility for their movement through the court is ordinarily more efficient and more likely to produce prompt disposition of cases.

1. See generally Note, *Calendar Practice in Criminal Courts — Control by Court or Prosecutor*, 48 COLUM. L. REV. 613 (1948).

2. See, e.g., FED. R. CRIM. P. 50; MICH. GEN. CT. R. 501.1, 501.2, 501.4.

3. FED. R. CRIM. P. 50, Advisory Committee Notes.

4. NAC, COURTS 9.4; NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE 721(a). See also standards 3-5.1 and 18-6.1(c).

5. NDAA, NATIONAL PROSECUTION STANDARDS 15.1(A).

6. Note, *supra* note 1, at 618.

7. See the commentary to standard 12-1.1 for a list of relevant factors that related standards suggest be taken into consideration in determining priority among criminal cases.

8. D. FREED & P. WALD, *BAIL IN THE UNITED STATES* 83 (1964); NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, PROCEEDINGS 208 (1965).

9. "Charge" means a written statement filed in court which accuses a person of an offense and which is sufficient to support a prosecution; it may be an indictment, information, complaint, or affidavit, depending on the circumstances and the law of the particular jurisdiction.

10. NAC, COURTS 9.4; NAC, CRIMINAL JUSTICE SYSTEM 5.4; NDAA, NATIONAL PROSECUTION STANDARDS 15.1.

11. Pub. L. No. 93-619, §101, Jan. 3, 1975, 18 U.S.C. §§3161-3174 (1976).

12. 18 U.S.C. §§3164-3166 (1976). See also ABA, TRIAL COURTS 2.51(a).

Commentary

Courts have a responsibility to provide the parties with fair opportunity for presentation of the matters in controversy, adequate notice and sufficient preparation time for their appearances, and reasonable schedule adjustment where necessary to make this possible. Under modern conditions, fulfilling these responsibilities requires careful and well-ordered management of the court's resources of personnel, facilities, and time. Moreover, the court is responsible for bringing cases to conclusion without undue delay. Justice delayed is justice denied to the extent that delay postpones resolution of the parties' rights and may result in loss or deterioration of the evidence upon which their rights will be determined. Accumulated delay may produce backlog crises that can precipitate procedural short-cuts, resulting in inadequate consideration of the merits of individual cases and confusion and conflict in allocation of the court's resources. These consequences constitute a failure of justice and subject the court system to public criticism and loss of public confidence in its fairness and efficiency.

Assuring adequate consideration of cases without undue delay requires the court to exercise active supervision of its caseflow. The alternative to management by the court is management by the bar or, in criminal cases, by the prosecutor. The members of the bar are not in a position to schedule cases so that all cases move forward in a fair and orderly way. Each lawyer's immediate concern necessarily centers on the cases in which he is participating; lawyers as a matter of professional courtesy must accommodate each other's needs for relief from compliance with scheduling rules and they sometimes resort to scheduling pressure as a bargaining device. These maneuvers not only delay individual cases but permit backup and disruption in the flow of other cases. Many conventional calendaring mechanisms involve indirect delegation of caseflow movement to the bar, for example, where cases are set through trial readiness documents filed solely at the discretion of the parties. Documents such as "notice of issue," "certificate of readiness," and "request for setting," may be employed in this way. Such devices leave it to agreement or coercion by the parties to decide when a matter is to be heard, with the court performing only a secondary arbitral role in securing compliance with scheduling rules. Where the prosecutor manages the scheduling of crim-

inal cases, he can do so to his own tactical advantage and in any event may give that appearance. Only the court has a vantage point comprehending all the cases and a position of impartiality toward them from which to provide fair and orderly direction to their movement.

Misdirected effort in a court's management of its calendar can result in equally gross inefficiency. Some courts in attempting to economize their own time over-schedule hearings and trials to such an extent that the parties, witnesses, and counsel are compelled to spend hours and even days idly waiting their turn to be heard. In addition to needlessly burdening the participants, this form of mismanagement often coerces parties into settling, induces cynicism about court schedules that makes effective scheduling impossible, and results in public disrespect for the courts.

The court's responsibility for case movement should commence when the case is filed and continue through to its final disposition. Continuous monitoring by the court can advance case progress even in the pre-trial stages of litigation (pleading, motions, discovery) that are chiefly in the hands of the attorneys for the parties. Continuous supervision of caseflow does not require that the court always be actively involved in advancing the progress of every case. The discovery stage of civil cases, for example, generally may be scheduled on the assumption that it will progress properly at the instance of the parties.

The court's supervision should include attention to the special circumstances of individual cases. Expedited hearing or trial should be afforded where the public interest or needs of the parties would be served thereby. On the other hand, suspension of the progress of an individual case may be deliberately arranged, for example to allow for injury stabilization in personal injury cases or to allow subsidence of notoriety in highly publicized criminal cases. The essential point is that such periods should be established by the court, upon appropriate consultation with the parties, as part of the case's schedule and should not be the product of inattention or indifference. Moreover, effective court supervision need not and should not be exercised merely through the sanctions of dismissal or default. Such sanctions can reinforce attentive monitoring, but should be used only after appropriate warning.

Court responsibility for case movement should terminate only when no further court action is required. In most types of criminal cases this point is reached upon dismissal, acquittal, the imposition of sentence, or disposition of post-trial motions, except to the extent the court is involved in probation supervision. In civil cases the court's responsibility usually terminates upon dismissal, entry of judgment or final decree, or disposition of post-trial motions. However, there are situations in which the court has responsibilities that extend further. Where an appeal is taken, the trial court should facilitate expeditious preparation and transmission of the record on appeal. Where the court's decree requires continued supervision by the court, with or without active aid from the prevailing party, the court should provide suitable procedures for monitoring compliance. Securing faithful compliance with custody and support awards in domestic relations cases, in particular, generally necessitates continuing supervision or accounting. Standardized procedures, administered by the court staff, should be established for this purpose. The use of a court trust officer to receive, disburse, and monitor payment of support awards is especially important.

ABA Standard for Criminal Justice 6-1.4 (Special Functions of the Trial Judge)

Commentary

The thrust of this standard is that a trial judge has personal responsibilities for accomplishing the work of the courts expeditiously.¹ This standard is based on canon 3A of the ABA Code of Judicial Conduct, which directs a judge to give priority to the duties of office over all other activities and to "dispose promptly of the business of the court."

The revised canons reflect in more general terms a directive that was specific in the original canons: "A judge should be prompt in the performance of his judicial duties, recognizing that the time of litigants, jurors and attorneys is of value and that habitual lack of punctuality on his part justifies dissatisfaction with the administration of the business of the court."² Thus, judges should observe a business-like working schedule, confine vacations and other days away from court within authorized limits, and promptly and resolutely dispose of matters under submission to them, giving the highest priority to hearing and determining the merits of cases. Moreover, judges should adjust their working habits to the requirements of the court as a whole, coordinate efforts with other judges and with auxiliary court staff, and make required reports concerning their individual caseloads.

It has been observed that public dissatisfaction with our system of justice tends to overlook defects in substantive law and focuses on the organization of our courts and how they manage their business. Public respect for the courts is therefore particularly susceptible of being diminished by the inefficient use of courtroom time. When dockets are crowded and prompt justice is jeopardized, public support for reasonable requests for additional judges can be seriously eroded by the failure of sitting judges to meet ordinary standards of promptness and full use of the working week.

To meet this standard it is essential that judges organize their courts for the prompt and convenient dispatch of business. A detailed "plan" for doing so is included in an NAC standard³ which provides that daily sessions in criminal courts "should commence promptly at 9 A.M. and continue until 5 P.M. unless business before the court is concluded at an earlier time and it is too late in the day to begin another trial." More in accord with the generalized approach of this standard is standard 2.31 of the ABA Trial Courts standards, which reads: "Every judge is responsible for disposing promptly of the judicial business assigned to him, doing his share of the work of his court, and facilitating management of the court's caseload."

To make the utilization of judicial time more effective, quasi-judicial and administrative tasks should be performed by court staff under the court's supervision, insofar as possible. Moreover, judges should direct

the actions of the court staff toward the proper management of judicial business and not tolerate abuses and neglect by the court staff in the discharge of their duties.

So far as practicable, administrative procedures and policies should be in writing, to help assure careful deliberation in making policy and uniformity and consistency in its administration.

Responsibility for efficient court administration rests upon each individual judge. Supervisory responsibility, however, should be established in a presiding judge and, where necessary, associate presiding judges. The presiding judge should also have responsibility for supervising the court executive's management of court staff services.

All court administrative procedures should be regularly reassessed by critical observation of present operations, liberal consideration of alternatives, and appropriate experimentation with new techniques and procedures.⁴

This is not intended to suggest a callous disregard of the legitimate engagements of counsel before other courts, at least so long as the engagements do not result from a deliberate or careless undertaking to try more cases than counsel can reasonably expect to handle. Nor is it intended to encourage in judges an excess of zeal that will occasionally induce a trial judge to extend court hours unreasonably, thereby taxing the energies of counsel and the ability of jurors to give adequate and proper attention to the evidence and proceedings.

Whenever unforeseen or unavoidable circumstances compel delay or postponement, the trial judge should explain to parties, counsel, jurors, and spectators the general nature of the difficulty and estimate the probable duration of the resulting delay.

1. For a discussion of the corresponding duties of lawyers in accomplishing the work of the courts expeditiously, *see* ABA, TRIAL COURTS 2.31 and accompanying commentary: "Every lawyer is responsible for cooperating with the court in administration of its business, assisting in timely disposition of his cases, and keeping his portfolio of cases in such control that he need not seek cancellation or continuance of court dates except in extraordinary circumstances."

2. ABA, CANONS OF JUDICIAL ETHICS 7 (printed with annotations in OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 198, 203 (1967)).

3. NAC, COURTS 4.15.

4. ABA, TRIAL COURTS 2.30, commentary at 48-49.

Commentary

In some courts continuances in criminal cases are routinely granted upon motion of either the prosecuting attorney or the defendant if the other party consents. Regulation of a court's power to grant continuances is crucial, "[s]ince . . . excessive granting of continuances can effectively undermine the provisions of a speedy trial statute."¹ The standard emphasizes that it is the responsibility of the court to make an independent determination as to whether there is in fact good cause for the continuance and to grant a continuance only for so long as is necessary under the circumstances. The policy of granting a continuance upon a showing of "cause" is found in some state statutes,² rule 721(d) of the Uniform Rules of Criminal Procedure, and the NAC and NDAA standards.³ A stricter requirement of extraordinary or exceptional circumstances is included in some state statutes.⁴ Before a continuance can be granted under the Speedy Trial Act of 1974⁵ the judge must consider a number of factors. These include: (1) whether the failure to grant a continuance would be likely to make a continuation of the proceeding impossible or would result in a miscarriage of justice; (2) whether the case is so unusual or complex that it would be unreasonable to expect adequate preparation within the Speedy Trial Act's time limits; and (3) whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the government.⁶

Implicit in the standard is the notion that the need for prompt disposition of criminal cases transcends the desires of the immediate participants in the proceedings. Thus, a continuance should not be granted for calendar congestion,⁷ lack of diligent preparation by the prosecution,⁸ the hospitalization of a defense counsel when an associate of the defense counsel is ready to proceed,⁹ change of counsel at a late date in the trial,¹⁰ or "for professional reasons" so defense counsel can collect his or her fee.¹¹

Although the standard deals specifically with continuances, it should be read to cover other procedures that have the same impact. Illustrative is the procedure permitted in some jurisdictions whereby the prosecutor may enter a nolle prosequi with leave, which leaves the charge outstanding and allows the prosecutor to restore the case to the calendar at any time.¹²

1. Poulos & Coleman, *Speedy Trial, Slow Implementation: The ABA Standards in Search of a Statehouse*, 28 HASTINGS L.J. 357, 371 (1976).

2. See, e.g., VA. CODE §19.2-241 (1976); WASH. R. CRIM. P. 3.3(e); see also Poulos & Coleman, *supra* note 1, at 371-373.

3. NAC, COURTS 4.12; NDAA, NATIONAL PROSECUTION STANDARDS 15.4. See also ABA, TRIAL COURTS 2.56.

4. See, e.g., ARIZ. R. CRIM. P. 8.5(b); FLA. R. CRIM. P. 3.191(f).

5. Pub. L. No. 93-619, §101, Jan. 3, 1975, 18 U.S.C. §§3161-3174 (1976).

6. 18 U.S.C. §3161(h)(8)(B) (1976).

7. *Id.* §3161(h)(8)(C) (1976).

8. *Id.*

9. Giacalone v. Lucas, 445 F.2d 1238 (6th Cir. 1971).

10. Commonwealth v. Scott, 277 N.E.2d 483 (Mass. 1971).

11. L. KATZ, L. KITWIN, & R. BAMBERGER, JUSTICE IS THE CRIME 265 (1972). See also commentaries to standards 3-2.9 and 4-1.2.

12. See Klopfer v. North Carolina, 386 U.S. 213 (1967).

ABA Standard Relating to Trial Courts 2.56

Commentary

Excessive leniency in regard to continuances and extensions is a major contributor to court delay, causing schedule breakdowns even in courts with adequate numbers of judges and staff. Such leniency sets off a cycle in which lawyers expect continuances to be granted, and therefore are not fully prepared for their hearings and trials; because they are unprepared, further continuances become necessary. The results are uncertain scheduling and wasted time for court and counsel as well as undue delay in the disposition of cases.