

Fair Trial and Public Discourse Black Letter

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Criminal Justice Section Standards

Fair Trial and Public Discourse

PART I. GENERAL DEFINITIONS AND PURPOSES

Standard 8-1.1. Purposes of the Standards

(a) These Standards have three primary goals:

(i) First, they are intended to provide a guide to best practices for lawyers and other professionals involved in criminal cases, including investigators and members of law enforcement, with respect to communications with the public;

(ii) Second, they are intended to provide a guide to best practices for lawyers who provide public commentary or consult on criminal cases in which they are not personally involved;

(iii) Third, they are intended to provide a guide to best practices for judges and judicial employees in anticipating and responding to public interest in criminal cases, and ensuring that jurors are not exposed to extrajudicial information about a case.

(b) With respect to each of these goals, these Standards reflect the views of the ABA that:

(i) a transparent and open criminal justice system is of critical importance in our democracy;

(ii) lawyers and others involved in the criminal justice system have a duty to ensure that criminal cases are conducted fairly and that verdicts are rendered solely on the basis of the evidence presented in court;

(iii) lawyers and others involved in the criminal justice system also have a duty to promote respect for and confidence in the criminal justice system; and

(iv) developments in information technology and in how individuals obtain information have made it unnecessary for purposes of these Standards to differentiate between members of the general public and those who are members of the traditional “Press” or “News Media.” This represents a departure from prior editions on these Standards, which were entitled “Fair Trial and Free Press.”

(c) While these Standards are intended to provide a basis for the formulation of internal guidelines within lawyers’ offices, the courts, and law enforcement agencies, they are not intended to serve as the basis in and of themselves for the imposition of professional discipline, to create substantive or procedural rights for accused or convicted persons, to create a standard of care for civil liability, or to serve as a predicate for a motion to suppress evidence or dismiss a charge.

Standard 8-1.2. Definitions of Terms Used in These Standards

For purposes of these Standards:

(a) An “extrajudicial statement” is any oral or written statement that is not made or presented in a courtroom in the course of judicial proceedings or in court filings or correspondence with the court or counsel in connection with a criminal matter. A “public extrajudicial statement” is any extrajudicial statement that a reasonable person would expect to be disseminated to the public or otherwise made available by means of public communication.

(b) A “criminal matter” ordinarily begins when an individual or entity has been publicly identified as a subject of a criminal investigation, arrested, or named in criminal charges, whichever is earliest, and ordinarily ends with a dismissal or verdict; provided, however, that if the charges are not dismissed and no verdict is reached, or a verdict has been reached but there is nevertheless a reasonable likelihood of a new trial, a “criminal matter” continues until the charges are dismissed or a verdict is reached in the new trial.

(c) A “lawyer participating in a criminal matter” is:

(i) any lawyer who is participating or who has participated in the investigation or litigation of the criminal matter;

(ii) any lawyer who is representing or who has represented a witness or likely witness in connection with the criminal matter; or

(iii) any lawyer who works for the same firm or government agency as a lawyer described in subsection (i) or (ii).

PART II. CONDUCT OF ATTORNEYS

Standard 8-2.1. Conduct by Lawyers Participating in a Criminal Matter

(a) Subject to any additional limitations imposed by local or professional rules, during the pendency of a criminal matter, a lawyer participating in that criminal matter should not make, cause to be made, condone or authorize the making of a public extrajudicial statement if the lawyer knows or reasonably should know that it will have a substantial likelihood of:

- (i) influencing the outcome of that or any related criminal trial or prejudicing the jury venire, even if an untainted panel ultimately can be found;
- (ii) unnecessarily heightening public condemnation of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation, or of a witness or victim; or
- (iii) undermining the public's respect for the judicial process.

As a general matter, lawyers participating in a criminal matter should consult with their supervisors prior to making any public extrajudicial statements.

(b) During the pendency of a criminal matter, a lawyer participating in that criminal matter should make reasonable efforts to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the lawyer from making a public extrajudicial statement that the lawyer would be prohibited from making under these Standards or other applicable rules of professional conduct, or engaging in conduct prohibited by these Standards.

(c) This Standard should not be construed as prohibiting a lawyer participating in a criminal matter from releasing or authorizing the release of a record or document that the lawyer is required to release under state open records laws or the federal Freedom of Information Act, upon receipt of a proper request. A lawyer participating in a criminal matter should not place statements or evidence into the court record or into a document that is deemed an open record under applicable law solely for the purpose of circumventing this Standard. If the lawyer has reason to believe that the public release of a record or document would create a substantial

probability of harm to the fairness of a trial or other overriding interest, the lawyer should consider seeking a sealing order pursuant to Standard 8-5.2.

(d) Nothing in these Standards is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile offenders or other protected categories of offenders, victims or witnesses, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct publicly made against him or her.

Standard 8-2.2. Specific Guidance Regarding Prosecutorial Statements

(a) Statements regarding the following subject areas, when made by prosecutors, pose a particular risk of violating Standard 8-2.1(a) and therefore ordinarily should be avoided by a lawyer participating in a criminal matter as a prosecutor during the pendency of that matter:

(i) the prior criminal record of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation;

(ii) the character, credibility, or reputation of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation, or the race, ethnicity, creed, religion, or sexual orientation of such person unless such information is necessary to apprehend a suspect or fugitive;

(iii) the personal opinion of the prosecutor as to the guilt or innocence of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation;

(iv) the existence or contents of any confession, admission, or statement given by a defendant or a person or entity who has been publicly identified in the context of a criminal investigation, or the refusal or failure of such person to make a statement;

(v) the performance or results of any examinations or tests, or the refusal or failure to submit to an examination or test by a defendant or a person or entity who has been publicly identified in the context of a criminal investigation;

(vi) the nature of physical evidence expected to be presented;

(vii) the identity, race, ethnicity, creed, religion, or sexual orientation, expected testimony, criminal record, character, reputation, or credibility of prospective witnesses other than the victim, and the race, ethnicity, creed, religion, sexual orientation, expected testimony, criminal record, character, reputation, or credibility of the victim;

(viii) the possibility of a plea of guilty to the offense charged, or other disposition; and

(ix) information that the lawyer knows or has reason to know would be inadmissible as evidence in a trial.

(b) Public statements regarding the following subjects by a lawyer participating in a criminal matter as a prosecutor ordinarily will not violate Standard 8-2.1(a):

(i) statements necessary to inform the public of the nature and extent of the prosecutor's action, such as:

(A) the existence of an investigation in progress, including the general length and scope of the investigation, and the identity of the investigating officer or agency;

(B) the facts and circumstances of an arrest, including the time and place, and the identity of the arresting officer or agency;

(C) the identity of the victim, when the release of that information is not otherwise prohibited by law or would not be harmful to the victim; and

(D) the general nature of the charges against a defendant, provided that the statement explains that the charge is an accusation and that the defendant is presumed innocent until and unless proven guilty;

(E) the name, age, residence, and occupation of a defendant;

(F) the scheduling or result of any stage in the judicial proceeding, and information necessary for the public to locate documents contained within the public court record of the matter.

(ii) statements that serve a legitimate law enforcement purpose, such as:

(A) statements reasonably necessary to warn the public of any ongoing dangers that may exist or to quell public fears; and

(B) statements reasonably necessary to obtain public assistance in solving a crime, obtaining evidence, or apprehending a suspect or fugitive.

Standard 8-2.3. Specific Guidance Regarding Defense Statements

(a) Public statements regarding the following subjects by a lawyer participating in a criminal matter as a defense attorney, if made after a criminal charge has been filed, pose a particular risk of violating Standard 8-2.1(a) and therefore ordinarily should be avoided by a lawyer participating in a criminal matter as a defense lawyer after a charge has been filed:

- (i) the personal opinion of the defense attorney as to the guilt or innocence of the defendant;
- (ii) the existence or contents of any confession, admission, or statement given by the defendant;
- (iii) the performance or results of any examinations or tests, or the defendant's willingness to submit to an examination or test;
- (iv) the nature of physical evidence expected to be presented;
- (v) the identity, race, ethnicity, creed, religion, or sexual orientation, expected testimony, criminal record, character, reputation, or credibility of alleged victims or prospective witnesses;
- (vi) the offer or refusal of a plea agreement or other disposition; and
- (vii) information that the lawyer knows or has reason to know would be inadmissible as evidence in a trial.

(b) Public statements regarding the following subjects by a lawyer participating in a criminal case as a defense lawyer ordinarily will not violate Standard 8-2.1(a):

- (i) the general nature of the defense;
- (ii) the name, age, residence, and occupation of the defendant or a person or entity who has been publicly identified in the context of a criminal investigation;

- (iii) the facts and circumstances of an arrest, including the time and place;
 - (iv) the scheduling or result of any stage in the judicial proceeding, and information necessary for the public to locate documents contained within the public court record of the case; and
 - (v) a request for assistance in obtaining evidence;
- (c) If the mere filing of a criminal charge is likely to cause grave harm to the defendant's business, career, employment, or financial condition prior to the resolution of the criminal case, which harm will not likely be substantially repaired by later exoneration of the defendant, the lawyer may participate in the formulation of a response to the charge by the defendant or the defendant's other representatives to mitigate the harm that includes an accurate public extrajudicial statement concerning:
- (i) the performance of any examinations or tests, or the defendant's willingness to submit to an examination or test;
 - (ii) the nature of physical evidence expected to be presented; or
 - (iii) the identity, expected testimony, or credibility of prospective witnesses.

The decision to participate in the formulation of such a response should not be made lightly. When such a statement is issued, it should be limited to such information as is necessary to mitigate the harm caused by the charge.

Standard 8-2.4. Statements by Legal Commentators and Consultants

- (a) A lawyer may serve an important role of educating the public regarding the criminal justice system by providing legal commentary with respect to a criminal case. A lawyer may also legitimately provide consulting services to a newsgathering entity or individual about a criminal case. A lawyer who is participating in a criminal matter should not undertake either of these roles – commentator or consultant – with respect to that criminal matter.
- (b) A lawyer who is serving as a legal commentator should strive to ensure that the lawyer's commentary enhances the public's understanding of the criminal matter and of the criminal justice system generally, promotes respect for the judicial system, and does not materially

prejudice the fair administration of justice, in the particular case or in general. To that end, a legal commentator should:

(i) Have an understanding of the law and facts of the matter so as to be competent to serve as a commentator;

(ii) Refrain from providing commentary designed to sensationalize a criminal matter; and

(iii) Prior to providing commentary, disclose to the public or the entity or individual requesting commentary any interests the lawyer has in the proceedings, including:

(A) the representation of a client, past or present, who may be affected by the proceedings;

(B) any relationships with the lawyers, judge, victim, witnesses or parties in the proceedings; and

(C) the fact that the lawyer is being compensated for providing commentary, if that is the case, and the source of such compensation.

(c) A lawyer serving as a commentator should exercise great caution if asked to express personal opinions regarding the performance of the participants or the likely outcome of the proceedings. If the lawyer chooses to respond to such inquiries, the lawyer should identify with specificity the basis for any such opinions.

(d) A lawyer serving as a legal commentator or consultant should not help provide information:

(i) that is under seal;

(ii) that was obtained in violation of a protective order;

(iii) that is grand jury information that has not been released; or

(iv) the disclosure of which would violate the lawyer's duty of confidentiality or loyalty.

PART III. CONDUCT OF LAW ENFORCEMENT OFFICERS AND EMPLOYEES IN CRIMINAL CASES

Standard 8-3.1. Extrajudicial Statements and Disclosure of Information by Law Enforcement Officers and Employees of Law Enforcement Agencies.

(a) Subject to any additional limitations imposed by local or professional rules, law enforcement officers and employees of law enforcement agencies should not make, cause to be made, condone or authorize the making of a public extrajudicial statement that a lawyer would be prohibited from making pursuant to Standards 8-2.1 and 8-2.2.

(b) Law enforcement officers and employees of law enforcement agencies should not disclose, cause to be disclosed, or condone or authorize the disclosure of information, images, or documents relating to a criminal matter that are not part of the public court record. This Standard should not be construed as prohibiting law enforcement officers and employees of law enforcement agencies from releasing or authorizing the release of a record or document that the agency is required to release under state open records laws or the federal Freedom of Information Act, upon receipt of a proper request. A law enforcement officer or employee of a law enforcement agency should not place statements or evidence into the court record or into a document that is deemed an open record under applicable law solely for the purpose of circumventing this Standard.

(c) Nothing in this standard is intended to preclude any law enforcement officer or employee of a law enforcement agency from replying to charges of misconduct that are publicly made against him or her or from participating appropriately in any legislative, administrative, or investigative hearing.

Standard 8-3.2. Conduct with Respect to an Individual in Custody

(a) Law enforcement officers and employees of law enforcement agencies should not exercise their authority over an individual in a manner deliberately designed to increase the likelihood that images of the individual in custody will be disseminated to the public or otherwise made available by means of public communication.

(b) Law enforcement officers and employees of law enforcement agencies who receive a request for an interview with an individual in their custody should transmit that request to the individual only upon the approval of the individual's lawyer, where that individual is represented by counsel in a pending challenge to his confinement.

PART IV. CONDUCT OF JUDGES AND COURT PERSONNEL IN CRIMINAL CASES

Standard 8-4.1. Extrajudicial Statements and Disclosure of Information by Court Personnel

(a) Subject to any additional limitations imposed by the applicable rules of judicial conduct or other local or professional rules, court personnel, including judges and law clerks, should not make, cause to be made, or condone or authorize the making of any public extrajudicial statement about a criminal matter other than one concerning the processing of the case.

(b) Court personnel, including judges and law clerks, should not disclose, cause to be disclosed, or condone or authorize the disclosure of information, images, or documents relating to a criminal matter that are not part of the public court record. This Standard should not be construed as prohibiting court personnel from releasing or authorizing the release of a record or document that the court is required to release under state open records laws or the federal Freedom of Information Act, upon receipt of a proper request.

PART V. CONDUCT OF JUDICIAL PROCEEDINGS IN CRIMINAL CASES

Standard 8-5.1. Prior Restraints

(a) Protecting the fairness of a criminal trial is by itself an insufficient basis for rules or judicial orders prohibiting members of the public from disseminating or otherwise making available by means of public communication any information in their possession relating to a criminal matter.

(b) If a lawyer participating in a criminal matter, or other person subject to these Standards, has repeatedly violated these Standards, a judicial order restraining such persons from making further public statements or disclosing non-public information in violation of these Standards may be appropriate. Such orders should be used sparingly and, when used, should be specific in describing to whom the order applies and what statements are prohibited. Prior to issuing such an order, the court should provide notice and an opportunity to be heard to those who would be affected by the proposed order and the public. Any such order should include written findings sufficient to justify its issuance, including that continued violations create a substantial danger to the fairness of the trial or other compelling interest, that the proposed order will effectively prevent or substantially lessen the potential harm, and that there is no less restrictive alternative reasonably available to prevent that harm.

Standard 8-5.2. Public Access to Judicial Proceedings and Related Documents and Exhibits

(a) Subject to the limitations set forth below, in any criminal matter, the public presumptively should have access to all judicial proceedings, related documents and exhibits, and any record

made thereof not otherwise required to remain confidential. A court may impose reasonable time, place and manner limitations on public access.

(b) A court may issue a closure order to deny access to the public to specified portions of a judicial proceeding or to a related document or exhibit only after:

(i) conducting a hearing after reasonable notice and an opportunity to be heard on the proposed order has been provided to the parties and the public; and

(ii) setting forth specific written findings on the record that:

(A) public access would create a substantial probability of harm to the fairness of the trial or other overriding interest which substantially outweighs the defendant's or the public's interest in public access;

(B) the proposed closure order will effectively prevent or substantially lessen the potential harm; and

(C) there is no less restrictive alternative reasonably available to prevent that harm, including any of the measures listed in Standard 8- 5.3 or permitting access to one or more representatives of the public.

(c) In determining whether a closure order should issue, the court may accept the items for which a seal is being requested under seal, in camera or in any other manner designed to permit a party to make a prima facie showing without public disclosure of that matter. The motion seeking to close access to those items must itself, however, be filed in open court unless the requirements of subsection (b) are met.

(d) If the court issues a closure or sealing order, the court should consider imposing a time limit on the duration of that order and requiring the party that sought the order to report back to the court within a specified time period as to whether continued closure or sealing is justified pursuant to the requirements set forth in subsection (b). If those requirements are no longer met, the documents or transcripts of any sealed proceeding should be unsealed.

Standard 8-5.3. Mitigating the effects of publicity on the fairness of a trial

If a case has been the subject of significant publicity, the court should consider the following options, to the extent available under applicable law in the jurisdiction and subject to the standards elaborated below, as means of mitigating the prejudicial effects of such publicity. The court should select the most effective option or options in light of the circumstances presented that will be the least disruptive to the proceedings and to jurors. The options include:

- (a) ordering a continuance;
- (b) conducting voir dire as to pretrial publicity;
- (c) providing clear cautionary instructions to the jury from the outset of jury selection;
- (d) providing clear cautionary instructions to court personnel, parties, lawyers, and witnesses;
- (e) providing lawyers with additional peremptory challenges;
- (f) impanelling additional alternate jurors;
- (g) importing jurors from another district or locality;
- (h) ordering a severance;
- (i) impanelling an anonymous jury;
- (j) sequestering the jury; and
- (k) ordering a change of venue.

Standard 8-5.4. Voir dire

If it is likely that any prospective jurors have been exposed to prejudicial publicity, they should be individually questioned to determine what they have read and heard about the case and how any exposure has affected their attitudes toward the trial. Questioning should take place outside the presence of other chosen and prospective jurors and in the presence of counsel. A record of prospective jurors' examinations should be maintained and any written questionnaires used should be preserved as part of the court record.

Standard 8-5.5. Cautionary jury instructions

(a) The court should instruct potential jurors and jurors that they must:

(i) avoid any extrajudicial information about the case;

(ii) not seek out any extrajudicial information related directly or indirectly to the case;

(iii) not communicate about the case with anyone except as authorized by the court; and

(iv) immediately inform the court if they become aware that any other juror has violated the court's instructions.

(b) The court's instructions should explain the rationale for these prohibitions and specifically address how the prohibitions relate to the types of information sources and means of communication that the jurors and

(c) These instructions should be given:

(i) to potential jurors at the beginning of jury selection, and, as warranted, throughout the jury selection process until a jury has been selected and sworn; and

(ii) to jurors at the conclusion of every trial day, and before breaks if the court deems it appropriate.

(d) If, during the trial, the court determines that information has been disseminated or otherwise made publicly available that goes beyond the record on which the case is to be submitted to the jury and raises serious questions of prejudice, the court may on its own motion or on the motion of either party question each juror, out of the presence of the others, about exposure to that information. The examination should take place in the presence of counsel, and a record of the examination should be kept. If the court determines that a juror is no longer likely to be able to render a fair and impartial verdict based solely on the evidence in the trial, the court should excuse the juror.

(e) The court should consider providing post-verdict guidance to jurors concerning any inquiries they may receive about the case including their right to respond or not respond to inquiries about

the case and cautioning them about related risks, including the potential prejudice to subsequent related proceedings.

Standard 8-5.6. Court plans for accommodating public interest in a criminal matter

(a) Standing rules for the jurisdiction. To the extent practicable, jurisdictions should adopt standing orders or rules of court for accommodating public interest in any particular criminal matter. These standing orders should include general provisions concerning:

(i) the procedures to be followed for individuals and entities to request official designation as representative sources of coverage, including but not limited to recording or broadcasting by electronic or other media of judicial proceedings in the criminal matter;

(ii) the extent to which such coverage, including recording or broadcasting by electronic or other media, is authorized by applicable statute and rules of court, in courtrooms, immediately adjacent areas, and in other parts of the courthouse and its environs;

(iii) conditions, limitations, and guidelines that will allow such coverage as is permitted to take place in a manner that will be unobtrusive, will not distract or otherwise adversely affect witnesses, jurors, or other trial participants, and will not otherwise interfere with the administration of justice, including:

(A) how seats in the courtroom will be allocated if sufficient seating is not available to accommodate all those with interest in attending, and any alternative arrangements that can be made to accommodate overflow interest;

(B) how documents and other exhibits will be made available; and

(C) any applicable rules limiting the public dissemination of visual images of jurors, judges, witnesses, or other trial participants, and any other restrictions on the dissemination of information about jurors, judges, witnesses, or other trial participants.

(b) Matter-specific rules. For matters in which there is likely to be significant public interest, the trial judge court should adopt and make available specific orders to effectuate subsection (a)(iii) of this standard at the earliest practicable time.

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