

**AMERICAN BAR ASSOCIATION
COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS
CRIMINAL JUSTICE SECTION
NATIONAL DISTRICT ATTORNEYS ASSOCIATION
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION**

**REPORT TO THE HOUSE OF DELEGATES
[ON TRAINING IN THE EXERCISE OF DISCRETION]**

RECOMMENDATION

RESOLVED, That the American Bar Association urges federal, state, territorial and local governments, and licensing authorities to fund professional associations and organizations to develop programs to train all criminal justice professionals -- including judges, prosecutors, defense counsel, probation and parole officers, and correctional officials -- in understanding, adopting and utilizing factors that promote the sound exercise of their discretion.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments and licensing authorities to recognize that such training should be credited towards continuing education program requirements.

REPORT

The criminal justice system in the United States is uniquely decentralized. Approximately ninety-five percent of criminal cases are prosecuted at the local level, and about 2500 jurisdictions have elected chief prosecutors.¹ Within a particular county or judicial district, a variety of line prosecutors and law enforcement agents exercise discretion independently of one another. Probation and parole officers operate with broad discretion at the field level, sometimes reporting to state correctional agencies or courts, and sometimes reporting to the county. Judges, corrections officials, and parole board members also make independent discretionary decisions.

The discretionary decisions these officials make independently on a daily basis have one thing in common: they have a profound influence on the lives of criminal defendants, on their families, and on the community. Ultimately, the decisions could affect whether a defendant will be able to return to society and remain law-abiding at the conclusion of a court-imposed sentence, whether the victim will be able to overcome the impact of the crime, and whether the community will accept that justice has been accomplished. However, despite the impact these decisions can have, the assumptions underlying them are rarely articulated or examined. Officials in different jurisdictions rarely compare notes on the use of discretion, and the exercise of discretion is even more rarely made the subject of systematic training or regulation.

The Commission was persuaded by Robert Johnson, the elected prosecutor from Anoka County, MN, and a liaison to the Commission from the Criminal Justice Section, that it is important to identify the significant amount of discretion that exists throughout the criminal justice system, to highlight the importance of exercising that discretion wisely, and to recommend that criminal justice professionals and their associations and organizations develop training programs that will assist them in understanding, adopting and utilizing factors that promote the sound exercise of discretion.

The resolution urges training for all criminal justice professionals who exercise discretion. These include judges, prosecutors, defense counsel, probation and parole officers, and correctional officials. It emphasizes that for helpful training to occur three ingredients are essential. Most important is funding -- i.e., new funds are needed for training that does not now occur. Funding alone is not sufficient, however. Jurisdictions must assure that the work schedules of those to be trained accommodate new training programs, and that the new training programs should be credited toward any continuing education requirements imposed upon criminal justice professionals.

¹ In Alaska, Rhode Island, and Delaware, the elected attorney general is the chief prosecutor. In Connecticut and New Jersey, as in the federal system, the chief prosecutor is appointed by the Governor. *U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, National Survey of Prosecutors in State Courts, 2001, May 2002*, available at <http://www.ojp.usdoj.gov/bjs/pub/ascii/psc01.txt>. There is no qualification (other than a license to practice law) for the office of district attorney.

Judges

The American Bar Association has consistently worked to shore up the discretionary role of judges in criminal sentencing. The ABA Sentencing Standards (3d ed.) opt for some form of guidelines to avoid unwarranted disparities in sentencing while assuring that a sentencing judge may consider the unique characteristics of each offender and the circumstances in which an offense was committed. The standards assume that judges will exercise their discretion appropriately, but the fact is that in many jurisdictions judges, whether elected or appointed, receive little training in the range of options available to them and in the factors that might warrant consideration when these options are considered. Judicial conferences are common throughout the United States, and CLE for judges serves the important function of keeping judges current on legal developments. Training in the appropriate exercise of discretion should be an important part of judicial training. It is also important to keep judges aware of sentencing options, including rehabilitative programs that may be available within their jurisdiction. Accurate and complete information will help to ensure that a judge is able to develop the most appropriate sentence in each case.

Sentencing guidelines systems have been adopted in the federal system and some states. One principal goal is avoidance of unwarranted disparities in sentencing. Guidelines may work to avoid such disparities, but training in the exercise of discretion holds out some promise of also helping to reduce unwarranted disparities.

Prosecutors

Prosecutors act as gatekeepers. No person may be convicted of a crime unless a prosecutor brings and pursues a charge against him.² Prosecutors have traditionally controlled programs that divert offenders out of the criminal justice system and into social service treatment, and programs that work to defer adjudication and sentencing. In recognition of their responsibility for public safety, prosecutors have more recently become involved in crime prevention strategies.³ Prosecutor-driven prevention programs may deal with issues ranging from community prosecution, mental health, child protection, and juvenile justice, to violence against women, gun violence, and white collar crime.

Since successful reentry and reintegration of offenders means less crime and fewer victims, prosecutors have also taken an interest in reentry programs and the collateral

² ABA Standards for Criminal Justice Prosecution Function and Defense Function (3rd Ed.), Standard 3-2.1 (Prosecution Authority to be Vested in a Public Official), Standard 3-3.4 (Decision to Charge); NDAA National Prosecution Standards (2nd Ed.), § 43.1 (Charges, Prosecutorial Discretion), § 44.1 (Diversion, Prosecutorial Discretion).

³ Some of the innovative prevention programs initiated and administered by prosecutors are encouraged and funded by the United States Department of Justice, and some are developed and funded locally. The American Prosecutors Research Institute (APRI), founded by the National District Attorneys Association in 1984, tracks the development of these programs nationally, to ensure that state and local prosecutors have access to the most up-to-date and relevant research. See the APRI's Major Program Areas at <http://www.ndaa-apri.org/apri/programs/index.html>.

consequences of conviction.⁴ But this is a new role for prosecutors, and it may mean new responsibilities for defense counsel who must learn how to talk with prosecutors about new prosecutorial alternatives. The fact is that as new programs develop, both prosecutors and defense counsel need to understand the factors that may result in an offender receiving the benefit of a sentence alternative to incarceration.

In jurisdictions that have adopted determinate sentencing with guidelines and mandatory minimums, prosecutors have effective control over some sentences by virtue of the charges they bring. The charging decisions in these jurisdictions may be especially important, both prosecutors and defense counsel need to understand the factors that are likely to be considered as charging decisions are made.

During the course of its hearings, the Commission heard from a number of prosecutors who have developed innovative community-based sanctioning programs, including community courts in Oregon, therapeutic community-based treatment centers in Arkansas, and extended in-patient drug treatment in New York.⁵ Many of the prosecutors who participated in the hearings have been leaders in the development of partnerships with defenders and courts and other justice stakeholders, partnerships that have yielded impressive reductions in the number of people returning to prison, or going there in the first place. Robert Johnson, himself a long-time leader in his own district and in the larger community of prosecutors, expressed concern that there is no forum in which prosecutors can share their experiences and learn about the variety of innovative crime prevention approaches being developed around the country – often under the auspices of the local prosecutor’s office.

Mr. Johnson pointed out that prosecutors themselves tend to set funding priorities for training in order to carry out their responsibilities to the public. Thus, they have developed training in the mechanics of prosecution -- such as search and seizure, confessions, lineups, DNA, cybercrime, and other trial-related aspects of their work -- because they believe that trial tactics training improves their ability to win cases. But, he emphasized that the public does not ask prosecutors simply to win cases. It asks prosecutors to reduce crime and victimization, which requires development of a broader and more nuanced crime control strategy. Mr. Johnson urged that training in the exercise of discretion - arguably the most important aspect of a prosecutor's responsibility – might improve prosecutorial effectiveness because the exercise of discretion is at the core of an overall strategy to reduce crime.

⁴ In July 2005, the National District Attorneys Association adopted “Policy Positions on Prisoner Reentry Issues,” available at http://www.ndaa-apri.org/pdf/policy_position_prisoner_reentry_july_17_05.pdf. This document affirms prosecutors’ interest in offender reentry as a public safety issue, and recommends that “prosecutors should educate themselves regarding the reentry programs that are provided or being proposed in their local jails and state prisons in addition to those reintegration plans that are being supervised by probation, parole, or their local community services board and be supportive of appropriate programs and plans.” It states that “America’s prosecutors should, where practicable, be participants in addressing th[e] issue [of offender reentry] in an effort to reduce recidivism and ensure the safety of victims and the community.”

⁵ Many of these prosecutor-driven programs are described in other sections of the Commission’s report. See particularly Report I on Alternatives to Incarceration and Conviction for Less Serious Offenders.

Training may encourage prosecutors to experiment with programs that divert an offender into an alternative sanctioning system that may benefit both the victim and society. Training programs can enable prosecutors who have such programs to share information about successes and failures with other prosecutors and compare notes on the best ways of training subordinates in making discretionary decisions. Training programs may help prosecutors to develop partnerships with courts, defenders, other actors in the justice system, community service providers, and community groups – all of whom are stakeholders in public safety and crime control.

Defense Counsel

It is not as common to think of defense counsel exercising discretion as it is to think of judges, prosecutors, probation and parole officers, and correctional officers exercising discretion. Yet, there are at least two aspects of discretion in which defense counsel should be trained. First, they should know and understand the factors most likely to influence the other criminal justice actors in making decisions in order to be able to offer evidence and to make arguments designed to assist clients in benefiting from discretionary decisions. Second, they need to understand the options available to defendants in a variety of community supervision or diversion programs, and the various risks and benefits of each program in order to be able to offer sound legal advice to clients about which options are best for them.

It is probably true that defense counsel have less power than other criminal justice professionals to initiate actions, as opposed to responding to the initiations of other actors. But, it is vital for defense counsel to understand the extent of discretion employed by others, the standards governing the exercise of discretion, and the ways in which discretionary decisions can enable defense counsel to seek the best possible result for their clients.

It is equally important for defense counsel to understand the programs and policies underlying the programs that are available to their clients. Most criminal defendants rely heavily upon the advice of their counsel in deciding whether to plead guilty or go to trial, to opt for an alternative disposition or to prefer the traditional adjudicatory approach to a criminal case, or to enter a treatment program or simply serve a sentence. Defense counsel are called upon daily to exercise careful judgment in considering the options available to a defendant and the characteristics of that defendant. These judgments are in the nature of discretionary recommendations, and they require as much careful thought and assessment as the decision of prosecutors in making charging decisions.

The Commission also heard from defense counsel that the success or failure of prosecutorial diversion/community supervision programs may turn on the willingness of defense counsel to support the programs and recommend them to their clients. The best prosecutorial programs are those in which defense counsel, the courts and other criminal justice professional support. Some of the best programs are influenced by suggestions of defense counsel as they persuade prosecutors that programs can be improved in order to both increase the likelihood of a defendant's rehabilitation and decrease the likelihood of recidivism.

Probation and Parole Officials, and Correctional Officials

The Commission also heard testimony about the extent to which probation/parole and correctional officials exercise great power over a criminal defendant's freedom. Probation and parole officials are responsible for supervising probationers and parolees who are given provisional freedom and whose liberty may be limited or controlled by the supervising officials. Correctional officials make the myriad day-to-day decisions that determine the conditions and often the duration of the court-imposed sentence. The parole board makes a discretionary decision to release an inmate under the indeterminate sentencing model, and the parole officer responsible for supervising the offender after release (or the probation officer in the case of a suspended sentence) has the power to recommend whether the offender should return to prison in the case of non-compliance with release conditions, or to give the offender another chance. The efforts of Jorge Montes, Chair of the Illinois Prisoner Review Board, to change the culture of the Board, described in the report on our recommendations on parole supervision,⁶ strikingly illustrate how changing concepts of what constitutes an effective sanction can influence the exercise of discretion on the part of paroling officials.

In jurisdictions that have adopted determinate sentencing and abolished discretionary parole, executive clemency may provide the only possibility of release before the expiration of the sentence. In some jurisdictions parole boards are charged with making clemency recommendations to the governor, as in Illinois, Maryland and Arkansas, and in some jurisdictions a separate clemency board has this function. In a handful of states, including Connecticut, parole and clemency functions co-exist in a single board, which is responsible for making the clemency decision independent of the governor.⁷ Of all the decisions made in the course of a criminal case, the decision whether or not to pardon or commute a sentence is perhaps the most obvious and formal exercise of discretion. Yet few parole boards (or clemency boards) have articulated the considerations that go into exercise of that discretion, established standards, or even shared their experiences with other boards that have the same responsibility.⁸

As a general matter, perhaps out of an abundance of caution, corrections and parole officials do not see their role as involving the exercise of discretion as much as they see it as involving the enforcement of rules. It is important for them to recognize that it involves both, and that the balance of rule and discretion is an elusive and important one in the criminal justice system. Whether or not they are aware of it, that balance is struck by them personally on an almost daily basis.

It is always less risky for a deciding official to opt for incarceration over release to the community. This was brought home to the commissioners at its Chicago hearing, where Patricia

⁶ See Recommendation on Improvement in Probation and Parole Supervision, *supra*.

⁷ Other states that follow this model are Alabama, Georgia, Idaho, South Carolina, and Utah. See Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State by State Resource Guide*, (W.S. Hein, 2006), condensed at <http://www.sentencingproject.org/rights-restoration.cfm>.

⁸ The ABA has taken the position, in response to a recommendation of the Justice Kennedy Commission in 2003, that jurisdictions should "establish standards governing applications for executive clemency." See Report No. 121C, Annual 2003.

Caruso, Director of the Michigan Department of Corrections, there to testify about her agency's reentry programs, was simultaneously dealing long-distance with the political fall-out from a high profile murder committed by a parolee who had apparently been mistakenly released. The decision to release a prisoner always involves some "political" risk. Yet, the just exercise of discretion means that officials who seek to do justice must be willing to accept the responsibility that accompanies release decisions. The Commission was impressed by testimony from Arkansas and Maryland officials that their respective governors take their clemency responsibilities seriously and have commuted sentences in appropriate cases.⁹

Corrections and parole officials should also be trained in the factors that should be considered when discretionary decisions are made that can have profound implications not only for an individual's freedom, but also for the prospect of successful reentry. In order to assure that officials make informed decisions, jurisdictions should provide them with training on the most accurate and current research and findings available as to the effectiveness of the available range of criminal sanctions.

Training and Cross-functional Communication

The Commission believes that it would be particularly helpful if judges, prosecutors, defense counsel, probation/parole and corrections officials, and others who exercise discretion could share with one another their experiences in balancing respect for and observance of rules with the discretionary power to make exceptions to those rules. There is no reason why prosecutors should not share with judges the factors they consider in making charging decisions, or why judges should not share with prosecutors the factors they consider in imposing sentences. Both prosecutors and judges should understand the factors considered by corrections and supervisory officials in deciding when a person should be released and when returned to prison. The standards governing the exercise of executive clemency or other discretionary pardoning authority should also be made clear to all actors in the system.

The sound exercise of discretion is likely to be improved if the actors in the criminal justice system talk to each other about what matters, how much it matters and why it matters. Indeed, the sound exercise of discretion could also be promoted if officials who exercise discretion would include defenders, community representatives, mental health professionals and drug counselors in their training programs. There is a danger when prosecutors train only with prosecutors, judges only with judges, etc. that preconceptions or misconceptions may be reinforced rather than challenged.

In the end, officials with discretion must decide how best to exercise it. The goal should be, however, to provide them with as much valid information and thoughtful guidance as possible. As the Commission has previously recommended,¹⁰ criminal justice officials can benefit from a broader understanding of how they interact with others to accomplish the common goals of justice and public safety.

⁹ See March 3 Hearing Notes, available at <http://www.abanet.org/cecs>.

¹⁰ See Recommendation on Alternatives to Incarceration and Conviction for Less Serious Offenders, *supra*.

Respectfully submitted,

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James R. Thompson, Co-Chair

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