Model Correctional Rules and Regulations

ADMINISTRATIVE SEGREGATION

CORRESPONDENCE

DISCIPLINARY PROCEDURES

GROOMING AND ATTIRE

SEARCH AND SEIZURE

USE OF FORCE

VISITATION

CORRECTIONAL LAW PROJECT
AMERICAN CORRECTIONAL ASSOCIATION
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INTRODUCTION

As everyone even remotely connected with corrections knows, the evolution of correctional law in the past few years has had a tremendous impact on the daily operation of penal facilities. As the constitutional rights of prisoners have been more clearly defined by the courts, the revision of outdated regulations has become more and more difficult yet more and more important.

The model rules and regulations contained in this booklet attempt to provide correctional officials with up-to-date, constitutional procedures which can be implemented without fear of legal attack. In order to insure their continuing legal viability and avoid needless litigation, they also take into account possible future judicial trends. In addition, they were drafted with concern for both institutional security and inmate fairness.

It is hoped that these models will be used in two ways. First, as a basis for comparison with existing regulations which may not be constitutionally sound and, second, as a basic framework for those who need to put "traditional practices" into a more formal context.

This document consists of seven individual models covering the areas of administrative segregation, correspondence, discipline, inmate grooming and attire, search and seizure, use of force and visitation. It is in no way an exhaustive study of all necessary inmate regulations. It has been limited to these few areas because it was felt they were the most crucial, either because of their previous neglect or their impact upon the inmate population.

Following each model is a commentary which explains the regulation and supports its provisions with case law, correctional standards, state statutes, individual state practices or other authority. Where pertinent, a brief discussion of the law is also given.

The best rules are of no use unless followed, therefore it is of vital importance that staff using these rules have appropriate training and supervision so as to understand their powers and duties under the rules. Failure to follow one's own rules may, in some situations, violate an inmate's constitutional rights, exposing institutional officials to potential monetary damages. At the very least, failure to follow a rule can be an embarrassing matter to defend in court, casting a potential shadow over the quality of institutional administration and the integrity of persons directly involved with the incident.

Anthony P. Travisono
Executive Director
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INMATE ACCESS TO RULES

Fundamental to any notion of due process is that persons affected by a rule or rules have the means of determining what such rules require of them.

Up-to-date copies of rules such as are contained in this pamphlet should be given to all inmates upon arrival at an institution. Other copies should be posted or otherwise available for inmate examination, such as in the institution library and segregation units. A procedure should be adopted by which inmates are made aware of changes in rules, including providing copies of changes to inmates.

ADMINISTRATIVE SEGREGATION
Model

I. PURPOSE

Administrative segregation is a level of custody into which an inmate may be classified as a result of a determination that he* presents a substantial risk to the security or order of the institution, the safety of that inmate or others and, therefore, requires separation from the general institution population and strict supervision in a highly structured, controlled setting.

II. PROCEDURES

An individual shall not be placed in administrative segregation status except pursuant to a decision by the classification committee reached as a result of a meeting conducted according to the following procedures.

A. Notice. At least 24 hours prior to the administrative segregation meeting, an inmate shall be given a notice of the meeting which includes a statement of the reason(s) why he is being considered for placement in administrative segregation, the date, time, and place of the administrative segregation meeting, and a list of the following rights which the inmate has regarding the hearing:
   1. The inmate may present witnesses and written statements to the committee and may ask questions of persons participating in the meeting unless doing so would be unduly hazardous to institutional safety or correctional goals. Witnesses also may be excluded if their testimony is irrelevant, redundant, or otherwise unnecessary.
   2. The inmate may have the assistance of a staff member in preparing for the meeting. The staff assistant shall attend the meeting with the inmate. Inmates shall be expected to be responsible for their own presentations except in those situations where assistance is necessary to an adequate presentation of the inmate's case due to the inmate's illiteracy, complexity of the issues involved, or other reason deemed sufficient to the committee. In all cases, a staff assistant may ask questions of persons participating in the meeting.
   3. In the event that the meeting is concerned with an inmate's alleged involvement in an incident for which he could face criminal charges, the inmate has a right to remain silent at the meeting and to know that anything the inmate says at the meeting may be used against him in a criminal prosecution.
   4. The notice shall also indicate that in addition to the specific reasons for which the meeting is being conducted, the committee may consider the inmate's past and present institutional attitude, adjustment and record, and criminal record.

B. If the superintendent or his designee has reasonable cause to believe an inmate is an immediate danger to himself or to others or to the security of the institution, he may place the resident in administrative segregation prior to an administrative segregation meeting. In such an event, the meeting shall be held within 3 working days after the resident is placed in segregation. This period may be extended by special approval of the superintendent. The inmate shall be notified in writing of any such extensions and the reasons therefor.

* Masculine pronouns are used for the sake of simplicity and ease of reading. Where the masculine form is used it should be read as including the feminine.

C. The administrative segregation meeting shall be held by the classification committee or a subcommittee thereof composed of not less than three members. Any member of the committee with direct involvement in an incident giving rise to the meeting or who may be otherwise prejudiced shall disqualify themselves or may be disqualified by the committee chairman.

D. The inmate shall be present at all stages of the meeting except for decisional deliberations by the committee and discussion of information from anonymous sources conducted in accordance with Paragraph III below.

E. Additional Information - the committee may require staff and/or inmates to appear at an administrative segregation meeting to present relevant information. The committee may temporarily adjourn a meeting in order that such additional information be obtained.

III. ANONYMOUS INFORMATION

The decision to place someone in administrative segregation may be based upon information from a source whose identity is not disclosed to the inmate at the meeting when disclosure would create a substantial risk to the safety of the informant. Such information may be presented to the committee orally or in writing.

A. The substance of any information from an anonymous source shall be shared with the inmate at the meeting to the extent that this may be done without creating a substantial risk to the safety of the informant.

B. When the committee considers information from an anonymous source, the name of the source and all details of such information shall be given to the committee out of the presence of the inmate unless nondisclosure of the name and/or details has been previously approved by a staff member designated by the superintendent. Such approval shall constitute the approving official's verification that the source and the information are, in his judgment, reliable and may properly be considered in deciding whether to place an individual in administrative segregation and that nondisclosure of the informant's identity to the committee was necessary to obtain the information and/or to preserve the informant's anonymity.

C. In all cases in which the committee considers information from an anonymous source, a confidential record shall be maintained which indicates the details of such information and the identity of the informant and the degree of the committee's familiarity (or that of the official approving non-disclosure of the informant's identity to the committee) with the informant's reliability. Such records shall be available only to the superintendent, the director of corrections, and their specific designees.

D. The Director of Corrections shall review the complete record of all decisions in which the identity of an anonymous informant was withheld from the committee. Such reviews should be completed within two weeks of the conclusion of proceedings at the institution level, if not otherwise appealed by the inmate, in which case the time guidelines for appeals shall apply. The Director of Corrections shall review or cause to be reviewed the confidential file maintained on all cases which considered information from an anonymous source at least every 90 days.

IV. RECORD

All meetings of the committee shall be tape recorded except for the decisional deliberations of the committee and portions of the meeting when the inmate is excluded while the committee deals with anonymous information.

V. DECISION

A. The committee shall reach a decision based upon information presented at the meeting and shall provide the inmate with a written decision which states the reasons and basis for the committee's decision, and which summarizes the information presented to and considered by the committee. The decision shall be based on substantial, credible information which demonstrates the necessity for segregation and the lack of other available alternatives. The decision shall also state the reasons for the committee's excluding the testimony of any witness offered by the inmate and shall advise the inmate of the right to appeal and of proper appellate procedures.

B. The superintendent may reverse the decision of the committee that a resident need not be segregated. If the superintendent does so, he shall include a written justification for the decision in the administrative segregation meeting record and shall give a copy of such justification to the inmate.

VI. APPEAL

Within 5 days of receipt of the written decision, an inmate may appeal all rulings of and the final decision of the committee to the superintendent, who shall act on the appeal within 3 working days and shall provide the inmate with written reasons for the decision. The superintendent shall also advise the inmate of the right to appeal decisions of the superintendent which overrule a committee decision not to segregate an individual. Such decisions may be appealed to the Director of Corrections, who should act on such appeals within 2 weeks of their receipt.

VII. REVIEW OF ADMINISTRATIVE SEGREGATION STATUS

A. The classification committee shall review the status of all inmates in administrative segregation at least every 30 days. The inmate shall be present at these review meetings and shall have the same rights in such meetings as are available to inmates in initial segregation meetings. The committee shall provide the inmate with a written decision which states the reasons and basis for its decision and which summarizes the information presented to and considered by the committee.

B. If the review committee determines that the inmate should remain in administrative segregation, that decision may be appealed to the superintendent. The superintendent may overrule a classification committee decision to discharge an inmate from administrative segregation. In such cases, the superintendent shall provide a written justification for the decision in accordance with the requirements of Paragraph V.B. and this decision may be appealed to the Director of Corrections.

VIII. CONDITIONS OF CONFINEMENT

All inmates in administrative segregation shall have the following rights, privileges and amenities except as they may be limited in accordance with Section IX of these rules.

A. Cells in administrative segregation shall be equipped and furnished in a manner substantially similar to cells in the general population.

B. Each inmate shall be provided the same opportunities for personal hygiene as are available to the general population, except that an inmate may be limited to three showers per week.

C. Inmates shall be provided with an opportunity to exercise outside of their cells at least one hour a day, 5 days a week. Such exercise shall be outdoors, weather permitting.

D. A representative of the medical staff shall make rounds through the segregation unit on a daily basis. A physician shall make rounds in the segregation unit at least once a week. A record of all visits by medical personnel shall be maintained.
   1. Should an inmate in segregation complain of or exhibit an apparent medical/ dental or psychological problem at times other than the medical staff member's visit, the officer in charge of the segregation unit shall be notified and shall immediately notify the medical staff. Such notifications and action taken shall be recorded.

E. Inmates shall be able to possess the same types and amounts of personal property including clothing as are available to persons in the general population.

F. Inmates shall retain all rights to correspondence and reading, as are available to persons in the general population.

G. Inmates shall retain all rights of access to the courts.
   1. If an institution maintains a law library for inmates in the general population which is not physically available to persons in segregation, the segregation unit should contain a minimal collection of materials sufficient to allow an inmate to make use of the institution's law library.
   2. Inmates in segregation may request up to four law books per day from the main institution library and such books should be delivered, if available, within 24 hours of the request. Inmates in segregation shall be allowed to retain such books in their possession at least overnight.

H. The quality and quantity of food provided inmates in segregation shall be substantially the same as provided inmates in the general population.

I. Inmates in segregation shall be provided the same bedding supplies as are provided persons in the general population.

J. Inmates in segregation may request books from the main institution library and may possess the same number and type of books in their cells as may the general population, including religious publications and pamphlets.

K. Inmates in segregation shall be afforded visiting privileges which are, as much as practicable, equal to those available to persons in the general population.

L. Inmates in segregation shall continue to receive the services of a counselor and they may participate in such educational, vocational, and/or rehabilitative programs as can be provided within the confines of the segregation unit, consistent with the security needs of the unit. An emphasis shall be placed upon making rehabilitative programming available which has as its goal the return of persons to the general prison population.

M. Inmates in segregation may order items from the commissary three times per week. Items from the commissary may be withheld if they are determined by the institution's chief security officer to be a threat to the security of the segregation unit.

N. Institution chaplains shall be available to persons in segregation on at least a weekly basis.

O. Inmates in segregation shall have access to a telephone to a degree substantially equivalent to that available to the general population.

IX. RESTRICTIONS IN CONDITIONS OF CONFINEMENT

A. Non-disciplinary restrictions on the rights, privileges, and amenities available to persons in segregation may be imposed when such restrictions are necessary to prevent the destruction of property, to maintain the health and/or safety of any person and/or otherwise to maintain the security of the segregation unit. Such restrictions shall be imposed on an individual, case by case basis if at all possible and only on the basis of substantial information justifying such restriction(s).
   1. Unless the immediate restriction of a particular item is necessary, restrictions must be approved in advance by the superintendent or the institution's chief security officer. Emergency restrictions shall be reviewed and approved or disapproved by the same official as soon as is reasonably possible following the imposition of such restriction. A written record shall be maintained of all restrictions imposed and the reasons therefore.
   2. Restrictions shall be maintained no longer than is necessary. The segregation unit log shall state the continuing justification and the unit supervisor's approval for the continuation of such restrictions at least every other day. Restrictions imposed on an individual shall also be reviewed at 30-day administrative segregation classification review meetings.
   3. Any inmate for whom a significant restriction of basic cell furnishings, personal hygiene implements (except razors), food, bedding, or standard institutional issue clothing is imposed shall be referred to the mental health staff within 24 hours of the superintendent's approval of such restriction and the medical and/or mental health effects of such restriction on an inmate shall be reviewed by an appropriate member of the institution's medical staff on at least a twice weekly basis.

B. Rights, privileges, or amenities pertaining to exercise, personal property (not including basic cell furnishings, personal hygiene implements, food, bedding, or standard institutional issue clothing), library access, and commissary access may be reduced or withdrawn for limited periods of time as a sanction for violating institution or segregation unit disciplinary rules. Rights, privileges, or amenities pertaining to correspondence, visiting, and telephone usage may be reduced or withdrawn as a sanction for violating institution or segregation unit disciplinary rules where the violation is directly related to the item restricted, e.g., refusal to terminate a visit at the end of a visiting period may warrant the loss of visiting periods for a limited period of time.
   1. Restrictions imposed as a result of a violation of an institution or unit disciplinary rule shall be imposed only as a result of a disciplinary hearing conducted in substantial compliance with the general institution disciplinary rules.

X. STAFF ASSIGNMENTS

Staff assigned to work in the administrative segregation unit should be selected especially for such assignments, with consideration being given to the nature of the inmates in the unit and the personality, training and performance record of staff members considered for assignment to the unit.

A. All staff assigned to the unit shall be given a special orientation and training as to the function of the unit, rules governing its operation, and the needs and problems typical of inmates in the unit.

B. Procedures shall be established for evaluating the on-the-job performance of all staff assigned to the unit and for removing ineffective staff from the unit promptly.

Commentary

Administrative segregation is a phrase with a variety of definitions. As used in these regulations, the phrase refers to the (potentially) long-term, indeterminate separation of an inmate from the general prison population because the inmate presents a danger to himself or others or a danger to the security of the institution. (These rules do not deal with "protective custody" status, although the reasoning and requirements of these rules and comments can, in large measure, be applied to protective custody cases).

Although the decision to segregate an individual may flow from a specific disciplinary infraction or series of infractions, the process is neither a disciplinary one nor a punitive one. It is a classification decision which should be based upon a broad examination of an individual's behavior and adjustment in the institutional setting, see American Correctional Association's Standards for Adult Correctional Institutions, §4193-4199 and the United States Justice Department's Draft Federal Standards for Corrections, "Special Management Inmates" (hereafter referred to as ACA Standards, and Draft Federal Standards, respectively).

Because of the serious consequences which generally accompany a placement in administrative segregation (e.g., an inmate's loss of a substantial degree of liberty and loss of access to most facilities and programs available to the general population), and because of the indeterminate length of administrative segregation placement, the status has been the subject of a substantial amount of litigation, both as to procedural questions and substantive questions regarding conditions of confinement in segregation units. The model attempts to reflect, at a minimum, the current status of the law, although in some respects the rules may go beyond a clear judicial consensus of constitutional requirements.

ENTRY PROCEDURES

The greatest judicial debate regarding administrative segregation deals with the question of whether the due process clause of the 14th amendment applies to the decision to segregate an individual. Several courts, because of the loss of liberty and the onerous conditions of the typical segregation unit, have decided that the due process clause of the 14th amendment does apply and that a hearing is required to accompany the decision to segregate, *Hardwick v. Ault*, 447 F.Supp. 116 (Georgia, 1978), *Polizzi v. Sigler*, 564 F.2d 792 (8th Cir. 1977) (a case dealing with U.S. Bureau of Prisons "special offender" category), *Bono v. Saxbe*, 450 F.Supp. 934 (E.D. Ill., 1978).

Of frequent significance in the eyes of the courts is the similarity between administrative segregation conditions and those of disciplinary segregation. The courts reason in essence that if something looks like punishment, it must be punishment regardless of its label and therefore the due process requirements relevant to prison disciplinary hearings attach to the process by which someone is placed in administrative segregation, i.e., the requirements of *Wolff v. McDonnell*, 418 U.S. 539 (1974). See *Hardwick v. Ault*, 447 F.Supp. 116 (M.D. Ga., 1977)

On the other hand, a number of courts have looked to the Supreme Court's prison transfer decisions, *Meachum v. Fano*, 427 U.S. 215 (1976), *Montayne v. Haymes*, 427 U.S. 236 (1976) as dispositive of the due process issue. In those cases, the court decided that a prisoner had no constitutional right to be in one prison over another and that absent such a constitutional right or a right to remain in a particular facility that was created by state law, no due process hearing was required to transfer an inmate between prisons, even though the institution to which the individual is transferred may offer conditions considerably more onerous than the prior facility, *Four Certain Named Inmates v. Hall*, 550 F.2d 1292 (1st Cir. 1977), *Solomon v. Benson*, 563 F.2d 339 (7th Cir. 1977) (Bureau of Prisons "Special Offenders" category), *Cooper v. Riddle*, 540 F.2d 731 (4th Cir. 1976). Some Courts have used a *Meachum* approach and held due process procedures applicable, finding that state administrative regulations create the necessary "liberty interest" to trigger due process, *U.S. ex rel Hoss v. Cuyler*, 452 F.Supp. 256 (E.D. Pa., 1978). One court felt a state practice was sufficient to trigger a need for due process procedures, *Durso v. Rowe*, 579 F.2d 1365 (7th Cir. 1978).

The due process question is further confused by a recent Supreme Court decision, *Enomoto v. Wright*, 46 U.S.L.W. 3525 (1978). That decision affirmed without comment a district court decision which indicated that *Wolff* procedures or procedures similar thereto would apply to the segregation process. The form of the decision in *Enomoto* as well as the *Meachum* and *Montayne* decisions (which were not mentioned in *Enomoto*) create a serious question as to whether *Enomoto* reflects the Supreme Court's position on due process and administrative segregation. This question will remain until further action by the Supreme Court on some future case.

Without trying to decide the legal question of the applicability or inapplicability of the due process clause, the model recommends that a *Wolff* type procedure accompany the decision to segregate an individual.

By adopting procedures similar to *Wolff*, the model becomes less open to successful legal attack. By requiring that certain procedural steps be adhered to and that a record be prepared which is subject to review, the rules assure greater fairness than would be created by a decision-making process which excluded inmate participation and input. The meeting and record also is intended to provide a check on the arbitrary and/or unnecessary use of segregation and

to provide documentation which will be useful in future institutional dealings with an inmate.

States which have adopted due process models similar to this have found that attaching due process requirements to administrative segregation entry decisions does not compromise their ability to make appropriate use of the status.

A. Notice

The most important part of the notice is the statement of the reasons why the institution is considering an inmate's possible segregation. With such a notice, the individual is made aware of the reason for the proceeding and is able to prepare a response. The notice should be as specific as possible. It should avoid conclusory statements such as stating a segregation meeting is to be conducted because an inmate is believed "to be a risk to the security and order of the institution." Such statements are not only of no benefit to the inmate in attempting to prepare a presentation for the committee, but are also of no benefit to anyone attempting to conduct a meaningful review of the proceedings. The notice should tell the inmate why the institution thinks him a security risk . . . "because of the 3 assaults you have been found to have committed" . . . "because of the loan sharking operation you have been running," etc.

B. The Meeting

1. Inmate Participation and Witnesses

At the meeting itself, the inmate may question those presenting information against him, may make an oral presentation to the committee, and introduce written materials from others on his own behalf and call witnesses (unless to do so would be unduly hazardous to institutional safety or security or endanger the physical safety of an individual). Potential witnesses may be excluded if the Committee determines, after hearing a summary of their testimony from the inmate or his advisor, that the proferred testimony would be irrelevant or redundant. A rule could be added requiring an inmate or his advisor to submit a list of witnesses and a summary of their testimony prior to the meeting.

Where the committee receives statements from persons appearing directly before them and does not permit the inmate to question such individual or where the inmate refuses to allow a witness called by the inmate to testify, the committee should include reasons for its action in its final, written decision, see *Wolff*, 418 U.S. at 565.

2. Staff Assistance.

The inmate is entitled to have the assistance of a staff member in preparing for the meeting and, to at least some degree, in making a presentation at the meeting. Assistance before the meeting is particularly important since in many cases, an inmate will be in segregation prior to the meeting. The ability to present written statements from others or seek witnesses is of illusory value to an inmate who is locked up unless he has the assistance of someone able to move through the general population and contact persons who may be able to make statements on the inmate's behalf.

In allowing the inmate to be assisted by someone in preparing and presenting his position at the meeting, the rules go beyond the requirements of *Wolff v. McDonnell*, which required that an inmate be given assistance only:

> "Where an illiterate inmate is involved . . . or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for adequate comprehension of the case . . . 418 U.S. at 571"

Making illiteracy/issue-complexity determinations in every case as an absolute condition of obtaining assistance would appear to be more trouble than benefit in that determinations probably would require a separate decision to be made in advance of the meeting regarding the mental capacities of the inmate. Every denial of a representation request invites litigation over the correctness of the denial. In light of these administrative and potential legal entanglements and because of the number of inmates who probably would need some assistance because of pre-meeting confinement, it appears advisable to allow assistance to at least be available to the inmate in every case.

The purpose of the assistance should be understood by all persons involved in the meeting. In denying the right to counsel in prison disciplinary hearings, the Supreme Court relied heavily on its belief that to insert counsel in disciplinary hearings would:

> " . . . Inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals," *Wolff v. McDonnell*, ibid.

This concern is at least equally present in administrative segregation meetings which are obviously important as a means of furthering correctional goals. The meetings also involve an ongoing relationship between the committee and the inmate that is not present in the disciplinary context.

As part of the classification process, the administrative segregation proceedings are part of a two-way street. The committee which puts someone in segregation must continue to try to maintain an open communication with the individual as part of its responsibilities to evaluate the individual for possible discharge from segregation and placement in other classification status.

The purpose of the assistance then is *not* to provide an inmate with an advocate for an adversary proceeding. It is to allow the inmate "to collect and present the evidence necessary for an adequate comprehension of the case," *Wolff*, supra. The administrative segregation meeting is not the place for Perry Mason courtroom tactics and the committee should discourage such an approach from persons assisting the inmate.

The role of the staff member in gathering information is largely nondiscretionary. A good faith effort should be made to gather that which is requested by the inmate without making any determinations as to the value, weight, or relevance of the information,

since this is the job of the committee. But, if the staff member discovers other relevant information, either positive or negative, he should arrange to bring that to the attention of appropriate institutional officials (which may mean taking the lead in introducing the information in the meeting), since the goal of the proceeding is to make the most informed decision as is reasonably possible. Relevant information, from any source, then is properly laid before the committee and should not be suppressed or "forgotten" on the justification that it was someone else's job to find such information.

The duty to disclose negative information makes it clear that the staff assistant is not an advocate for the inmate. However, he is under an obligation to gather the information requested by the inmate and, if the inmate is unable to adequately present the information gathered for him, to assist in presenting this information to the committee. The need to rely on the skills of inmate or the staff member for presenting information at the meeting can be reduced if the committee takes the lead in drawing information out of persons appearing before it. There is no need for the committee to sit passively and wait for formal presentations, the calling of witnesses, carefully formulated testimony, elaborate opening and closing arguments, etc. Indeed, the more the committee assumes a leadership role in the meeting, the less like an adversary proceeding the meeting will likely become.

The staff member should not be discouraged from asking relevant questions in the meeting or presenting information on the inmate's behalf which the inmate has overlooked, even though the inmate may be otherwise perfectly capable of making a complete presentation. Again, the goal of getting as much relevant information before the committee as is reasonably possible should normally take precedence over strict application of procedural rules.

The role and duties of the staff assistant must be made clear to the inmate at the time he requests assistance. The inmate's expectation, based on experiences with courts, probably will be that any assistance will be from an advocate. The institution and the designated staff assistant should take special pains to dispell any such expectations before the inmate is misled, intentionally or otherwise.

Staff members chosen as possible inmate assistants should be carefully selected, to assure that they understand the responsibilities and are capable of carrying them out in good faith. Obviously, a person should not be designated as an assistant in a case where he may have a personal bias or involvement. If the demand is sufficient enough, the position might become the primary assignment of a staff member or group of staff members. Some systems utilize department ombudsmans' offices as a source of assistants (at least in the disciplinary hearing context). The more the assistants can be removed from the day-to-day internal institutional matters (particularly custody matters), a greater likelihood they will be accepted by the inmates.

Staff may be unwilling to accept the role of inmate assistant since it may antagonize other staff members or put them in what they perceive to be an intolerable relationship with inmates. Inmates may refuse to utilize staff aid out of an inherent distrust of staff. If for these or other reasons staff assistance is seen as unworkable but some form of aid is desired (and, if courts accept *Wolff* reasoning as controlling, some form of aid will be required in at least a limited number of cases), two other sources of aid exist.

The first is to simply create a special ombudsman/hearing assistant office, administratively separate from the institution or perhaps administratively separate from the entire Department of Corrections and define the role of such an office as more of an advocate for the inmate, eliminating the duty to disclose negative information. This may be more expensive than the suggested model. While eliminating or at least reducing the conflict of interest from the inmate's point of view, the moral dilemma and problem may remain for the office regarding what to do with negative information they come across, especially when such information may have a direct bearing on the safety and security of staff or inmates in the institution. This problem should be addressed if the ombudsman model is adopted.

A second choice, suggested by the Supreme Court in *Wolff*, is to use inmates in the role of assistants. Several concerns present themselves with this alternative. The inmate assistants may attempt to extract improper fees for their services or use the position to establish a power base in the population. There may be logistical problems connected with allowing such inmates the necessary freedom to move about the institution that would be required if they were to begin to do their job. Allowing inmates in this role may tend to increase the adversary nature of the proceedings and divert attention to arguments over procedural technicalities or alleged constitutional violations and away from the main purpose of the proceeding. There will probably be an inherent question of the honesty of such inmate representatives which will tend to affect their credibility with the classification committee.

Several of these concerns may be surmountable. More than one state system uses inmate assistants (either in the administrative segregation or disciplinary context and/or as legal assistants for inmates in court proceedings) and apparently have managed to control the abuses and drawbacks of the system. Inhearing problems (procedural arguments, excessive advocacy, etc.) probably can be controlled by the committee if it clearly defines and enforces limitations pertaining to assistance in the meeting.

The use of inmates may have a major plus in that it avoids the at least apparent conflict of interest a staff member brings to the role of inmate assistant. This may be significant in litigation challenging the adequacy of assistance in the hearings, if such a case were to arise. A greater degree of trust is likely to exist between inmates than between inmates and staff.

3. Power To Compel Attendance.

The committee is given the power to require inmates or staff to appear before the committee to give relevant information. Given the seriousness of the segregation decision and the importance of having a decision based on sound, reliable information, the committee should not be hesitant in using this power whenever a direct statement from someone will be helpful in clarifying a point at issue or providing the committee with information which would allow it to make a more informed decision.

Many times an act which resulted in a disciplinary proceeding against an inmate may be a substantial contributing factor in the segregation decision. In these cases, there should be no need to re-prove the offense by duplicating the disciplinary hearing—referral to the disciplinary hearing report should suffice. However in some cases previously unestablished facts may be critical. In general, and to the extent that previously unestablished contested facts are considered by the committee, strong efforts should be made to obtain statements from persons directly involved with the critical fact or facts at the meeting. The accuracy of the committee's decisions will tend to be enhanced the more they rely on direct, first-hand information as opposed to indirect information, second or third-hand hearsay or unverified rumor.

4. Disqualification For Prejudice.

The rule requiring disqualifying of prejudiced members of the committee must not be taken lightly, since an impartial decision maker is one key to a fair proceeding. Each committee member should consider his own feelings and degree of involvement with each inmate coming before the committee. It should be noted that in addition to actual fairness and impartiality of a tribunal, some courts, in other administrative contexts, have found merely the appearance of fairness to be of sufficient significance to invalidate proceedings which do not provide such an appearance.

C. Evidence and Use of Anonymous Informants

The model indicates the decision to segregate should be made on the basis of "substantial, credible information" which demonstrates the necessity of segregating the individual. See "Special Management Inmates," Section 004, Draft Federal Standards. Alternatives short of segregation should be considered, e.g., transfer to another institution, forms of special conditional release, etc., see ACA Standards, §4201.

What constitutes "substantial, credible information" will depend largely on the situation. An inmate's entire institutional record and prior criminal history may be relevant to the decision and may be considered by the committee, see *Hodges v. Klein*, 421 F.Supp. 1224 (N.J. 1976), affirmed 562 F.2d 276 (3rd Cir. 1977).

The model does not preclude the use of hearsay statements. Furthermore, it allows information to be received through anonymous statements which may be heard by the committee out of the presence of the inmate. Such statements may be presented orally or in writing by a staff member (who should be the individual who received them from the informant). In considering such statements, the committee is under an obligation to inquire, out of the presence of the inmate, as to the identity of the informant so as to allow it to make an evaluation of the informant's general credibility and the reliability of the information being offered. The committee may make any additional inquiries concerning the informant and/or the information he provided that they deem relevant and should do so particularly in those cases where the members of the committee are not personally knowledgeable as to the credibility of the informant.

The rules contain an exception regarding disclosure of the identity of an informant. An official specifically designated by the superintendent may approve the withholding of the identity of the informant from the committee. Such an approval reflects a decision by the designated official that even by disclosing the identity of an informant to the committee, he would be placed in danger or that a promise of strict anonymity was necessary to obtain the cooperation of the informant. The approval also shows the informant is, in the official's judgment, sufficiently reliable and credible for the information provided by the informant to be considered and given weight by the committee. This exception should be used only with great caution since it reduces the inmate's opportunity to rebut such information and will be critically reviewed by a court.

In all cases where a decision relies on information from an anonymous source, the committee would be well-advised to look for information which corroborates the anonymous information and should be reluctant to segregate someone solely on the basis of uncorroborated anonymous statements.

A great deal of information about inmate activities which threaten institutional security and safety may come from other inmates who, for their own safety, cannot be identified to the subject of a segregation proceeding. Therefore, the use of anonymous statements may be critical for the successful working of the segregation end of a classification system. On the other hand, any procedure which carries with it consequences as serious as that of administrative segregation and which relies on information which is withheld (perhaps both as to specific content and source) from the subject of the proceeding will be, as a practical matter, suspect in the eyes of most judges who are accustomed to procedures where confrontation and cross-examination of all witnesses are the rule (and a rule for which there are few exceptions). The misuse, overuse, or other apparent abuse of the powers to use and consider anonymous testimony will merely invite judicial restriction or outright ban of such powers.

The model requires maintenance of confidential records in every case where anonymous testimony is

used. These records should show the details of the information presented anonymously, the degree of the committee's familiarity with the reliability of the informant and the identity of the informant. These records should be available only to the superintendent and director of corrections, and/or their specific designees.

D. Self-Incrimination

The model allows the inmate to remain silent at the meeting when criminal charges are potentially involved. The inmate's silence should not be used against him. This aspect of the model is not constitutionally required, *Baxter v. Palmigiano*, 425 U.S. 308 (1976). In the disciplinary hearing context, the Supreme Court in *Baxter* held that an inmate's silence in a disciplinary hearing can be used against him but if inmates are compelled to testify against themselves, they must be offered immunity (in a subsequent criminal proceeding) regarding what they might say. Because state practices may vary and because local prosecuting attorneys may be acutely concerned about immunity questions, the model leaves the question of attempting to compel testimony to local option.

E. Decision and Appeal

The decision of the committee to segregate an individual must be in writing and must reflect the reasons on which the committee based its decision. A copy of the written decision is given to the inmate who may appeal the decision to the superintendent. The reasons given in the written decision should be specific enough to allow a third person, not present at the meeting, to be able to review the decision in a meaningful way.

Conclusory "reasons" such as "the inmate was found to be a danger to others," standing alone are insufficient. The "reasons" must show what conclusion was reached and why (" . . . due to his record of assaults on other inmates and several threatening statements made to staff . . . "). In a sense, a good "reasons" statement becomes like a good newspaper story in that it tells the "who, what, where, why, when, and how" of the committee's decision. The decision probably cannot and should not be written up in one or two sentences unless the facts of a given case are very simple and straightforward.

The written decision need not be given to the inmate at the hearing. However, it should reflect the oral decision that is given the inmate. Although the rules do not set a time limit for the written decision, common sense dictates that it be provided as soon as is reasonably possible so that a given proceeding can reach a conclusion.

If the committee needs additional information, or cannot reach a decision immediately, it may recess the meeting and reconvene it at a later date. Particularly if the inmate remains in segregation while the meeting is continued, reconvening the meeting should be of the highest priority.

The completeness of the reasons statement is important in defending any litigation challenging the administrative segregation process. Perhaps more significantly, complete detailed reasons provide a basis for sound management review of the correctness of administrative segregation decisions and create a record which allows more intelligent decisions to be made concerning the particular inmate in the future.

The model not only allows the superintendent to overrule the decision of the segregation committee in response to an inmate's appeal, but also allows the superintendent to overrule the decision of the committee not to segregate an individual or to discharge an individual from segregation. In such cases, the model requires the superintendent to provide written justification for his decision to overrule the committee and allows such decisions to be appealed to the Director of Corrections. No time limit is set for such appeals.

The Superintendent should be cautious in exercising this power since the decision of the committee not to segregate an individual will obviously carry a good deal of weight when examined by any reviewing bodies such as a court. Overuse of the superintendent's power to overrule a committee decision which does not require segregation will tend to deprive the segregation process of any appearance of fairness and lend an appearance of arbitrariness to the proceedings.

The superintendent should confine his review of the committee's decision to consideration of facts and information available to the committee. If the superintendent feels that the decision not to segregate was in error because of information which was not considered by the committee, the matter should be remanded back to the committee for further consideration.

The committee's procedural rulings are also reviewable (e.g., should a committee member have been disqualified for prejudice, should an inmate have been allowed to testify, were time limits in the rules adhered to, etc.). Procedural errors do not require a re-hearing unless it appears that the error in fact prejudiced the inmate in his presentation. The committee member should be advised of all procedural errors so as to reduce the likelihood of their reoccurrence.

Note the special appeal and review procedures applicable in cases where anonymous information is used. In all such cases, the Director of Corrections must review the confidential file and cases to which it pertains at least every 90 days. In cases where the identity of the informant is not given to the committee, the Director of Corrections must review the complete record of such cases within 2 weeks of the conclusion of institutional proceedings even if the inmate does not take an appeal. If an inmate does appeal, normal appeal time limits would prevail.

The appeal serves as a management tool for internally reviewing the administrative segregation hearing process. In addition to overruling the decision of the committee to segregate an individual, the superintendent may take lesser steps such as remanding the case back to the committee for further consideration or allowing the individual's release under specific conditions.

F. Periodic Reviews

Both court decisions and professional standards require periodic reviews of the administrative segregation status, *Kelly v. Brewer*, 525 F.2d 394 (8th Cir. 1975), ACA Standards §4201. It would be inconsistent with the purpose of the administrative segregation status not to require periodic reviews since it cannot be assumed that a prisoner felt to be a security risk today will remain so forever. To keep one in the severe conditions of the typical segregation unit without the "existence of a valid and subsisting reason" may violate due process concepts of fundamental fairness and/or the 8th amendment's prohibition against cruel and unusual punishment, *Kelly v. Brewer*, 525 F.2d 394 (8th Cir. 1975), *U.S. ex rel Hoss v. Cuyler*, 452 F.Supp. 256 (E.D. Pa., 1978).

The model requires 30-day reviews to be conducted by the administrative segregation committee. Such reviews would consider the original reason for segregating an individual in light of his adjustment and behavior while in the segregation unit. Therefore, reports from the unit staff are important, as are records maintained by the unit. Again, largely as a management tool, the model requires department-level review of all cases where an individual has been held in administrative segregation longer than 90 days. At every review, but especially in cases of prolonged segregation, the committee should consider whether any alternative to segregation is available and what, if any, assistance could be provided the inmate in order to hasten his return to the general population.

The courts which have considered the question of the need for periodic reviews of a segregated status have been very concerned not only that justification continues but that the justification relied upon bears a reasonable relationship to the purpose of segregation Criteria which some courts have suggested as passing this test of relevance include such things as:

- The inmate's disciplinary record
- The inmate's past criminal record
- Prison records from past institutionalizations
- Psychological makeup
- Involvement in criminal activity while at the prison
- Attitude toward authority
- Institutional record on work assignments
- Adjustment to institutional programs
- Willingness and ability to house with other inmates
- Record of violent reactions to stressful situations
- Habitual conduct or language of a type expected to provoke or instigate stressful, perhaps violent situations, see *Hodges v. Klein*, 421 F. Supp. 1224 (D. N.J., 1976), affirmed 562 F.2d 276 (3rd Cir., 1977), *U.S. ex rel Hoss v. Cuyler*, 452 F.Supp. 256 (E.D. Pa., 1978).

These courts have required, in various ways, that the original decision and each subsequent review specify the criteria the committee has relied upon for its decision. In other words, if the committee feels an individual is, for example, a danger to the security of the institution, what about this case makes them believe it?

By using somewhat specific criteria and specifying ones which are of concern in a given case, the committee is less likely to utilize improper criteria. Moreover, the inmate is also advised of why he is segregated. The inmate is also given guidance as to what problems must be corrected before he can be considered for discharge. Both the courts in *Kelly, supra* and *Hoss, supra* felt it of constitutional importance that segregated prisoners have such guidance (which is still less than specific standards or goals which, if met, automatically require discharge from segregation).

No court has attempted to definitively identify every conceivable criteria that might legitimately be applied in a given case. If a comprehensive list is adopted as part of an institution's segregation rules, it may be wise to include an open-ended provision such as "such other specified factor(s) which demonstrate(s) the need for segregation." In using such an open-ended provision, care must be taken to define the factor(s) of concern sufficiently to allow a showing that: (a) such factors reasonably relate to the purposes of segregation and (b) that they provide guidance to the segregated inmate as to what he should do to get out of segregation. If it appears that a previously unidentified criteria relied upon in a given case may be likely to reoccur, it could be added to the institution's general list.

CORRESPONDENCE
Model

I. PRIVILEGED CORRESPONDENCE

A. Privileged correspondence is mail between an inmate and attorneys, legal aid services, or other agencies providing legal services to inmates, or paraprofessionals having a bona-fide association with such agencies or an attorney, judges and clerks of federal, state, and local courts, or public officials and their authorized representatives acting in their official capacities.

B. Outgoing Privileged Correspondence
   1. Outgoing privileged correspondence shall be treated as privileged only if the name and official status of the recipient appears on the envelope.
   2. Outgoing privileged correspondence is not to be opened, inspected or censored in any manner.
   3. Outgoing privileged correspondence initiated by an indigent inmate shall be mailed without charge to the inmate. This shall extend only to first class postage and shall not include registered, certified or insured mail.
   4. Outgoing privileged correspondence may be held prior to mailing for a reasonable period of time to allow verification of the privileged status of the addressee.

C. Incoming Privileged Correspondence
   1. Incoming privileged correspondence shall be treated as privileged only if the name and official status of the sender appears on the envelope.
   2. All incoming privileged correspondence may be opened and examined for cash, checks, money orders or contraband, but only in the presence of the inmate to whom the communication is addressed.
   3. In cases where cash, checks or money orders are found, they shall be removed and credited to the inmate's account.
   4. Where contraband is found, it shall be removed.
   5. In no case shall the letter be read or censored.
   6. Incoming privileged correspondence may be held prior to delivery for a reasonable period of time to allow verification of the privileged status of the sender.

D. Packages
   1. Incoming packages from privileged correspondents shall be inspected for contraband in the same manner as any other items of privileged correspondence.

II. GENERAL CORRESPONDENCE

A. General correspondence is mail between an inmate and someone other than those approved for privileged correspondence.

B. Outgoing General Correspondence
   1. Inmates shall be allowed to send letters to whomever they wish, including inmates at other institutions, except when clear evidence related to institutional security, order, or rehabilitation exists to justify a limit. Any limitation shall be appealable to the warden or his designee. The number of letters sent shall not be limited.
   2. Outgoing mail is not to be opened, inspected or censored in any manner except as is necessary to enforce the requirements of §II-B of these rules.
   3. Indigent inmates shall receive postage and stationery sufficient to send at least three letters of general correspondence per week.

C. Incoming General Correspondence
1. There shall be no limit on the amount of incoming mail an inmate is allowed to receive.
2. All incoming general correspondence may be opened and examined for cash, checks, money orders or contraband.
3. In cases where cash, checks or money orders are found, they shall be removed and credited to the inmate's account.
4. When contraband is found, it shall also be removed.
5. The Director of the Department of Corrections shall establish guidelines for determining when incoming mail is to be read. If a letter is read which the reader believes meets any of the criteria for censorship, the letter shall promptly be referred to the Warden's designee for review and decision as to whether censorship of all or part of the letter is required.
6. In each case where it is deemed necessary to read an inmate's mail, a written record shall be made which shall include the following:
   a. The inmate's name and number.
   b. Name of the sender.
   c. The date the letter was received and read.
   d. The reason for reading the letter, if the decision to read the letter was discretionary.
   e. The signature of the officer who read the mail.
   f. This rule shall not apply if all incoming mail is read.
7. Letters shall not be censored unless there is evidence that the correspondence contains one or more of the following:
   a. Plans for sending contraband in or out of the institution.
   b. Plans for criminal activity.
   c. Instructions for manufacture of weapons, drugs or drug paraphernalia, or alcoholic beverages.
   d. The letter threatens blackmail or extortion.
   e. Plans for escape or unauthorized entry.
   f. The letter is in code which is not understood by the reader.
   g. The letter contains plans for activities in violation of institution rules.
   h. The letter contains information which, if communicated, would create a serious danger of violence and physical harm to a human being.
   i. The letter contains other material which would, if communicated, create a serious danger to the security of the institution.
8. If a letter is censored, a written notice, signed by the official authorizing the censorship and stating the reason(s) for censorship shall be given to the sender and the inmate.
   a. The sender and/or the inmate may appeal the decision to the warden or his designee who may not be a person involved in the original decision to censor.
   b. Either the original or a legible copy of censored correspondence shall be retained.
9. The written records of reading and censorship shall be reviewed each month by the Director of the Department of Corrections or his designee to determine if:
   a. There were sufficient grounds to censor the mail.
   b. The censorship was no more extensive than necessary to meet the criteria for censorship.
   c. Mail that is selected for reading is chosen in accordance with established policy.

D. Packages
1. Each warden shall prepare and make available to the inmate population a list of items which may be received in packages.
2. Any person may purchase and send such approved items to any inmate.
3. All incoming packages shall be inspected for contraband.

E. Publications

1. Books, magazines, newspapers, and other printed matter shall be approved for inmates unless deemed to constitute an immediate and tangible threat to the security or order of the institution or to inmate rehabilitation by meeting one or more of the following criteria:
   a. The material contains instructions for the manufacturing of explosives, weapons, drugs or drug paraphernalia or alcoholic beverages.
   b. The material advocates violence within the institution.
   c. The material is of a type which has demonstrably caused violence or other serious disruption of institutional security or order within the institution or similar institutions.
   d. The material advocates racial, religious, or national hatred in such a way so as to create a serious danger of violence in the institution.
   e. The material is of a nature which encourages deviate sexual behavior which is criminal and/or in violation of institution rules or detrimental to rehabilitation.
2. If a publication is believed to be unacceptable under any of above criteria by staff member designated to screen incoming publications, the publication shall be referred to a censorship board comprised of three high ranking institution officials designated by the warden, who may serve as a member of the board.
   a. The Board shall promptly review all material referred to it. If it is determined that the material should be censored under any of the above criteria, a notice of censorship shall be sent to the inmate and the sender of the material, stating the reason(s) for censorship and advising both parties of a right to appeal the censorship decision to the Director of the Department of Corrections or his designee.
   b. Any publication censored by the Board shall be retained by the Department along with records of the Board's decision and any appeal decision unless the decision is made to allow the publication to be given to the inmate.

III. PROCEDURES FOLLOWING REMOVAL OF ITEMS FROM INCOMING MAIL

A. In each case where it is deemed necessary to remove any item from incoming mail, a written record shall be made of such action.

B. Such record shall include:
   1. The inmate's name and number.
   2. A description of the mail in question.
   3. A description of the action taken and the reason for such action.
   4. The disposition of the item involved.
   5. The signature of the acting officer.
   6. When contraband is found which is not otherwise illegal, a notice shall be sent to the inmate and the sender. The notice shall indicate the nature of the contraband, that both the inmate and the sender may appeal to the warden the decision not to deliver the contraband, and ask the sender what he wishes done with the contraband if no appeal is taken or an appeal is denied and that if the sender does not indicate what should be done with the item, that it may be discarded or donated to charity.
   7. Contraband which is illegal shall be turned over to law enforcement authorities.

C. In any case where the decision to remove an item is discretionary, it shall be made by the same official designated to censor incoming letters.

IV. COLLECTION AND DISTRIBUTION

A. Locked mail collection boxes shall be placed in all living units/cell blocks and in other

common areas of the institution. Mail collection shall be made daily, according to a regularly set schedule. No collections need be made on Sundays or postal holidays.

1. Access to the mail boxes shall be limited to only those staff members directly assigned mail handling responsibilities.
2. If for any reason an inmate is in a status which prevents him from having direct access to a mail collection box, mail shall be collected directly from him in accordance with the above requirements.

B. Incoming mail shall be held only so long as is necessary for inspection or for reading/censorship. Except in situations of pending censorship decisions and verification of the status of apparent privileged correspondence, mail should not be held longer than 24 hours, excluding week-ends and holidays.

C. Distribution of incoming mail shall be done by a correctional employee directly to the receiving inmate's hand.
   1. Mail shall not be dropped on a table or other convenient place for each inmate to come and look for his own.

D. At no time shall any inmate be involved in the collection, handling, or distribution of mail.

Commentary

Perhaps no other area in the correctional law field has attracted as much litigation as prisoner correspondence. This is probably due to the fact that the correspondence involves not only the inmate, but also the free person who writes and receives mail from the inmate and who is still protected by the First Amendment and all of its judicial gloss as is the inmate, but to a lesser degree. As Justice Powell said in *Procunier v. Martinez*, 416 U. S. 396 at 409 (1974)" . . . the interests of the parties are inextricably meshed". Add to this that inmates quite often correspond with those for whom other privileges may exist, such as lawyers and courts, and the complexity of constitutional issues becomes evident.

As in other areas of correctional law where institutional and constitutional interests collide, the validity of institutional restrictions on inmate correspondence depends on the outcome of balancing First Amendment freedoms against the interests the institution may have for restricting such freedoms. In developing correctional rules, the administrator should bear in mind that the First Amendment freedom of speech (which includes correspondence) has long been an area of particular concern for the courts and is often viewed as the most precious right guaranteed by the constitution. "Courts have jealously protected the inmate in the exercise of his First Amendment rights . . . (because writing, and reading) supplies a vital link between the inmate and the outside world, and nourishes the prisoner's mind despite the blankness and bleakness of his environment," *Wolfish v. Levi*, 573 F.2d 118, 129 (2nd Cir. 1978) reversed, *Bell v. Wolfish*, 25 CrL 3053 (Supreme Court, 1979). Therefore, regardless of the specific test a court may state as applicable in adjudicating the vaildity of correspondence rules, any suggested justification for restricting inmate correspondence will be subjected to close judicial scrutiny.

In *Procunier*, supra, the Supreme Court set out a specific formula by which correspondence rules should be judged. A rule which restricts an inmate's First Amendment freedom of correspondence (or the First Amendment freedom of the free person wishing to correspond with an inmate) must:

1. Be within the constitutional power of the government, and
2. Further an important or substantial governmental interest, and
3. Concern a governmental interest unrelated to the suppression of free expression, and
4. Result in an incidental infringement on the First Amendment freedom that is no greater than is essential to the furtherance of the legitimate governmental interest.

The court also went on to enumerate what it perceived to be the state's legitimate interest in the prison context generally:

"The identifiable governmental interests at stake

in this task are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of prisoners," *Procunier*, 416 U.S. at 412.

How the courts will apply the general tests established in *Procunier* in particular situations cannot be predicted. However, it can be said with some certainty that justifications based on administrative convenience and/or the lack of funds will be found wanting and that the burden of establishing that a rule furthers a legitimate governmental interest in a manner no greater than is essential will be on the defender of the rule, not on the prisoner or other person attacking the rule.

For these and other reasons, it is important to tread very carefully when writing and enforcing a correspondence regulation.

PRIVILEGED CORRESPONDENCE

Rather than listing perhaps a dozen specific officials within a "privileged" status, the model defines three general categories - mail to and from attorneys or legal assistance agencies, courts, and public officials generally which are considered privileged. This is in keeping with past court decisions *Wolff v. McDonnell*, 418 U.S. 578 (1974), *Sostre v. McGinnis*, 442 F.2d 178 (2nd Cir. 1971). Because of the importance of allowing confidential communication between inmates and "privileged" correspondents, mail between these persons must be treated differently than general correspondence. Parole authorities would be among the "public officials" whose correspondence would be privileged.

At least a few courts have declared another category of correspondence to be privileged — correspondence with members of the media. The source of this right is said to be the inmate's First Amendment interests in free expression and his right to petition for redress of grievances. Courts which have endowed media correspondence with a privileged status have placed it in basically the same category with attorney correspondence: outgoing media mail cannot be opened or examined although mailing may be delayed for up to 48 hours to verify that the addressee is a member of the media. Moreover, mail must be addressed to the business office of the press representative. Incoming media correspondence can be opened and examined for contraband in the presence of the inmate, but not read. In order that it enjoy a privileged status, the envelope must identify the sender, *Taylor v. Sterrett*, 532 F. 2d 462 (5th Cir. 1976), *Hardwick v. Ault*, 447 F. Supp. 116 (Ga. 1978).

Neither of the two leading sets of correctional standards (or proposed standards) recommend a media privilege. Commission on Accreditation for Corrections, Manual of Standards for Adult Correctional Institutions (hereafter referred to as ACA Standards); June, 1978 Draft Federal Standards for Corrections (hereafter Draft Federal Standards). However, in light of what may be a developing inmate right, institution managers may wish to consider a policy of extending a privileged status to media correspondence.

A. Outgoing Mail

There seems to be no compelling reason to either inspect, open, read or censor any privileged outgoing mail. This is emphasized by the National Sheriffs' Association's Standards for Inmates' Legal Rights which says, "Outgoing mail should be left sealed and untouched." §19 (1974). Therefore, to prevent any hint of impropriety and to limit inmate complaints regarding denial of access to court or counsel, the model prohibits any interference with outgoing privileged mail. To assist an institution in identifying mail going to privileged correspondents, especially attorneys, the institution may wish to contact the local and state bars for a list of members of the bar.

B. Indigency

The model further requires that privileged correspondence sent by indigent inmates be mailed without charge to that inmate. This will allow these inmates the opportunity to keep in touch with their attorney, the court, etc. as well as defuse any equal protection complaints that may arise. See also, *Bach v. Coughlin*, 508 F.2d 303, (7th Cir. 1974); and Illinois Postal Regulations, §823-II-D-2.

The model does not contain a specific section on indigency nor are there many cases which have attempted to translate the subjective concept of indigency into a hard, objective rule related to actual dollars and cents. However, one case has approved a Texas Department of Corrections policy of allowing free postage for inmates implementing their right to access to the courts only for those inmates whose institution accounts showed a zero balance at the time the stamp request was made. The Texas rule also provided that the cost of stamps issued in such a situation could be recouped by the Department from any funds coming into the inmates account for up to 60 days, *Guajarado v. Estelle* 432 F.Supp. 1373 (S.D. Texas), affirmed 580 F.2d. 748 (5th Cir., 1978).

Subject to whatever indigency test an institution might adopt, the ability of an inmate to send free mail would include the sending of large documents such as trial transcripts, briefs, etc.

In the prison context, cases have found that approximately $50.00 in an inmate's account removes the inmate from an indigent status for purposes of court fees (which range from $15.00 up), *Shimabuku v. Britton*, 357 F.Supp. 825 (D. Kansas, 1973), Aff'd 503 F.2d 38 (10th Cir. 1974), *Ward v. Werner*, 61 F.R.D. 639 (M.D. Pa., 1974).

As a rule, indigency is a flexible status, depending largely on a balance between the costs which an individual seeks to have waived and the income and needs of the person seeking the waiver. Complete impoverishment is generally not required. In an institution, where the basics of life (food, shelter, clothing, medical care, etc.) are provided, the issue probably would involve the importance of the typically

small sums of money an inmate may have for obtaining amenities beyond the basics provided by the institution. These "extras" might range from the purchase of candy and cigarettes to paying for vocational or educational programs not available without at least some contribution from the inmate. Obviously, some such expenses may be of considerable importance to institutional interests, e.g., participation in a rehabilitation program. Therefore, it is recommended that any attempt to develop an indigency formula in the context of an institution not rely solely on an inflexible scale, but have some degree of discretion built into the indigency determination process.

As an example of such an approach, one court has adopted guidelines of indigency which it utilizes to determine whether an inmate who files suit in the court should be required to pay all or part of the court fees. The scale looks at the inmate's present assets (for example, $0 to $20 in an account suggests the inmate can pay clerk's fees of from $0 to $3.00), but also considers the recent financial history of the inmate in settling on a final amount to be paid. The policy also leaves the door open for other factors to be considered which may be relevant in a specific case, see *Braden v. Estelle*, 428 F.Supp. 595 (S.D. Texas, 1977). Part of the success of the Texas approach probably can be attributed to the fact that the Texas Department of Corrections has computerized its inmate accounting system, thus making retrieval of necessary information an easy task.

C. Incoming Mail

In order for any incoming mail to be classified as privileged, the envelope must indicate that the mail is being sent by one entitled to the privilege. This is in keeping with the United States Supreme Court's decision in *Wolff v. McDonnell*, supra: "We think it entirely appropriate that the State require any such communications to be specifically marked . . . if they are to receive special treatment."

Once the privileged mail is identified as such, it may be opened and examined for cash, checks, money orders or contraband. See ACA Standards §4346 (1977); Draft Federal Standards, Mail and Visiting §006. This, however, must be done in the presence of the inmate to whom the mail is addressed. See *Wolff*, supra.

The model explicitly states that in no case shall incoming privileged mail be read or censored. It would appear that any regulation which authorized the censorship or reading of incoming privileged mail would be greater than is necessary to protect legitimate governmental interests and would be found to violate First Amendment rights. See *Procunier v. Martinez*, supra, and *Wolff v. McDonnell, supra*.

D. Packages

Since most packages sent by privileged correspondents will consist of published material, they will fall under the protection of the First Amendment. Therefore, they should be inspected only in the presence of the receiving inmate and only in the same manner as described above.

E. Identification of Privileged Mail

As noted, to be accorded privileged status, mail must be identifiable as privileged. While a rule that mail be labeled "privileged" might aid in identifying both incoming and outgoing privileged mail, failure of the sender of a privileged letter to put such a label on the envelope should not divest the letter of its privileged status and mail handlers must remain alert to the name and title of the sender (incoming mail) or recipient (outgoing mail) to determine if the mail is privileged.

The "reasonable periods" for which mail can be held while the privileged status of the addressor/addressee is determined normally should not exceed one working day, if even that. Longer delays probably will require a showing of good cause by the institution, cause beyond the institution's control. Records should be kept which show such cause.

GENERAL CORRESPONDENCE

A. Outgoing Mail

The recommendation that inmates be allowed to send letters to whomever they wish, including inmates at other institutions may go beyond the present state of the law, see *Peterson v. Davis*, 415 F.Supp. 198 (E.D. Va. 1976); and *Lawrence v. Davis*, 401 F.Supp. 1203 (W.D. Va. 1975). However, "correspondence with members of an inmate's family, close friends, associates and organizations is beneficial to the morale of all confined persons and may form the basis for good adjustment in the institution and in the community," Association of State Correctional Administrators—Policy Guidelines (1972). With these goals possibly attainable, it seems both senseless and destructive to curtail correspondence by restricting either the number of letters an inmate may send or to whom he may send them except in exceptional circumstances.

Consistent with the ACA Standards §4341, the model allows a limit to be imposed on the volume of mail or on persons with whom an inmate wishes to correspond only when there is clear and convincing evidence to justify such a limit. Such evidence should be clearly related to the legitimate institutional interests of security, order and rehabilitation. Any limitations may be appealed to the warden.

The prohibition against opening or inspecting privileged outgoing mail also applies to outgoing general correspondence. An exception is available to allow enforcement of the rules pertaining to with whom an inmate may correspond. What is sent out of an institution through the mail appears to be a minor risk to the security of the prison and should not be examined for fear of involving the institution in needless legal action.

The cases which have dealt with the issue of reading and/or censoring outgoing mail seem to favor the position that such mail cannot be read or censored, at least without some prior showing of "good cause" or "reasonable cause" for such action, *Wolfish*, supra, *Owens-El v. Robinson*, 442 F.Supp. 1368

(W.D. Pa. 1978), *Vest v. Lubbock County Commissioners Court*, 444 F.Supp. 824 (S.D. Texas, 1977). However, this position is not uniformly held and some courts have approved the general reading of outgoing mail. In *Feeley v. Sampson*, 570 F.2d 364 (1st Cir. 1978), a federal appellate court said that the scanning of outgoing mail was not a violation of an inmate's First Amendment rights and in *Smith v. Shimp*, 562 F.2d 423 (7th Cir. 1977), the court also approved a policy of reading outgoing mail. However, the court in *Shimp* refused to assume that the institution (a jail) did not monitor all communication between inmates and outside persons including mail, visits, and telephone calls.

Other courts, such as those which decided the *Wolfish* and *Owens-El* cases dealt with situations where visits and telephone calls were not monitored. Given the failure to monitor these forms of communication, the courts could not see how any institutional interest in monitoring outgoing mail would be furthered. In other words, since the institution had decided that its legitimate interests such as preventing escapes, introduction of contraband, etc. did not require the monitoring of visits or telephone calls, the asserted need to monitor outgoing mail was "meaningless," *Wolfish*, 573 F.Supp. at 130, and therefore inconsistent with the requirements of *Procunier*, supra. As discussed above, it appears that a policy of reading outgoing non-privileged mail in the presence of the inmate may be valid if restricted to those cases where specific cause exists for reading such mail and the cause is related to legitimate governmental interests of security, order, and/or rehabilitation.

A policy of reading all outgoing mail may become more and more difficult to justify in light of the ACA and draft Federal standards and as more jurisdictions relax their scrutiny of outgoing mail. States which have operated under a policy of not monitoring outgoing mail appear not to have experienced increased security and/or escape problems which they can attribute to the lack of surveillance of outgoing mail.

In order to be valid, it would appear that a rule authorizing the reading of outgoing non-privileged mail without specific cause would probably require a showing that institutional experience demonstrated that the outgoing mail had been used to communicate escape plans or other information directly related to the interests of institutional security (perhaps discussing plans for the introduction of contraband) and that the facility did not permit other forms of unmonitored communication that might be a vehicle for compromising institutional security in similar fashions or that there was a substantive difference between outgoing mail and other forms of unmonitored communication which warranted treating mail differently, see *U.S. v. Hearst*, 563 F.2d 1331 (9th Cir. 1977).

The model requires that all indigent inmates be given a postage and stationery allowance so that they can send at least three personal letters per week. The primary reason for this rule is the value in institutions developing affirmative programs to help inmates maintain community ties, ACA Standards §4347.

B. Incoming Mail

"Correctional authorities should not limit the volume of mail to . . . a person under supervision," National Advisory Commission Standard, supra §2.17; ACA Standards §4341. By allowing unlimited correspondence, inmate hostility and resentment is minimized.

The initial procedure for examining incoming general correspondence should be similar to that examining incoming privileged correspondence. All contraband and money should be removed prior to delivering the letter to the inmate. In the area of general correspondence, however, the courts have not required that the letter be inspected in the presence of the inmate, the model thus omits that step.

A clear distinction has been made between the inspection-reading of mail and censorship thereof, *Wolff*, supra, *Blue v. Hogan*, 553 F.2d 960 (5th Cir. 1977). Therefore, the model does not limit the circumstances under which incoming non-privileged mail can be read for the purpose of determining whether censorship is required under any of the grounds under which mail may be censored.

The model requires that an institution formulate guidelines setting out the circumstances under which mail will be read, e.g., a specific random formula, when contraband is found, etc. By developing a specific guideline for determining what incoming non-privileged mail is to be read and adhering to it, the institution will be in a better position to defend itself against assertions of unwarranted or inappropriate reading of incoming mail. The model does not preclude reading all incoming mail, although this presents obvious workload problems, depending on the size of the facility.

The model allows the censorship of incoming general correspondence, but only under certain specified circumstances which generally relate to the security of the institution. Rather than a rule which simply adopts the general "security, order and rehabilitation" test of *Procunier*, supra, the model attempts to list specific grounds for censorship. The *Procunier* language, while setting the general framework for censorship, can be subject to attack on vagueness grounds. The rule does include a final general "security" standard, but it is recommended that this standard be applied with caution. Additional specific grounds for censorship may be added, if experience dictates their necessity. The grounds for censorship which are listed are taken largely from specific cases and/or from a random review of mail regulations from several states.

The rules require that the censorship referral and decision be made "promptly." Because of the first amendment issues involved, "prompt" in this case should normally mean the same day the letter is received, if at all possible. Longer times will be required, on occasion, but should be the exception and should be clearly justifiable.

The model also sets out certain procedural safeguards to be followed in cases of potential censorship. Because of the legal significance of any decision to censor a piece of mail, the model requires that the decision to censor be made by a high-ranking institution official designated by the warden. It is assumed that mail will be initially scanned (according to whatever policy is adopted pertaining to the reading of mail) by a lower-ranking official who, upon finding something believed to be in violation of the mail rules, would then forward the letter to the official assigned the censorship duty. This official would then review the mail and make the decision to censor the mail or approve its delivery to the inmate. If the decision is made to censor the mail, a written notice of the reason the letter was read or censored must be given to the sender and the inmate, both of whom have a right to appeal the decision, see *Procunier*, supra.

Procunier requires only that the notice and right of appeal be given to the sender. State rules vary between allowing appeals by the sender, the inmate, or both. The model gives notice and appeal rights to both, recognizing that while an inmate, without seeing a piece of mail subject to censorship, may not be able to prepare a meaningful appeal, nevertheless, he still has some interest in the contents of the letter.

Similar appeal rights exist regarding contraband, except when the contraband is thought to be illegal regardless of institutional limitations, e.g., illicit drugs (in which case the material should be turned over to law enforcement authorities). The rule allows the sender of "non-illegal" contraband to specify a means for its disposition. Nothing in the rule requires the institution to return the contraband to the sender at institution expense. If it is decided that "non-illegal" contraband will be returned to the sender at the sender's expense, notification of this policy should be communicated to the sender before packages are sent, if this is possible, and to the inmate, in any event.

The model does not include a definition of contraband. It is recommended that an institution develop as specific a definition of contraband as possible, so as to assure uniform application of contraband prohibitions and to increase the inmates' understanding of what is and is not allowed within the institution. Depending on how contraband is defined, it may be that the decision to exclude certain types of material, perhaps in certain circumstances, is not an automatic, objective choice, but rather is a subjective, discretionary decision. Where discretion is involved, the rules require that the decision be made by the same official who is responsible for making censorship decisions.

The model also requires a specific record to be made both of all cases of censorship (in which case notice and reasons of censorship are given to the sender and inmate), and also in all cases where mail is read (if the policy is to read all mail, this requirement may be deleted). No notice of reading (as opposed to censorship) need be given to the sender or the inmate. However, the model would require a record to be kept as a protection against litigation. If accurate and complete records are kept, they will be helpful in rebutting assertions of inappropriate reading of mail. Either the original or a legible copy of all censored correspondence should be kept.

Central to any strategy of avoiding litigation about reading or censoring mail is a constant monitoring of the institution's mail inspection program. The model not only requires a written record of all mail which is read; but also provides review by the Director of the Department of Corrections, or his designee, of all decisions to censor mail and of the records of instances in which mail was simply read.

C. Packages

The model allows for inmates to receive items from the outside community. A list of all items which can be received by inmates should be given to all prisoners. This will reduce the risk of unwelcomed items entering the institution through the mail, as well as lessen misunderstandings as to what items are acceptable. These packages may all be opened and examined for contraband.

D. Publications

A number of cases have held that the Supreme Court's decision in *Procunier v. Martinez* applies to the censorship of published materials. Therefore, if the state wishes to censor all or a portion of a publication, it must show that it furthers one or more of the institutional concerns of security, order or rehabilitation. See *Aikens v. Jenkins*, 534 F.2d 751 (7th Cir. 1976); *Gray v. Creamer*, 376 F.Supp. 675 (W.D. Pa. 1974), *Carpenter v. South Dakota*, 536 F.2d 759 (8th Cir. 1976). As with the criteria for censoring incoming mail, the model attempts to list specific grounds for censoring publications. These grounds have been developed from the same general sources as were the criteria for censoring incoming correspondence.

The model also creates a procedure for the censorship of publications which is similar, but not identical to, the procedure for censoring incoming letters. The primary difference is that the decision to censor is given to the three-member committee, not a single individual. Both the sender of the material (often the publisher) and the inmate to whom the material was addressed are given a right to appeal. The decision to censor must be communicated to both the sender and the inmate, and must indicate the reason(s) for the censorship decision.

The procedure for censoring a publication is more exacting than that required for censoring an individual piece of correspondence because if anything, the First Amendment interests involved are stronger in the publication situation which involves not only the interests of the inmate in receiving the material, but also the First Amendment freedom of the press issues which are of interest to the publisher.

E. Sexual Material

The model does not require that material fit the judicial definition of obscenity in order to be censored.

Censorship of obscene material is valid (outside the prison context) because obscene material is seen as falling outside the protection of the First Amendment. Once material is found to be obscene, in a sense it stops being "speech" and therefore loses its First Amendment protections. The problem which has confounded the courts over the years is settling on a definition of "obscenity" and then deciding whether a particular work falls within that definition.

The current judicial definition of obscenity involves a complicated 3-part test. The courts ask (1) whether the average person, applying contemporary community standards, would find the work, as a whole, appealing to the prurient interest, (2) whether the work depicts "in a patently offensive way" sexual conduct specifically defined by applicable state law (or in this case, the regulation), (3) does the work, as a whole, lack serious literary, artistic, political or scientific value, *Miller v. California*, 413 U.S. 15.

However, in order to be banned in an institution under the balancing test of *Procunier*, it would appear that sexual materials need not go so far as to fit within the judicial definition of obscenity if it can be shown that their introduction would in some way adversely affect security, order, or rehabilitation. This argument emerges from the fact that the Supreme Court in *Procunier* did not base its approval of institutional censorship of certain types of inmate correspondence on the conclusion that such correspondence fell completely outside the protections of the First Amendment (as is the case with obscene materials), but rather that the institution had sufficient interests to allow it to incidentally suppress certain First Amendment freedoms. Therefore, if it can be shown that materials (which do not necessarily meet the judicial definition of obscenity) lead to the increase of homosexual activity, aggressive behavior, or seriously impede rehabilitation etc., censorship should be approved under the *Procunier* analysis. This position has been approved by several courts, see *Guajardo v. Estelle*, 24 CrL 2035 (5th Cir. 1978), *Carpenter v. South Dakota*, 536 F.2d 759 (8th Cir. 1976), *U.S. ex rel Picketts v. Lightcap*, 567 F.2d 1226 (3rd Cir. 1977), concurring opinion.

Because of the difficulty in applying the complicated three-part, subjective judicial standard to a particular piece of work, and because the judicial standard may be unnecessary, the model adopts a standard which requires a finding by the censorship committee that the material, if admitted to the institution, would create a substantial detriment to rehabilitation, or to the security or order of the institution by reason of it encouraging deviate, criminal sexual behavior, or in violation of institution rules. *Guajarado*, supra.

In deciding to censor a particular publication, it should be remembered that the burden of proof will be on the institution to demonstrate, at the very least, that the suspect contents of the publication are of a nature likely to compromise institutional security, order, or rehabilitation efforts. The burden may well be a substantial one and so the decision to censor should not be made lightly, particularly when "rehabilitative interests" are used to justify censorship.

F.

As in other First Amendment areas, the burden will be on institutional officials to justify a publisher-only rule. Although the publisher-only rule had been rejected by a number of lower courts, *Caczek v. Hutto*, 448 F.Supp. 155 (W.D. Va., 1978), *Rhem v. Malcolm*, 317 F.Supp. 594 (S.D.N.Y., 1974), aff'd. 507 F.2d 333 (2nd Cir., 1974), the Supreme Court in 1979 approved the rule in *Bell v. Wolfish*, 25 CrL 3053. However, the ruling in *Wolfish* was not a complete endorsement of the rule in its broadest form. The rule at issue in *Wolfish* applied only to hardbound books, not paperbacks or magazines. The facility had an 8,000 volume library. The facility also was a jail, housing mostly pretrial detainees for a maximum of 60 days. All of these factors were significant to the court, 25 CrL 3062. In the absence of some or all of these factors, a publisher-only rule might not be accepted by a court, despite the Supreme Court's recognition of the rational security concern behind the rule. Prior to *Wolfish*, two circuit courts had also upheld the rule, *Woods v. Daggett*, 541 F.2d 237 (10th Cir., 1976), *Guajardo v. Estelle*, 580 F.2d 748 (5th Cir., 1978).

Both the ACA Standards §4341 and the Draft Federal Standards, Mail and Visiting §002 omit the rule; the Draft Federal Standards, in their comments, specifically reject the rule.

A publisher-only rule creates a conflict between the security concerns of an institution and the First Amendment interests of the inmate. Some institutions do not use the rule, see *Wolfish v. Levi*, 573 F.2d at 130, although probably the majority of facilities across the country still do enforce the rule in some form.

The model, while not including a publisher-only rule, does not prohibit one, either. Instead, it leaves this decision to the local administrator. However, based on the recent cases which have criticized the rule and the Supreme Court's limited approval of the rule, care should be taken in drafting and enforcing any rule to assure that it is no broader than necessary and that substantial alternative means of obtaining reading material do exist.

PROCEDURES FOLLOWING REMOVAL OF ITEMS FROM INCOMING MAIL

Whenever it is necessary to remove any item from incoming mail, (as described elsewhere in the model) a written report should be made of the action. This report can serve a twofold purpose. First, it will serve to notify both the inmate and the sender that the item has been received and intercepted, thus reducing the chance that either of these two parties will complain that the institution has been stealing items from the mail. Second, it can put the institution on

notice as to what persons are abusing the mail and require their correspondence to be more closely scrutinized.

COLLECTION AND DISTRIBUTION

Every effort should be made to expedite the handling of both incoming and outgoing mail. ACA Standards §4342, Draft Federal Standards, Mail and Visiting §003. To accomplish this goal as well as the goal of minimizing the number of persons involved in the handling of mail, the model requires that mail be collected from locked collection boxes daily, except Sundays and postal holidays and that mail be through the institution mail handling system within 24 hours, weekends and holidays excepted.

By limiting the number of persons handling mail, the model attempts to curtail abuses in mail collection and to reduce any "chilling effect" on an inmate's use of the mail which might flow from a fear that the mail was extensively handled and read by a large number of institutional employees, *MCLU v. Schoen*, 448 F.Supp. 960 (D. Minn., 1978). It is strongly recommended that mail handling procedures be set up in such a way so as to minimize the number of staff handling the mail. In addition to the benefits of such a policy described above, the fewer people involved in handling mail, the less likely a problem will arise because of an individual's ignorance of appropriate mail rules.

DISCIPLINARY PROCEDURES
Model

I. RULEBOOK

A. A copy of the rulebook, containing all institution disciplinary rules and a list of all chargeable offenses, shall be made available and explained, where necessary, to all inmates upon their entry into the institution.

B. The rulebook shall contain a list of possible sanctions that may be invoked for each specific offense. Such sanctions shall include:
   1. Reprimand.
   2. Loss of one or more privileges for a maximum of 30 days.
   3. Confinement to assigned quarters for a maximum of 30 days.
   4. Placement in more secure housing unit for a maximum of 90 days.
   5. Restitution.
   6. Isolated confinement for a maximum of 15 days.
   7. Transfer to a greater level of institutional custody.
   8. Loss of good time.

II. PROCEDURES FOLLOWING A MINOR OFFENSE

A. A minor offense is one in which the extent of sanctions to be imposed are restricted to:
   1. Reprimand.
   2. Loss of one or more privileges for a maximum of 30 days.

B. Upon the reasonable belief of an institutional staff member that such an offense has been committed, he may file a written disciplinary report of the incident with the shift supervisor. Such report shall include:
   1. The specific rule violated.
   2. The facts surrounding the incident.
   3. The names of witnesses to the incident, if any.
   4. The disposition of any evidence involved.
   5. Any immediate action taken.
   6. The date and time of the offense.
   7. The signature of the reporting officer.

C. Should a staff member believe an offense may properly be responded to by a reprimand, warning, and/or counseling, he may so respond, in which case no disciplinary report need be prepared. A counseling report of this action may be made at the staff member's option. Such reports shall be placed in the inmate's file and a copy shall be given to the inmate. The inmate may prepare a response to counseling reports, which shall be placed with the report in the inmate's file.

D. Upon the filing of a disciplinary report alleging commission of a minor offense, the following steps will be undertaken:
   1. Notice
      a. A copy of the disciplinary report, as a notification of the charges, shall be given to the inmate at least 24 hours prior to a hearing on the matter, unless such notice is waived by the inmate.
      b. The notice shall advise the inmate of his rights in the disciplinary process.

2. Hearing
   a. The inmate shall be present at all phases of the hearing, unless excluded for reasons of institutional security; such reason to be stated in writing.
   b. The inmate shall be allowed to make a statement and present any reasonable evidence, including written statements from others, in his behalf.
   c. The hearing officer, who shall be a high ranking officer not having direct involvement with the incident, shall allow any other evidence that may aid in his decision. Unless the hearing officer feels additional oral testimony is necessary, his decision may be based on the disciplinary report, the statements of the inmate, and any other relevant written information presented at the hearing.
3. Record of findings
   a. Following the hearing, the hearing officer shall state in writing his findings, the evidence relied on and the sanctions imposed, if any.
   b. A copy of this record shall be given to the inmate.
4. Appeal
   a. The inmate shall be advised of his right to appeal the decision to the warden or his designee.
   b. The inmate must notify the hearing officer of his intention to appeal the decision at the close of the hearing and must file a written statement setting out the grounds for the appeal within 24 hours of receipt of the hearing report. Failure to comply with either of these time limits will constitute grounds for dismissal of the appeal. The hearing officer may, in his discretion, grant a stay of any sanction imposed at the disciplinary hearing during the pendency of an appeal.
   c. The warden or his designee may affirm or reserve the decision outright, may reverse and remand the decision back to the hearing officer for further proceedings, or may reduce, but not increase, the sanction imposed. The appeal decision shall be in writing and should be rendered within 5 working days of the receipt of the appeal. A copy of the decision shall go to the inmate.

III. PROCEDURES FOLLOWING A MAJOR OFFENSE

A. A major offense is a rules violation in which a more severe sanction may be imposed than permitted for a minor offense.

B. Upon the reasonable belief of an institutional staff member that such an offense has been committed, he shall file a written disciplinary report of the incident with the shift supervisor. Such report shall include:
   1. The specific rule violated.
   2. The facts surrounding the incident.
   3. The names of witnesses to the incident, if any.
   4. The disposition of any evidence involved.
   5. Any immediate action taken.
   6. The date and time of the offense.
   7. The signature of the reporting officer.

C. Upon the reporting of the alleged major offense, the following steps will be undertaken:
   1. Notice
      a. A copy of the disciplinary report, as a notification of the charges, shall be given to the inmate at least 24 hours prior to a hearing on the matter unless such notice is waived by the inmate.
      b. The notice shall advise the inmate of his rights in the disciplinary process.
   2. Pre-hearing detention
      a. Until the hearing, the inmate is entitled to remain in his existing status, unless

he constitutes a sufficient threat to other inmates, staff members, or himself to warrant pre-hearing detention.

b. If pre-hearing detention may be ordered only by the shift supervisor, such order must be reviewed by the warden or his designee within 24 hours. Failure to do so shall return the inmate to his previous status.

c. Any time spent in pre-hearing detention shall be credited against any subsequent sentence imposed.

3. Hearing

a. All hearings for major offenses shall be conducted by an impartial hearing officer, who shall be responsible directly to the Director of Corrections or his designee, and who should not be directly responsible to the institution superintendent. A hearing officer shall be disqualified to preside over hearings in which he witnessed the incident in question, or is in some way prejudiced against the inmate who is the subject of the hearing.

b. At the hearing, the inmate shall be entitled to the following:

1. An opportunity to be present during all phases of the hearing; except that he may be excluded during the hearing officer's deliberations and for reasons of security, such reasons to be stated in writing.
2. The inmate may consult with counsel or counsel substitute prior to the hearing. At the hearing, an inmate may be accompanied by a counsel substitute who may be either a staff member or approved inmate to act as counsel substitute. The extent to which counsel substitute may present an inmate's case at a disciplinary hearing shall be within the discretion of the hearing officer, taking into consideration such factors as the literacy and intelligence of the inmate, the complexity of the issues under consideration, and any other factors which may impede the inmate from making a complete presentation on his own behalf.
3. Copies of any written information which the hearing officer may consider except where disclosure of such information would be unduly hazardous to institutional safety or endanger the physical safety of an individual; reasons for non-disclosure to be stated in writing. In all cases where written information is not disclosed, its contents will be summarized for the inmate to the extent this may be done without creating a substantial risk to institutional or personal safety.
4. An opportunity to make a statement and present documentary evidence.
5. An opportunity to call witnesses on his behalf; unless doing so would be irrelevant, redundant and unduly hazardous to institutional safety or would endanger the physical safety of any individual; such reasons for denial to be stated in writing.
6. An opportunity to confront and cross-examine his accuser and all adverse witnesses; unless doing so would be unduly hazardous to institutional safety or would endanger the physical safety of a witness, such reasons for denial to be stated in writing.

c. At any time during the hearing the hearing officer on his own motion, or at the request of the inmate, may order an investigation into the incident, and continue the hearing to a future time.

d. An individual may be found guilty of a disciplinary infraction on the basis of information from a source whose identity is not disclosed to the inmate at the meeting. Such information may be presented to the hearing officer orally or in writing.

1. The details of any information from an anonymous source shall be shared with the inmate at the meeting to the extent that this may be done without creating a substantial risk to the safety of the informant.
2. When the hearing officer considers information from an anonymous source, the name of the source and all details of such information shall be given to the hearing officer out of the presence of the inmate.
3. In all cases in which the hearing officer considers information from an anonymous source, a confidential record shall be maintained which indi-

cates the details of such information and, if possible, the identity of the informant and the degree of the hearing officer's familiarity with the informant's reliability. Such records shall be available only to the superintendent, the Director of Correction, and their specific designees.

e. The hearing officer shall have the power to stay the imposition of a sanction pending completion of the written record of a decision and consideration of any appeals.

4. Decision and Record of Finding
   a. At the conclusion of a hearing, the hearing officer shall announce the decision and impose a sanction. The decision and sanction shall be in writing and a copy shall be given to the inmate. The sanction may include one or more of the specific sanctions listed in §I-B of these rules.
   b. In addition to the written decision and sanction notice, the hearing officer shall prepare a written record of the hearing. Such record should be completed within two working days of the hearing and shall contain:
      1. The hearing officer's decision.
      2. The sanction imposed.
      3. A summary of the evidence upon which the decision and sanction were based.
      4. A list of all witnesses and a summary of their testimony.
      5. A statement as to whether the sanction may be stayed during an appeal and the reasons for that decision.
      6. The date and time of the hearing.
      7. The signature of the hearing officer.
   c. A copy of the written record shall be given to the inmate.
5. Appeal
   a. The inmate shall be advised of his right to appeal and shall be presented with an appeal form for such purposes.
   b. All appeals must be in writing. The appeal must be filed with a designated official within 24 hours of the inmate's receipt of the written record of the hearing.
   c. All appeals shall be considered by the warden or his designee. Appeal decisions should be made within 5 working days of receipt of the appeal. The appeal decision may be to affirm or reverse the decision or reverse and remand the decision for a rehearing. The warden may also reduce, but not increase, the sanction imposed by the committee.
   d. The results of the appeal shall be given to the inmate in writing.
   e. The warden may review any disciplinary action, major or minor, regardless of whether an appeal is taken, and may reverse the decision, reverse and remand the decision, or reduce the sanction imposed whenever he feels such action is warranted.

IV. EXPUNGEMENT

If an inmate is found not guilty of an infraction, major or minor, all reference to that offense shall be removed from his file, if reasonably possible. Otherwise, the file shall clearly indicate that the inmate was not guilty of the alleged infraction.

V. PROCEDURES FOLLOWING CRIMINAL MISCONDUCT

A. Upon the determination of the shift supervisor or the disciplinary board that an inmate has committed a criminal offense, the proper law enforcement authorities shall be notified.

B. Any disciplinary hearing for this alleged offense shall be conducted in accordance with Section III C-3 above and the inmate shall be advised that he has the right to

remain silent in the hearing and nothing he says during the course of the disciplinary hearing may be used against him in any subsequent criminal proceeding.

VI. PROCEDURES FOLLOWING AN EMERGENCY

A. In the event of a widespread institutional disruption which requires emergency action any or all portions of these regulations may be temporarily suspended.

B. Any inmate involved in the emergency may be detained without a hearing throughout the course of the emergency.

C. Upon the restoration of order, all inmates who were detained shall be accorded all disciplinary procedures as provided for by this regulation.

Commentary

The fairness of prison discipline, not only in actuality but as perceived by the prison population, is essential in preventing unrest and maintaining harmony within an institution. Imperative to any equitable program are well defined rules of conduct, strict (but not severe) penalties and fairness and equality in imposition of punishment. At the forefront must be a disciplinary procedure which allows an inmate to air his side before an impartial hearing officer. An inmate "will more likely feel treated fairly if he has an opportunity to speak his piece fully before a Board or officer who he believes will hear him out, believe what he says (or at least some of it), and assign a penalty somewhere near what he can reasonably accept as appropriate." Minnesota State Prison, *Disciplinary Due Process in Correction Institutions*, 3 (1974).

The United States Supreme Court has recognized the constitutional need for fairness in prison discipline and has required certain due process rights prior to penalizing an inmate for inappropriate behavior. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court spelled out what process was due in hearings that could result in the loss of good time. This was later reiterated in *Baxter v. Palmigiano*, 425 U.S. 308 (1976). In both cases, the Court stopped short of requiring the full panoply of rights which are available in criminal proceedings.

Indications are, however, that these cases are not the final say on the matter. For as Justice White said in *Wolff*, "(a)s the nature of the prison disciplinary process changes in future years, circumstances may then exist that will require further consideration and reflection by this Court," 418 U.S. at 570. What future circumstances will arise and what direction the Court will then take remains to be seen. However, it is important to realize that the rights due inmates in disciplinary procedures are not static and may change and expand greatly in coming years.

The model has taken into consideration both the present requirements and possible future demands that are to be made on disciplinary proceedings. It has also streamlined procedures so that both justice and punishment can be meted out swiftly.

RULEBOOK

"It is the responsibility of any person or persons in charge of the management of an institution for the confinement of prisoners to develop and describe in writing a fair and orderly procedure for processing disciplinary complaints against prisoners and to establish rules, regulations and procedures to insure the maintenance of a high standard of fairness and equity. The rules shall prescribe offenses and the punishments for them that may be imposed" *Model Act for the Protection of Rights of Prisoners*, National Council on Crime and Delinquency, §4 (1972). These rules should be reasonably definite so as to advise an inmate of prohibited conduct and should be distributed and explained to him upon his arrival at the institution. See generally, *Meyers v. Alldredge*, 492 F.2d 296 (3rd Cir. 1974); *Landman v. Royster*, 354 F.Supp. 1292 (E. D. Va. 1973); *Goldsby v. Carnes*, 365 F.Supp. 395 (W. D. Mo. 1973). Since it can be assumed that inmates will lose copies of the rules that are given to them, replacement sets should be available (perhaps at cost) and complete sets should also be available for examination in the institution library. Copies of all rules and policies affecting inmate con-

duct should be available for inmate examination. Unless an inmate is aware of what is expected of him or at least knows how he can learn what is expected, a court may prevent an institution from enforcing a given rule.

Provisions should also be made for announcing rule changes and making copies of changes available to the general population.

The model avoids compiling a list of all chargeable offenses, preferring to leave that in the hands of individual institutions. It does, however, delineate possible sanctions for rule violations. These sanctions are generally typical of those currently found in prison's nationwide and are self explanatory except in the following instances: 1) In no case should loss of privileges include "mail, visitation, physical exercise at least one hour per day, or access to the judicial and and grievance processes." *Tentative Draft of Standards Relating to the Legal Status of Prisoners*, American Bar Association, §3.2 (1977); 2) The maximum length of permissible solitary confinement should be 15 days. Many penologists are coming to believe that whatever positive effect isolation has on an inmate happens within ten to fifteen days of lockup. Longer periods of time have been shown to be deleterious to both his psychological well-being and his attitude towards prison life and have been subject to judicial scrutiny and criticism, *Frazier v. Ward*, 426 F.Supp. 1354 (N.D.N.Y. 1977). See Minnesota State Prison, *Sentencing Considerations*, 3 (1975); Burns, *Corrections Organization and Administration, 386 (1975); 3)* When an inmate is transferred for disciplinary reasons to a greater level of institutional custody, he should receive full due process This requirement may possibly be contrary to the Supreme Court's decision in *Meachum v. Fano*, 427 U.S. 215 (1976). However, some lower court decisions in somewhat analagous areas suggest that where a transfer is imposed as a specific sanction for a disciplinary offense, due process rights would be implicated, *Bono v. Saxbe*, 450 F.Supp. 934 (E.D. Ill., 1978), *U.S. ex rel Hoss v. Cuyler*, 452 F. Supp. 256 (E.D. Pa., 1978). It is beyond the scope of this work to discuss the somewhat confusing state of the law regarding disciplinary-related transfers. Should the administrator wish further details in this area, the advice of counsel should be obtained.

PROCEDURES FOLLOWING A MINOR OFFENSE

Minor offenses are ones in which the penalties imposed do not cause the inmate a substantial deprivation. See *Cousins v. Oliver*, 369 F.Supp. 553 (E.D. Va., 1974); *Newkirk v. Butler*, 364 F.Supp. 497 (S.D.N.Y. 1973), aff'd. as modified 499 F.2d 1214 (2nd Cir. 1974). These penalties may range from a reprimand to the loss of commissary, entertainment or recreational use for a minimal period of time. See ACA Standards for Adult Correctional Institutions, §4334 (1978); National Advisory Commission Standards, supra; Response of the ACA, supra).

The good judgment of institutional staff, when uncovering and dealing with some offenses, can go far towards alleviating further problems. "In well run institutions line employees can prevent many infractions from becoming serious through counseling and verbal reprimands rather than involving disciplinary committees or administrators." Riots and Disturbances, American Correctional Association, 31 (1975). Many minor offenses do not warrant the time and effort of a full disciplinary proceeding, yet do warrant some staff response, and in some cases, a written record. The model allows this sort of flexibility, as do several states, including California, Florida, and New York. For minor offenses, a formal disciplinary proceeding need not be begun if the officer feels a reprimand, warning, and/or counseling is a satisfactory means of dealing with the situation. In these cases, the employee may file a counseling report, at his option. However, such reports would not trigger a disciplinary proceeding, but would merely go into the inmate's file for future reference. The inmate would receive a copy of such reports and could file a written response to them. Such responses would go with the original of the report into the inmate's file.

However, when a written report of the offense, as described in detail by the model, is to be filed by the officer certain procedures prior to imposing punishment must be followed.

The Supreme Court in both *Wolff v. McDonnell*, and *Baxter v. Palmigiano* refrained from deciding what processes are required by due process prior to punishing minor rules violations. In *Wolff* they did, however, allude to them and suggested that less extensive procedures may be permitted when imposing minor penalties than would be required when imposing major ones. "We do not suggest, however, that the procedures required by today's decision for the deprivation of good time would also be required for the imposition of lesser penalties such as the loss of privileges", 418 U.S. at 572, n. 19.

The model requires that an inmate be provided with notice of the charges, the right to consult with counsel or counsel substitute prior to the hearing, a hearing where he can make a statement and present written information in his defense, a written report of the hearing officer's decision and an opportunity to appeal that decision. Each of these requirements has its roots in either lower court case law, correctional standards or analogy to major offense proceedings.

A. Notice

The right to be notified of the charges is fundamental to any fair system of discipline. The inmate should be given a copy of the disciplinary report at least 24 hours prior to any hearing to adequately inform him of the offense he is accused of and to allow him time to prepare a defense. Without such notification, the concept of due process would be meaningless. Particularly since the reporting officer will normally not be present, it is important that the disciplinary report (which presumably will comprise part of the notice) be complete and detailed. The notice should also list all of the inmate's procedural rights available both before and during the hearing.

B. Counsel

The right to consult with counsel or counsel substitute prior to a minor offense hearing has been espoused by the American Bar Association in their *Tentative Draft of Standards,* supra. Such consultation would allow the inmate to be informed of his rights and also the procedures to be followed at the hearing. It could also help him decide whether to plead guilty. No assistance from counsel or counsel substitute is allowed at the hearing itself.

C. Hearing

The opportunity to be present at a hearing and to at least make a statement in his defense has been granted to inmates by most authorities. As a federal district court in Nevada has indicated, a "minor infraction requires . . . an opportunity to respond before imposition of punishment." *Craig v. Hocker,* 405 F.Supp. 656, 662 (D. Nev. 1975); see also, *Avant v. Clifford,* 67 N.J. 496, 341 A.2d 629 (1975). This position has also been adopted by ACA Standards §4337; the National Advisory Commission Standards, supra; the Response of the ACA, supra; the ABA Tentative Draft of Standards, supra and the United Nations in their Standard Minimum Rules for the Treatment of Prisoners, Fourth United Nations Congress on Prevention of Crime and Treatment of Offenders, §30 (1955).

To make the hearing as impartial as possible, the hearing officer should have no prior knowledge of the incident. Particularly in smaller facilities, it may be impossible to find an officer with no prior knowledge of an incident. The hearing officer should, at a minimum, have no direct knowledge or involvement with an incident and should not be involved in the routine prehearing processing of the report.

D. Report

Requiring a hearing officer to file a written report of his findings serves a dual purpose. First, it provides a conclusive record of the incident for the inmate's file. Second, it provides a record of the decision should the matter be appealed. See ACA Standards §4321.

PROCEDURES FOLLOWING A MAJOR OFFENSE

The model defines major offenses and provides that a disciplinary report must be filed upon the reasonable belief of staff that such offense has been committed. The contents of the disciplinary report is the same for both major and minor offenses. Use of a standard report form should expedite handling of offenses.

As already mentioned, the Supreme Court, in *Wolff v. McDonnell* spelled out what procedures are required prior to taking away an inmate's good time. In a footnote they indicated that these same procedures were required if an inmate was to be placed in isolation as punishment. These procedures included: 1) a written notice of the charges at least 24 hours prior to a disciplinary hearing: 2) a hearing before an impartial board in which the inmate is allowed to "call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goal", 418 U.S. at 566, and 3) a written statement by the factfinder of the reasons for his decision. The model has required that these procedures be followed prior to imposition of any major penalty. The model also expands upon some of the procedural rights required by *Wolff* and adds others for the reasons given below.

A. Counsel Prior to a Hearing

The model allows inmates to be assisted by counsel, a staff member, or another inmate in preparation for the hearing. At the hearing, the assistant's participation depends upon the inmate's need for assistance. Such need may be demonstrated through such factors as literacy, intelligence, complexity of the issues under consideration, etc. The objective is to assure that the inmate, by himself or with assistance, is able to adequately and completely present his position to the hearing officer.

The model allows inmates to act as assistants. Although most states apparently allow only staff, the conflict of interest the staff brings to the assistant's role may make them inevitably suspect in the eyes of an inmate and subsequently so in the eyes of a court. The experience of states which allow inmate assistance, Washington, New Jersey, and Maine, among others, would seem to suggest that such a procedure does not create insurmountable problems.

Consistent with *Wolff,* the practice of many states, and with the recommendations of the ACA Standards and the Proposed Federal Standards for Corrections, inmates may not be represented by counsel at the disciplinary hearing. If counsel is available, the rules do not prevent an inmate from consulting with and being assisted by an attorney in preparation for the hearing.

B. Pre-hearing Detention

The inmate may be placed in pre-hearing detention if "he constitutes a threat to other inmates, staff members or himself" *National Advisory Commission Standards,* §2.12; see also *Response of the ACA* §2.12. Such detention, due to its harshness, must in all cases be reviewed by the warden or his designated representative within 24 hours of its inception. See *Inmate 24394 v. Schoen,* supra; *Model Rules and Regulations on Prisoners' Rights and Responsibilities,* Center for Criminal Justice, Boston University School of Law (1973). It is urged that this action be imposed no more than is absolutely necessary. (See ACA Standards §4319).

C. Disciplinary Board Composition

In a major change from the original Correctional Law Project's Model Disciplinary Rules, the present model recommends replacing the three-member disciplinary committee with a single, specially trained, hearing officer.

The multi-member disciplinary hearing committee has probably been the customary approach in

prison disciplinary hearings around the country. Typically, such boards would draw their members, perhaps on a rotating basis, from regular institution staff. Attempts would be made to select members of the board from different program sections of an institution, so as to assure a balanced philosophical approach to deciding disciplinary cases.

However, with the growing importance of strictly adhering to due process requirements, it may be unwise to assume that a part-time disciplinary hearing board (whose members are borrowed temporarily from other institutional positions) can meet the challenge of conducting procedurally proper disciplinary hearings.

As an alternative to the Committee concept, the model requires the use of a full-time disciplinary hearing officer. Such an officer can easily be given intensive introductory training for the position and can receive ongoing training far more easily than such training can be provided to a continually changing group of hearing officers, as would be the case in the committee system.

The hearing officer should not answer to the warden of an institution, but rather should be responsible directly to the Director of Corrections. This helps preserve and protect the impartiality and appearance of impartiality (itself an important factor) of the hearing officer by reducing the possibility that the officer's decisions could be influenced by the warden or other staff at the institution.

Use of a single hearing officer would appear to have several advantages over the rotating three-member panel:

- Greater expertise in conducting the hearings than a rotating panel of persons whose primary interests may not be in presiding over disciplinary hearings; the panel may lack both the skills to conduct a fair and effective hearing and the desire to acquire such skills not only through specialized training but through continuing on-the-job experience. Such skills may allow hearings to be conducted with greater efficiency, since the hearing officer should be able to answer procedural questions more quickly and definitively than inexperienced persons serving on a committee.
- Greater impartiality - An impartial decision-maker is a requirement of due process under *Wolff v. McDonnell*. By removing the hearing officer from the direct supervision of the warden and from a position where the hearing officer may strongly identify with portions of the institution staff, the impartiality of the hearing officer should be strengthened and hence less open to legal attack.
- Potential Savings in Staff Time - Depending on the size of an institutions' disciplinary hearing caseload, the disciplinary committee may be required to serve at least several hours per day. A single hearing officer, handling the same number of cases, obviously will free up a substantial amount of staff time.
- Improved Written Decisions - In *Wolff*, the Supreme Court required that there be a "written statement by the fact-finders as to the evidence relied on and the reasons for the disciplinary action." It is not uncommon for disciplinary committees to use the same boilerplate reasons over and over again, simply because the committee lacks the training and expertise to understand the need for particularized decisions and reasons. Use of such boiler-plate reasons may convince a court that the inmate is not receiving necessary due process *Bono v. Saxbe*, 450 F. Supp. 934 (E. D. Ill., 1978).

As correctional law continues to evolve and develop, courts are increasingly looking into the details of institutional procedures and operations. Lower courts are filling in the gaps of Supreme Court decisions, putting flesh on the legal skeletons of Supreme Court opinions. Simply having written disciplinary procedures which, on their face, comply with *Wolff v. McDonnell* cannot be considered as protection against challenges to the adequacy of disciplinary procedures. The rules must be knowledgeably and properly applied in a variety of factual situations. The situation virtually demands that special attention be given to training and skills of the hearing officers who preside at disciplinary hearings. It should be noted that such hearing officers need not be attorneys, but can easily be drawn from correctional staff. It should also be noted that the major offense hearing officer need not be the same official designated to hear minor offenses. This latter official may still be an employee of the institution in question and directly answerable to the institution warden.

Note that the rules allow the hearing officer to order a transfer to a higher level of custody. This may be a function an administrator would prefer to leave to a classification committee, given the variety of factors which enter into such custody changes. Giving the hearing officer the power to only recommend a custody change would not offend prevailing case law. In such circumstances, the classification committee proceeding, relying on the results of the disciplinary proceeding, would not require any extraordinary due process procedures, but could follow whatever procedures were normally used for such decisions.

At least one state, New Jersey, has experimented with a single hearing officer system and appears to be highly satisfied that it is a preferable alternative to the committee system.

D. Written Refusal To Call Witnesses

In *Wolff* the Supreme Court declared that "it would be useful for the Committee to state its reason for refusing to call a witness," although they did not require it (at 566). The model believes, however, that presenting one's defense through the use of witnesses is both important and equitable. Therefore, a valid reason for denying this right should be stated and to allow its review, it should be done in writing.

E. Confrontation and Cross-Examination

The inmate should be allowed to confront and cross-examine both the accuser and other adverse

witnesses. Although some courts have denied an inmate the right to confront his accuser for fear of placing the prisoner on the same level as the prison official, see *Nolan v. Scarfati*, 306 F.Supp. 1 (D. Mass. 1969). "(f)airness to a prisoner prior to a major change in conditions of confinement or other penalty must outweigh whatever possible effect would occur in the prisoner's attitude or the prison atmosphere." (*Tentative Draft of Standards*, American Bar Association, supra at 451.) Cross-examining adverse witnesses also is an important way of ferreting out the truth. In cases where cross-examination may prove dangerous to the witness, it may be refused; however, reasons for the refusal should be in writing. (See *Tentative Draft of Standards*, Id.) If direct cross-examination is not allowed, the inmate should at least be allowed to ask questions of the accusing official through the hearing officer.

F. Use of Anonymous Witnesses

The rules contain an exception to the confrontation and cross-examination right in allowing for the hearing officer to consider information from unidentified informants. Such anonymous statements may be presented to the hearing officer orally or in writing by a staff member (who should, but need not be, the individual who received the statement from the informant). In considering such statements, the hearing officer is under an obligation to inquire, out of the presence of the inmate, as to the identity of the informant so as to be able to evaluate the informant's reliability and credibility. The hearing officer may make any additional inquiries concerning the informant and/or the information provided by him deemed relevant. This should be done particularly in those cases where the hearing officer is not personally knowledgeable as to the credibility of the informant.

Before the hearing officer relies on anonymous testimony, two separate decisions concerning the information must be made. The hearing officer should satisfy himself as to the general credibility of the informant (for example, has the informant provided reliable, accurate information in the past) and is there something about the present information that suggests its reliability. A conclusory statement from a staff member to the effect that "a previously reliable informant told me that *x* inmate did the offense with which he is charged" does not show present reliability - how does the informant know *x* committed the offense? He may be passing on a totally false rumor. A statement that "a previously reliable informant told me he saw *x* commit the offense" provides the necessary specific detail to establish the present reliability; the informant at least claims to have been an eyewitness to the incident. Faced with such a statement, the hearing officer might want to confirm that the informant reasonably could have been in a position to be an eyewitness. It will obviously be important for staff presenting information from anonymous informants to question such persons in some detail regarding the information they are presenting.

In all cases where a decision relies on information from anonymous sources, the hearing officer would be well advised to look for information tending to corroborate the anonymous information and to be reluctant to find someone guilty of a disciplinary infraction solely on the basis of uncorroborated anonymous statements.

The use of anonymous statements may be important in a disciplinary system. However, any procedure which carries with it consequences as serious as a disciplinary proceeding and which relies on information which is withheld (both as to specific content and source) from the subject of the proceeding will be, as a practical matter, suspect in the eyes of judges who are accustomed to procedures where confrontation and cross-examination of all witnesses are the rule (and a rule for which there are few exceptions). The misuse, overuse, or other apparent abuse of the powers to use and consider anonymous information will merely invite judicial restriction or outright ban of such power.

The model requires maintenance of confidential records in every case where anonymous information is used. These records should show the detail of the information presented anonymously, the extent of the hearing officer's familiarity with the reliability of the informant and the identity of the informant. These records should be available only to the superintendent and Director of Correction and/or their specific designees.

G. Inmate Copy of all Evidence

Providing the inmate with a copy of all written information which the disciplinary board may consider allows him to prepare a full defense. This requirement has been suggested by the American Bar Association in their Tentative Draft of Standards.

H. Appeal

Although not required by *Wolff*, appeals enhance the fairness of the proceedings as well as providing a mechanism for the internal review of all disciplinary decisions, see ACA Standards §4323, Draft Federal Standard, Inmate Rules and Discipline §018. The model requires prompt appeals and urges prompt appellate decisions in order to mitigate the effects of imposing a penalty only to have it reversed a few days later in the event a stay of the penalty was not granted pending the appeal. Should a longer appeal period be adopted, it will become more important to consider granting stays during the period of appeal. Prompt disposition of appeals also lessens the confusion and uncertainty that will develop regarding an individual's status while an appeal is pending. The appeal process should consider three factors: were the institution's disciplinary rules substantially followed (and if not, was the inmate prejudiced by the failure to adhere to any of the rules); was the decision based on substantial evidence; and were the sanctions imposed appropriate, given the offense, the inmate, and other relevant circumstances, see Draft Federal Standard, Inmate Rules and Discipline §018.

Note that a warden may independently review a disciplinary action, even if no appeal was taken, where such review is warranted, in the warden's discretion.

EXPUNGEMENT

Finally, mention should be made of the fact that in both major and minor offenses, if the inmate is found innocent of the charges, the full record of the incident shall be expunged from his record. If the violation for which an individual was found not guilty is part of a proceeding where other violations were established, expungement (which would require retyping of the institution records) is not necessary. Obviously, no collateral consequences should befall an inmate as a result of a "not guilty" decision and institution records should clearly indicate where an alleged violation has not been established. General records of all disciplinary proceedings, regardless of outcome, may be kept for statistical or research purposes, but all inmate-identifying information should be deleted from such records, see ACA Standards §4333.

PROCEDURES FOLLOWING CRIMINAL MISCONDUCT

An inmate, in defending himself in front of the disciplinary board for an offense which may also be a violation of the criminal laws, may find that anything he says may be used against him at the subsequent criminal proceeding. The model seeks to alleviate this problem by providing the inmate with "use immunity" protection at the criminal proceeding for anything he says at the disciplinary hearing. This protection is in line with the Supreme Court's declaration in *Baxter v. Palmigiano*, 425 U.S. 308 (1976) that " . . . if inmates are compelled in those proceedings to furnish testimonial evidence that might incriminate them in later criminal proceedings, they must be offered 'whatever immunity is required to supplant the privilege' and may not be required to waive such immunity." (at 1557). See also *Shimabuku v. Britton*, 503 F.2d 38 (10th Cir. 1974); *Avant v. Clifford*, 67 N.J. 496, 341 A.2d 629 (1975).

PROCEDURES FOLLOWING AN EMERGENCY

When emergency situations, such as riots or major disturbances, occur in correctional institutions, it is important for the prison officials to act efficiently and effectively to control the situation. The model provides that during such occurences any or all portions of the regulation may be temporarily suspended. This is because ". . . the state's interest in decisive action clearly outweighs the inmate's interest in prior procedural safeguards" *LaBatt v. Twomey*, 513 F.2d 641, 645 (7th Cir. 1975). Upon the termination of the emergency, however, all due process procedures must be reinstituted and the inmate must be given a disciplinary hearing. See e.g., *Carlo v. Gunter*, 520 F.2d 1293 (1st Cir. 1975); *Morris v. Travisono;* 509 F.2d 1358 (1st Cir. 1975); *Johnson v. Anderson*, 420 F.Supp. 869 (M.D. Pa. 1976). Note that the longer an emergency exists, the more suspect its legitimacy may become and the more likely a court will be to require reinstitution of due process proceedings.

GROOMING AND ATTIRE
Model

I. GROOMING

A. Hair
1. Inmates shall be permitted to adopt any hair style or length, including beards and moustaches provided they are kept clean.
   a. Shampoo shall be provided for this purpose.
   b. Inmates shall also have the opportunity to shave regularly.
2. When the length or style of one's hair is found to present a health or sanitation problem, the inmate may be required to trim or cut his hair or wear a hair net or other covering to alleviate the problem.
3. Inmates performing work assignments which may reasonably be determined to include safety hazards may be required to wear appropriate protective head coverings.
4. New identification photographs shall be taken of any inmate whose outward appearance changes or is altered as a result of a change in his hair style.

B. Bathing
1. All inmates shall be required to keep themselves clean, and they shall be provided with such water and toilet articles as are necessary for health and cleanliness.
2. All inmates shall be provided with adequate facilities to bathe or shower at least three times per week.
3. No personal hygiene needs shall be denied for punitive reasons.

II. ATTIRE

A. Clothing
1. Inmates shall be permitted to wear any personal clothing they wish unless it can be shown that such clothing may constitute a security problem.
2. If an inmate is not allowed to wear personal clothing, he shall be provided with a sufficient supply of clothing suitable for the climate and adequate to keep him in good health.
3. No clothing issued to an inmate shall be degrading or humiliating.
4. All clothing shall be laundered on a regular basis.

B. Jewelry and Medallions
1. Inmates may be required to turn in for safekeeping, or return home, valuable jewelry which could cause conflicts within the institution.
2. Non-valuable jewelry or medallions which constitute a threat to the security or order of the institution shall not be worn.
3. In banning a particular piece of non-valuable jewelry or a medallion as a security threat, prison officials shall look to its potential use as a weapon and not to its symbolism or "message," unless such "message" presents a clear threat to institutional security or order.

Commentary

To justify restrictions on an inmate's grooming or attire, prison administrators have generally cited the need for identification, health and security. These three needs while generally regarded favorably by courts can be found wanting on close scrutiny. Therefore, the model eases some restrictions in the area of grooming and attire to avoid the possibility of lengthy and expensive court action in the future.

GROOMING

A. Hair

The model permits an inmate to wear his hair in any length or style and to grow a moustache or beard if he so desires. This will help preserve the inmate's identity, as well as enhance his self respect; two important goals in any successful rehabilitation program. The model, however, does take into account the need for health and safety precautions by requiring the cleaning and cutting of hair when health or sanitation becomes a problem. It also requires the wearing of hair nets or other protective coverings when an inmate is involved in the preparation of food or is working around machinery which may constitute a safety hazard. Further, it is recognized that by permitting an inmate to grow his hair in any length or style a change in the inmate's physical appearance may result. This change could create a security problem. To remedy any potential problem in this regard, new identification photographs should be taken when the need arises. See *Teterad v. Burns*, 522 F.2d 357 (8th Cir. 1975). Some states, for example, require that an inmate's I.D. card correspond to his appearance before allowing him to purchase items from the inmate canteen or enter the visiting room.

This part of the model has taken much of its language from the *Wisconsin Resident Grooming Code* (1976). However, it also reflects the view of many other standards and regulations; See, e.g., *Tentative Draft of Standards Relating to the Legal Status of Prisoners*, American Bar Association §6.7 (1977); Draft Federal Standards for Corrections, Inmate Rights §012; ACA Standards, Inmate Rights §4303.

It also should be mentioned that while the model may go further than most jurisdictions in allowing inmate freedom in regard to hair style and length, it is done with the hope of minimizing the vast amount of litigation that has occurred on this subject. See generally, *Hill v. Estelle*, 537 F.2d 214 (5th Cir. 1976); *Burgin v. Henderson*, 536 F.2d 501 (2nd Cir. 1976); *Jilhead v. Carlson*, 410 F.Supp. 1132 (E.D. Mich. 1976).

B. Bathing

"Prisoners have a right to a healthful environment, to include: . . . provisions for personal hygiene, toilet articles, and an opportunity to bathe frequently . . ." *Standards for Inmates' Legal Rights*, National Sheriffs Association, §3 (1974). This attitude has been adopted in the model which calls for providing inmates with adequate water and toilet articles, as well as bath or shower privileges at least three times a week. See also, *Standard Minimum Rules for the Treatment of Prisoners*, Fourth United Nations Congress on Prevention of Crime and Treatment of Offenders, §15, 16, 17 (1955) and *Sweet v. South Carolina Department of Corrections*, 529 F.2d 834 (4th Cir. 1975) which requires revision of limited shower privileges to assure healthfulness.

Access to basic personal hygiene articles has been required consistently by the courts, *Ahrens v. Thomas*, 434 F.Supp. 873 (W.D. Mo., 1977), *McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1975).

ATTIRE

A. Clothing

In matters of dress, inmates should be allowed to wear personal clothing. (See e.g., *Tentative Draft of Standards*, American Bar Association, supra.) The only times when personal clothing may be prohibited is where: 1) it may contribute to an escape attempt by disguising or confusing the identity of the inmate or 2) it may cause a threat to the order of the institution by pointing out economic or social differences between inmates. Where the inmates are allowed to wear personal clothing, reasonable regulations to prevent confusion between inmates and security personnel should be promulgated.

When it becomes necessary for an institution to supply an inmate with clothing, such clothing should be "climatically suitable, durable, economical, easily laundered and repaired, and presentable." United Nations, *Standard Minimum Rules*, supra. They also should not degrade or humiliate the inmate in any way. See *Model Penal Code—Part III on Treatment and Correction*, §304.5(2), American Law Institute (1962).

B. Jewelry and Medallions

Conflicts may arise between inmates over possession of valuable jewelry. For this reason, the model permits institutions to ban this type of jewelry. Other jewelry may also be banned at the discretion of the institution if it can be shown that the jewelry could be used as a weapon. See *Rowland v. Jones*, 452 F.2d 1006 (1971) or otherwise constitutes a threat to the security or order of the institution. In considering the banning of jewelry which could not be used as a weapon, but which may carry a "message" thought to constitute a security risk, officials should bear in mind courts have been willing to find an abuse of discretion if the jewelry was banned solely because it expressed a message or belief that was unpopular to the institution. See generally, *Sezerbaty v. Oswald*, 341 F.Supp. 571 (S.D.N.Y. 1972). In acting against such "message" jewelry, officials should take care to determine that the message actually poses a threat to security or order and is not simply offensive or unpopular to the administration.

SEARCH AND SEIZURE
Model

I. INSPECTION AND SEARCH OF PRISONER ROOMS AND CELLS

A. Routine room or cell inspection
   1. A routine room or cell inspection is an outside visual examination of an inmate's room or cell and its contents.
   2. It may be done by members of the institutional staff at any time, without specific cause.
   3. It may be conducted without the prior authorization of a shift supervisor.
   4. Information gained through this inspection may be used in applying for authorization for a room search.

B. Room or cell search
   1. A room or cell search is a thorough inspection of the room or cell of a particular inmate.
   2. It may be done by members of the institutional staff only upon a reasonable belief that the search will reveal evidence of illegal activity or contraband, or
   3. It may be conducted as part of a routine security inspection or on authorization of the shift supervisor, unless circumstances are such that an immediate search is necessary for fear of destruction or disposal of evidence.
   4. Where circumstances require a search without prior authorization, immediately after the search the officer shall file a written report with the shift supervisor explaining why time did not allow for prior authorization. A copy of this report shall be given to the inmate, unless this would create a security problem in which case appropriate deletions could be authorized by the shift supervisor.
   5. The inmate may be present during conduct of a cell search, absent a specific security problem.
   6. The attendance of two officers should be required during a cell search.
   7. Receipts must be given to the inmate for all property seized in the course of a cell search.

II. NON-INTRUSIVE SENSOR, PERSONAL AND BODY SEARCHES

A. Non-intrusive sensor and scanning device searches
   1. A non-intrusive sensor or scanning device search is a search conducted using a mechanical device.
   2. This type of search may be done by members of the institutional staff at any time without specific cause.
   3. It may be conducted without the prior authorization of the shift supervisor.

B. Personal searches
   1. A personal search is a search of the inmate's person, including a body frisk and the examination of pockets, shoes and cap. It does not include the removal or opening of any of the inmate's clothing except for those articles mentioned above.
   2. It may be done by members of the institutional staff at any time, without the prior authorization of the shift supervisor.
   3. It may also be conducted:
      a. Prior to entering the visiting room.
      b. After a visit between the inmate and a visitor in which close physical contact provided the opportunity for contraband to be passed.

c. Prior to the departure of the inmate from any prison area where the inmate has access to dangerous or valuable items (e.g. kitchen implements or shop tools), provided such areas have previously been declared searchable and prior notice to that effect has been posted.

C. Body searches
1. Strip search
a. A strip search is a search in which the inmate is required to remove all clothes.
b. It may be conducted only under the following conditions:
1. With prior authorization from the shift supervisor, by members of the institutional staff of the same sex as the inmate, where there is a reasonable belief that the inmate is carrying weapons or contraband.
2. Without prior authorization from the shift supervisor, where there is a reasonable belief that an inmate is carrying contraband and an immediate search is necessary to prevent destruction or disposal of the evidence. After the search, the officer shall file a written report with the shift supervisor explaining why time did not permit prior authorization. A copy of this report shall be given to the inmate, if this will not cause security problems.
3. After a visit between the inmate and a visitor in which close physical contact provided the opportunity for contraband to be passed.
4. Prior to the departure of the inmate from any prison area where the inmate has access to dangerous or valuable items (e.g. kitchen implements or shop tools) provided such areas have previously been declared searchable and prior notice to that effect has been posted.
5. All strip searches shall be conducted by institutional staff of the same sex as the inmate in a private place, out of the view of others.
2. Body cavity searches
a. A body cavity search is a visual or manual inspection of an inmate's anal or vaginal cavity.
b. It shall be conducted only under the following conditions:
1. With prior authorization from the shift supervisor, when there is probable cause to believe that an inmate is carrying contraband there.
2. By a medically trained person other than another inmate, in the prison hospital or other private place, out of the view of others.

III. GENERAL SEARCHES

A. A general search is a shakedown of designated places in the institution. It is aimed at the general prison population as a whole rather than at a specific inmate.

B. It may be done only upon the authorization of the warden or a designated representative, who upon ordering a general search shall specify which areas of the prison are to be searched and what types of body searches are to be performed on inmates in the targeted areas.

C. A general search may be ordered at any time without specific cause, except:
1. If a general search authorization includes strip searches, these shall only be conducted on the identified inmate class and carried out in accordance with the provisions of Section II C-1.
2. If a general search authorization includes body cavity searches, these shall only be conducted on the identified inmate class and carried out in accordance with the provisions of Section II C-2.

D. Following a general search, the warden or a designated representative shall file a written report to the Director of the Department of Corrections describing the scope of the search undertaken and the results of the search, including a list of all items of contraband seized.

IV. PROCEDURES FOR OBTAINING AUTHORIZATION TO SEARCH

A. Applying for authorization to search
   1. In each instance where an authorization to search is required (e.g. room or cell search, body search) and circumstances are not such that an immediate search is necessary for fear of destruction or disposal of the evidence, the searching officer shall file an authorization form with the shift supervisor prior to the search.
   2. This authorization form shall contain:
      a. The name of the inmate to be searched.
      b. The type of contraband expected to be seized.
      c. The reason to believe that the inmate is involved in illegal activity or that contraband will be found in his or her possession. Such belief to be based on:
         1. The personal observation of the officer and/or
         2. The incriminating information of a third party who is believed to be reliable, and/or
         3. Other incriminating evidence.
      d. The time, date and signature of the searching officer.

B. Authorization granted by shift supervisor
   1. Upon receiving the form for authorization to search, the shift supervisor shall determine whether there is sufficient information to establish the degree of cause necessary for the type of search requested.
   2. If the shift supervisor finds the requisite degree of cause, he or she shall authorize the search by signing the authorization form.
   3. One copy of this form shall be kept by the shift supervisor. Two other copies shall be returned to the searching officer.
   4. Prior to conducting the search, the searching officer shall present a copy of the authorization form to the inmate. If information for a search was provided by an inmate-informant, this name may be omitted from the inmate's copy.

V. SEARCH REPORTS

A. If, as a result of any search, contraband or evidence of illegal activity are found, the searching officer shall tag the evidence for identification and turn it in to the shift supervisor.

B. The searching officer shall also submit a written report of all searches to the shift supervisor; this report shall include:
   1. The time and date the search was conducted,
   2. The person or places searched,
   3. The items seized, if any,
   4. Any force used to effectuate the search,
   5. Any property damaged by the search,
   6. Any witnesses to the search, and
   7. The signature of the searching officer.

C. The contraband or evidence of illegal activity plus a copy of the report shall ultimately be turned over to the disciplinary committee for their consideration.

D. In the event criminal charges are to be filed, a copy of the report shall be turned over to the appropriate law enforcement authorities.

Commentary

The Fourth Amendment protection against unreasonable searches and seizures has generally been found to survive at least to some extent during incarceration. For example in *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975), the Seventh Circuit Court of Appeals declared through Judge (now Justice) Stevens that inmates do not totally give up their right to privacy and that some Fourteenth Amendment protection continues during incarceration. See also *Saunders v. Packel*, 436 F.Supp 618 (E.D. Pa., 1977). But see *Christman v. Skinner*, 468 F.2d 723 (2nd Cir. 1972); *United States v. Hitchcock*, 467 F.2d 1107 (9th Cir. 1972) cert. denied 410 U.S. 916. Some degree of inmate privacy is apparently mandated but not how to determine the appropriate level.

As the U.S. Supreme Court explained in *Bell v. Wolfish*, 25 CrL 3053 (1979):

> "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it and the place in which it is conducted."

In general, however, the greater the degree of the intrusion accompanying a particular form of search, the higher the burden for showing an institutional need or cause requirement is likely to be.

What degree of privacy survives for a prison inmate and what standards of reasonableness and degree of cause are required prior to infringing on that privacy are still developing. Clearly, courts will examine institution search and seizure policies more closely now than in the past. If an institution's administration cannot justify their search policy or if a less intrusive means of meeting institutional goals (such as reducing the flow of contraband or discovering weapons) is shown, the policy probably will not be upheld.

The model has been developed to provide the institution with a sufficiently free hand to allow maintenance of a high level of security while at the same time recognizing valid inmate privacy interests.

INSPECTION AND SEARCH OF PRISONER ROOMS AND CELLS

The search of a prisoner's room or cell can take one of two forms. First, it can involve a routine room inspection in which the officer observes the area solely by visual examination. This type of inspection is a relatively minor infringement on inmate privacy. The security of the institution necessitates such cursory inspections which can lead to the discovery of concealed contraband.

Room inspections are also "designed to insure that a minimal standard of cleanliness and order is maintained within each room." Model Rules and Regulations on Prisoners' Rights and Responsibilities, Center for Criminal Justice, Boston University, School of Law, 60 (1973); hereafter referred to as the Model Rules. Because of the ease with which this type of inspection can be accomplished and the minor inconvenience it poses to inmates, it can be conducted at any time by an officer without supervisory approval.

The second way of detecting the concealment of contraband or the perpetration of illegal activity within an inmate's cell is by conducting a thorough search of the cell. These types of searches should be conducted so as to avoid "unnecessary force, embarrassment or indignity to the inmate." American Correctional Association, Standards for Adult Correctional Institutions, §4163; hereafter, ACA Standards. See also *Commonwealth v. Wallington*, 357 A.2d 598 (S.Ct. Pa., 1976). To comply with this standard and avoid undue inmate harrassment, the model requires that the following conditions (reasonable belief test and approval of supervisor) be met prior to conducting this type of search.

Except in those cases involving truly random cell searches, before any room search is permitted, there must first be reasonable belief that the search will reveal evidence of illegality. This requirement of reasonable belief, although further in scope than most courts have gone, see, e.g. *U.S. v. Palmateer*, 469 F.2d 273 (9th Cir., 1972), but see *U.S. v. Ready*, 574 F.2d 1009 (10th Cir., 1978) has been recognized in principle by the National Advisory Commission Standards (hereafter, NAC Standards) which acknowledge the need for search and seizure policies, but not as justification for "carte blanche searches of inmates and their property."

The second condition required for a room search is prior approval of the shift supervisor. This requirement is supported by both the Model Rules and Regulations on Prisoners' Rights and Responsibilities, supra, and the ACA Standards, §4293. Such prior approval is necessary to insure that reasonable belief is shown before conducting a room search. This approval requirement takes that determination out of the hands of the searching guard and places it in the province of the supervisor.

The model recognizes the need for permitting routine random cell searches in the absence of specific cause as a general precautionary measure with the approval of supervisory personnel. This will increase the flexibility that administrators have to reduce contraband flow and weapons possession.

Requiring a shift supervisor to approve a room search enables the institution to keep close tabs on such searches and reduces the chance of theft or needless destruction of inmate property by overzealous guards. Since some courts have ruled that

prisoners do not forfeit all Fourth Amendment rights during incarceration, see *Bonner v. Coughlin* and *Saunders v. Packel*, supra, some form of procedural protection of those rights should be required before conducting such an extensive search.

The model recognizes that in some instances the requirement of prior supervisory approval cannot be met. This is particularly true in cases where an immediate search is necessary for fear delay might permit destruction or disposal of evidence. In the emergency situations, the model authorizes an immediate search. However, this must be followed by a written report to the shift supervisor explaining why time did not permit prior authorization. Requiring a written report in such circumstances should help curtail abuses in emergency situations.

Reduction of Property Claims

Efforts to minimize the volume of litigation concerning property lost or damaged during cell searches are essential. A great deal of time, energy and resources are wasted annually in unsuccessful attempts to defend such property claims which are frequently lost due to the absence of a sound property control system.

Several remedial steps can be considered to address this problem. The presence of the inmate or an inmate observer during the conduct of a cell search, in the absence of a specific security problem, may be permitted, see *Giampetruzzi v. Malcolm*, 406 F.Supp. 836 (S.D.N.Y. 1975) but see also *Bell v. Wolfish*, 25 CrL 3053 (1979), reversing such a requirement. Nevertheless, this approach may help to limit the incidence of property claims which result in litigation and is worthy of consideration on that basis, as the court in *Wolfish* acknowledged as a conceivable benefit.

The attendance of two officers for the performance of a cell search is recommended as a way to reduce the volume of property-related allegations resulting from searches by individual officers, see ACA Standards, §4163. The second officer functions as an observer whose ability to testify can perhaps deter some unnecessary litigation. Respect for inmates' rights to property authorized by institutional regulations is an important corollary to an effective search policy, see U.S. Department of Justice, *Draft Standards*, Security and Control, Std. 013, (hereafter, Draft Federal Standards), and ACA Standards, supra and §4366. A receipt procedure of some sort along with recording and accounting practices should be established in conjunction with cell search policies to assure proper control of property after it is confiscated.

A related concern is the need for a clear and well-published definition of what items are considered contraband. Both inmates and staff should be made aware of the policy in this area in order to reduce unwarranted challenges to search-related confiscations.

NON-INTRUSIVE SENSOR, PERSONAL AND BODY SEARCHES

A. Non-Intrusive Sensor and Scanning Device Searches

The National Advisory Commission on Criminal Justice Standards and Goals, Corrections (NAC Standards) calls on correctional agencies to develop a search and seizure policy that provides for the use of "non-intensive sensors and other technological advances instead of body searches whenever feasible," §2.7, (1973). This approach is also endorsed by the ACA Standards, §4163, and by the Draft Federal Standards, Security and Control, Std. 013.

The use of sensors and walk-through scanning devices are but a minor intrusion upon the inmate. They have been proven to be effective ways of uncovering the concealment of contraband in airport and border searches and their use in prisons is encouraged. The model, noting their efficiency and relative unobtrusiveness, permits their use without prior supervisory approval and does not require a belief that the inmate is carrying contraband.

B. Personal Searches

The holding and transferring of contraband by inmates present very serious security problems within an institution. The model recognizes the need for staff to have a relatively free hand when attempting to curb the proliferation of such objects. Thus, it allows a personal search or frisk of an inmate's outer clothing, including examination of pockets, shoes, and cap, at any time without prior supervisory approval.

The model permits unannounced and irregularly timed personal searches in efforts to control contraband. This is consistent with ACA Standards, §4163 which cautions against the use of "unnecessary force, embarrassment or indignity to the inmate" in the conduct of searches while also emphasizing the importance of limiting the frequency of such searches. Adequately advising inmates of the possibility of random searches will go a long way toward insulating such practices from successful challenges.

In any case, the best approach regarding policies and practices on search procedures is to highlight the importance of conducting searches in a thoroughly professional manner. Legal problems can arise from the way in which a search is handled even if all the necessary cause requirements are met. The need to avoid harassment, abuse, and a side-show atmosphere are paramount considerations for staff professionalism in the conduct of searches. Proper record-keeping and property security are also essential.

C. Body Searches

The model defines two categories of permissible body searches, strip searches and body cavity inspections. Because of the greater intrusion on inmate privacy involved, strict requirements must be met prior to conducting either of these searches.

A strip search requires the showing of cause amounting to a "reasonable belief." To provide guidance on the meaning of that phrase, it is suggested that a correctional officer not conduct a strip search unless the belief that an inmate is carrying contraband is based on: (1) "The observation of facts, which may be interpreted in light of the correctional officer's experience and his knowledge of the character of the inmate, or (2) Incriminating information from a third party where there is no reason to believe the third party is motivated by the desire to harass the inmate", see Model Rules, supra at 63.

A strip search can be conducted only upon the prior approval of a shift supervisor, unless time is of the essence; in that case post-search approval must be obtained. Due to the humiliation/intrusion involved in a strip search, it is necessary that greater restrictions be placed on this practice than on personal searches. By requiring the correctional officer to obtain advance authorization from a supervisor, it is hoped that inmates will be strip searched no more frequently than is reasonably necessary to control the flow of contraband, see ACA Standards, §4163; Draft Federal Standards, Security and Control, Std. 013.

The model recognizes two situations where strip searches or personal searches can be performed as a matter of course. These are: (1) after a visit where close personal contact was allowed, and (2) after an inmate leaves an area where they may have had access to dangerous items, but only if the area has previously been declared and posted as searchable.

As the creation of an expectation of privacy may be of significance in the determination by a court of the reasonableness of a search, it is vital that notice of potential searches in these circumstances be prominently and effectively communicated to the inmates. This approach may avoid creating a privacy expectation that could preclude searches of this variety in such circumstances.

These notice requirements are designed to give inmates prior warning and to avoid arbitrary designations of areas as searchable. These "two situations are both ones where inmates will have greatest access to contraband" and thus reason to believe contraband may be concealed after such occurrences can be inferred. See Model Rules, Id at 65 for further discussion and Draft Federal Standards, supra; see also *Jackson v. Werner*, 394 F.Supp. 805 (W.D. Pa., 1975) and *Bell v. Manson*, 427 F.Supp. 450 (D. Conn., 1966).

"Strip searches shall be conducted with maximum courtesy, maximum respect for the patient's dignity, and minimum physical discomfort to the patient" (*McCray v. State*, No. 4363 Md. Cir. Ct., Montgomery County, November 17, 1971), rev'd on other grounds, 297 A.2d 265 (1972). In keeping with this declaration and recognizing the indignity that may be felt by inmates in removing their clothes for search, the model requires that all strip searches be conducted in a private place. See Draft Federal Standards, supra. Unprofessional conduct by staff in carrying out strip searches is certain to increase judicial scrutiny of search policies. Abuses of this type cannot be condoned. Procedures designed to assure inmate privacy during body searches will help alleviate judicial concern over degrading "side-show" searches.

The other type of body search is the body cavity inspection. Due to the invasion of personal privacy and literal intrusion caused by this procedure, the strictest prerequisites must be met prior to conducting such searches. See *Hurley v. Ward*, 448 F.Supp. 227 (S.D.N.Y. 1978). First, at all times the approval of the shift supervisor must be obtained in advance of body cavity searches. Second, such approval should only be granted if the searching officer has probable cause to believe that contraband is being concealed there. Third, the search shall only be conducted by medical personnel in a private place, preferably in the prison hospital.

These procedures go beyond those presently required by most courts. See, e.g. *Hodges v. Klein*, 412 F. Supp. 896 (D.N.J. 1976); *Daugherty v. Harris*, 476 F.2d 292 (10th Cir., 1973) cert. denied 414 U.S. 872 (1973); *Frazier v. Ward*, 426 F. Supp. 1354 (S.D.N.Y. 1977); and *U.S. v. Lilly*, 576 F.2d 1240 (5th Cir., 1978). Indeed, the recent *Bell v. Wolfish*, decision, supra, held that visual body cavity inspections can even be conducted on less than probable cause, given significant and legitimate institutional security interests.

However, correctional standards now being developed (see Draft Federal Standards, Security and Control, Std. 013) propose comparably rigorous procedures. In keeping with the goal of avoiding needless future litigation, the model adopts strict procedural safeguards for body cavity searches.

GENERAL SEARCHES

This section of the model gives the warden or a designated representative the authority to order a general search of any area of the institution. This type of search is designed to uncover the concealment of contraband hidden in general areas of the prison. It is also appropriate where information is received regarding the presence of contraband somewhere within the institution. *See U.S. v. Ready*, supra.

A general search may be authorized at any time without specific cause. "Prison-wide searches for contraband instituted by prison officials . . . must be deemed reasonable per se unless there is abuse or wanton conduct during the search" *Laaman v. Helgemoe*, 437 F.Supp. 269 (D.N.H. 1977).

The only exceptions to the "any time, without specific cause" rule are that: (1) these searches should be conducted "no more frequently than reasonably necessary to control contraband in the institution or to recover missing or stolen property" (NAC Standards, supra, §2.7; ACA Standards, §4163; and Draft Federal Standards, supra), and (2) if strip searches and/or body cavity searches are to be performed, they can only be conducted in accordance with the provisions in Section II C-1 and 2, respectively.

The reason for this latter exception is the belief that body cavity searches—whether administered under general or body search classification—inflict extensive humiliation and embarrassment upon the inmate. Therefore, they should be allowed only when proper cause is demonstrated and then only when adequate privacy procedures are followed.

The submission of a written report to the Director of the Department of Corrections after each general search is required to allow the Director to monitor the institution's search plan and to insure that such searches are kept reasonable in scope.

PROCEDURES FOR OBTAINING AUTHORIZATION TO SEARCH

The model calls for the requesting officer to submit an authorization form to the shift supervisor prior to or after certain types of searches (e.g. room or cell search, body search). "The primary function of the authorization form is to provide evidence for use in any disciplinary or grievance proceedings that might result from the search. The information required by the form should also encourage the officers to learn the standards for permissible searches" (Model Rules, supra at 62).

The authorization requirements have been kept to a minimum so that obtaining approval for a search does not become unduly bureaucratic. The officer need only identify the inmate to be searched, the contraband to be seized, and the reason for the search, the date, and his or her signature. It is suggested that the institution develop a standard search authorization form to expedite the process.

When authorizing a search, the shift supervisor must determine that the requisite cause for the type of search requested is present. This can easily be accomplished by the use of common sense by the supervisor. For example, prior to authorizing a strip search the supervisor should determine: (1) whether the source of the information upon which the officer is basing his or her determination is credible, and (2) whether the contraband to be seized is of the type or size that would not be revealed by a personal search and, thus, necessitates a strip search.

SEARCH REPORTS

The final items addressed are the procedures to be followed upon the seizure of contraband found in the possession of an inmate. Any time that inmate property is confiscated, there is a possibility of a lawsuit. The reporting requirements of this section will make defending such suits a great deal easier and help reduce the likelihood of the litigation degenerating into a swearing contest. The model calls for identification tagging of the evidence and filing a written report of the incident with the shift supervisor.

These practices can assist the institution in complying with the requirements of *Wolff v. McDonnell*, 418 U.S. 539 (1974). In many instances where contraband is seized, disciplinary action is subsequently brought against the inmate. In *Wolff*, the Supreme Court determined that prior to imposing disciplinary penalties, an institution must meet certain due process requirements. By properly handling seized items and recording the search in detail, complying with the *Wolff* standard requiring written records of disciplinary proceedings, including evidence relied on, becomes easier.

In addition, requiring institutional staff to submit written reports of all searches to their supervisors may provide "a means of controlling excessive zeal on the part of employees conducting the search" (NAC, supra at 39). This approach may also help reduce the potential for liability being incurred by the institution as a result of inmate suits against the guards alleging search-related harassment.

When emergency searches are conducted without prior supervisory approval, there is a need to document the circumstances which gave rise to the emergency. The factors that provided the basis for such searches should be reported in writing and reviewed by supervisory personnel to determine if the action taken was justifiable under the prevailing conditions.

A final purpose served by these documentation procedures is that in the event the discovery of contraband leads to criminal charges against the inmate, a report of the search plus the evidence discovered will be readily available to law enforcement personnel. Such documentation can save investigative time for both the authorities and the institution.

USE OF FORCE
Model

I. DEADLY FORCE

A. Deadly force is force which will likely cause death or serious bodily injury.

B. It may be used only as a last resort and then only in the following instances:
   1. To prevent the commission of a felony, including escape.
   2. To prevent an act which could result in death or severe bodily injury to one's self or to another person.

C. When used, the following steps shall be undertaken:
   1. An immediate notification of its use shall be given to the warden and to the proper law enforcement authorities.
   2. A report written by the officer who used the deadly force shall be filed with the Director of the Department of Corrections, and the proper law enforcement authorities. Such report shall include:
      a. An accounting of the events leading to the use of deadly force.
      b. A precise description of the incident and the reasons for employing the deadly force.
      c. A description of the weapon and the manner in which it was used.
      d. A description of the injuries suffered, if any, and the treatment given, and
      e. A list of all participants and witnesses to the incident.

II. NON-DEADLY FORCE

A. Non-deadly force is force which normally causes neither death nor serious bodily injury. It may be in the form of physical force or chemical agents.
   1. Physical force or chemical agents may be used only in the following instances:
      a. Prior to the use of deadly force
         1. To prevent the commission of a felony, including escape.
         2. To prevent an act which could result in death or severe bodily harm to one's self or to another person.
      b. In defending one's self or others against any physical assault.
      c. To prevent commission of a misdemeanor.
      d. To prevent serious damage to property.
      e. To enforce institutional regulations.
      f. To prevent or quell a riot.

   In every case, only the minimum force necessary shall be used.
   2. Chemical Agents — Special Conditions
      a. Chemical agents may be used only by employees specifically trained in their use.
      b. Chemical agents shall not be used:
         1. Without approval of the Warden or his representative, if approval is possible under the circumstances,
         2. Repeatedly against an inmate within a short period of time.
      c. In every case, individuals affected by the agents shall be permitted to wash their face, eyes or other exposed skin areas as soon as possible after the use of the agent.

B. After the use of non-deadly force, the following steps shall be undertaken:
   1. A notification of its use shall be given to the Warden.

2. A report written by the officer who employed the non-deadly force shall be filed with the Director of the Department of Corrections. Such report shall include:
   a. An accounting of the events leading to the use of the non-deadly force.
   b. A precise description of the incident, and the reasons for employing the force.
   c. A description of the weapon used, if any, and the manner in which it was used.
   d. A description of the injuries suffered, if any, and the treatment given, and
   e. A list of all participants and witnesses to the incident.

C. The use of any type of force for punishment or reprisal is strictly prohibited and is grounds for dismissal of the employee involved.

III. MECHANICAL RESTRAINTS

A. Mechanical restraints may be used only when reasonably necessary and only in the following instances:
   1. In transporting an inmate from place to place.
   2. When the past history and present behavior or apparent emotional state of the inmate creates the likelihood that bodily injury to any person or property damage or escape by the inmate will occur. Use of restraints in these circumstances shall be approved by a designated high ranking official. Such approval shall be obtained in advance, if possible, or immediately following application of restraints.
   3. Under medical advice, to prevent the inmate from attempting suicide or inflicting serious physical injury upon himself.

B. Mechanical restraints shall never be used:
   1. As a method of punishment,
   2. About the head or neck of the inmate, and
   3. In a way that causes undue physical discomfort, inflicts physical pain or restricts the blood circulation or breathing of the inmate.

C. Restraints shall be used no longer than is absolutely necessary.

COMMENTARY

The force available to correctional staff is one of two types: deadly and non-deadly. Each can be used only under certain select circumstances which are well defined in the model.

DEADLY FORCE

The use of deadly force is permissible to prevent the commission of a felony, see *Beard v. Stephens*, 372 F.2d 685 (5th Cir. 1967) or to prevent the infliction of severe bodily harm, see *In re Riddle*, 57 Cal.2d 843, 372 P.2d 304 (1962). In both cases, however, its applicability is limited.

It is well settled that deadly force may only be used as a last resort; after all other reasonable means available have failed. (see *In re Riddle*, Id.) Unless it can be shown that deadly force was used only as a last resort, civil and/or criminal liability may result.

The model permits the use of deadly force to prevent an inmate from escaping. This is contingent upon a state statute classifying an escape attempt as a felony. While, as a general rule, an escape or an attempted escape has been classified as such, see Pa.

Stat. Ann. Title 18 §5121 (1973); this is not always the case. Therefore, it is important to examine the applicable law in preparing this part of the regulation. If the statute does not classify escape as a felony, then deadly force cannot be used to prevent it.

One further comment must be made in regard to the use of deadly force to stop escapes. Recently, the U.S. Court of Appeals for the Eighth Circuit found a statute which permitted the use of deadly force against fleeing felons to be overly broad. The court indicated that the "statute may authorize the use of deadly force only against suspects who (have) committed violent crime . . . " They declared it to be unconstitutional as applied to non-violent fleeing felons. *Mattis v. Schnaar*, 547 F.2nd 1007 (8th Cir. 1976). While this ruling may curtail the utilization of deadly force on escaping inmates who have not been convicted of a violent crime, a distinction can be made because it is very difficult and impractical to distinguish between an inmate escapee who has been convicted of a violent crime and one who has not, prior to deciding what type of force can be used. In dealing with fleeing felons, however, the police are well aware beforehand of what type of crime the suspect has allegedly committed and so can readily decide what type of force is permitted.

The applicability of *Mattis* to a correctional setting is in doubt. But, it is still important to be aware of a possible trend in regard to preventing escapes.

The use of deadly force may also be employed to prevent death or serious bodily injury to a prison employee, inmate or third person. Thus, it may be used in self defense, see *In re Ferguson*, 55 Cal.2d 663, 361 P.2d 417 (1961), but only when the "prison official is in reasonable apprehension of death or serious injury and the use of deadly force is his last resort." Palmer, *Constitutional Rights of Prisoners*, 17 (1973). It may also be used to prevent the death or serious injury of a third person, but again only as a last resort (see *In re Riddle*, supra.).

The requirement of filing an immediate report to the proper law enforcement authorities regarding the incident and the subsequent forwarding of a detailed account to them and to the Department of Corrections will serve a twofold purpose. It will notify the proper authorities of the matter and will provide a record for use by the department's attorney should the matter later be the subject of a lawsuit.

NON-DEADLY FORCE

Physical force or chemical agents can be used "for self defense, to prevent imminent physical attack on staff, inmates or other persons, or to prevent riot or escape, *National Advisory Commission on Criminal Justice Standards and Goals, Corrections, 2.4 (1973)*. See also ACA Standards, Security and Control, §4188. Further, it has been upheld by courts when used to prevent the commission of a misdemeanor, See *State v. Jones*, 211 S.C. 300, 44 S.E.2d 841 (1947).

Physical force has also been declared an acceptable method to enforce institutional regulations, See *In re Jones*, 57 Cal.2d 860, 372 P.2d 310 (1962). It, however, must be used with restraint as only the minimal amount necessary to enforce the regulation will be protected.

While the model allows physical methods to enforce institutional regulations, it is hoped that the trend toward less physical control of inmates will be undertaken. As the American Correctional Association has said, "Control and management of offenders should be by sound scientific methods, stressing moral values and organized persuasion, rather than primarily dependence upon physical force." *Declaration of Principles of the American Correctional Association*, Principle XXIX (1970).

The use of chemical agents, tear gas, etc. does not per se constitute cruel and unusual punishment, see *Grear v. Loving*, 391 F.Supp. 1269 (1975) and *Clemmons v. Gregg*, 509 F.Supp. 1338 (1975). They can be an effective method in maintaining order, but they should not be used to disable a man physically who poses no threat, as such action would be cruel and unusual, see *Landman v. Royster*, 333 F.Supp. 621 (1971). Whenever possible, their use should be authorized by the Warden or his representative, see ACA Standards, Security and Control, §4165. In every case, full documentation should be made following their use. Also, they should be used only by those officials who have been trained in their use (See ACA Standards, Security and Control, §4165-4173).

In all cases, if excessive force is used it will not necessarily constitute cruel and unusual punishment. In determining whether that constitutional line has been crossed, "a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm." *Johnson v. Glick*, 481 F.2d 1028 (1973). A worthwhile practice to consider in situations which may involve the use of force, is to record the entire incident on video tape. The New Jersey State Prison (Trenton) has found this to be a relatively inexpensive deterrent to violence in situations where confrontation and violence may be reasonably anticipated. The tape can provide a clear record of what actually occurs and may help reduce the number of inmate brutality complaints which frequently can be resolved only through a "swearing contest" between inmates and involved correctional officers.

MECHANICAL RESTRAINTS

The three instances described in the model are the only times these restraints should be used. See generally, ACA Standards, Security and Control, §4189; Standard Minimum Rules for the Treatment of Prisoners, Fourth U.N. Congress on Prevention of Crime and Treatment of Offenders, §33 (1955). They should never be used for punishment purposes, nor should they be used in a manner above or beyond where they are truly necessary.

VISITATION
Model

I. SELECTION OF VISITORS

A. List of Approved Visitors
1. Each inmate shall submit to designated institutional staff a list of names and addresses of proposed visitors. Staff shall approve persons for an inmate's visiting list in accordance with the following guidelines:
   a. All persons under the age of 18 may visit only with the permission of a parent or guardian.
   b. Persons on active probation or parole or other forms of conditional release (including, but not limited to, furlough or work release) must obtain the permission of both the individual or agency supervising such conditional release and the institution superintendent prior to being allowed to visit.
   c. Persons with criminal records shall not be automatically excluded from visiting. The nature and extent of an individual's criminal record, plus his history of recent criminal activity, shall be weighed against the benefits of visitation in determining visitation eligibility.
   d. Persons shown, by substantial evidence, to be of harmful effect to the inmate or to constitute a threat to the security of the institution may be excluded from an approved visiting list.
2. The inmate shall be given a copy of his approved visitors' list. The institution shall also notify each person on the list of their acceptance and shall send to each of them a copy of the visitation regulations, including the hours of permissible visitation.
3. When an individual is not placed on an approved visiting list, notice of the exclusion and the reasons therefore shall be given to the inmate who submitted the individual's name. The inmate may appeal the decision to the superintendent, who may set reasonable time limits for such appeals.

B. Other Visitors
1. Special visits by persons not on the approved visitors' list, including prospective employers, sponsors and parole advisors, shall be authorized as a matter of course by the Warden or his representative. These persons may offer valuable assistance to inmates and shall be allowed to visit, whenever possible.
2. Attorneys and Attorney Representatives
   a. Attorneys and their representatives, i.e., investigators, paralegals and law students, are permitted to visit inmates in reasonable numbers during normal hours.
   b. These visitors must notify the institution twenty-four hours in advance of an intended visit, unless it can be shown that such notice was not possible.

II. CONDITIONS FOR VISITING

A. Visiting Hours
1. Each institution shall have as many visiting hours as staff and other resources permit. These hours shall be flexible enough to allow visitors with various working hours an opportunity to visit.
2. Although visiting on Saturdays, Sundays and holidays may be emphasized, weekday afternoon and evening visitation shall also be permitted, where possible.

B. Frequency of Visits
   1. Limitations on the length or frequency of visits shall be imposed only to avoid overcrowding or the inequitable allocation of visiting time or for other compelling circumstances.
   2. A reasonable number of visits or number of hours per month shall be established. Consistent with resources available, these shall include at least one visit per week for each inmate for a minimum time of at least one hour.
   3. Exceptions shall be made to any such rules where indicated by special circumstances, including but not limited to the distance the visitor must travel, the frequency of the inmate's visits or health problems of the offender.

C. Number of Visitors
   1. Limitations on the number of visitors who may visit an inmate at one time may be imposed to prevent overcrowding in the visiting room or to eliminate difficulties in supervising the visit, but these regulations shall be interpreted flexibly and subject to exceptions.

D. Termination and Suspension of Visits
   1. A particular visit may be denied or terminated and visiting privileges suspended under the following circumstances:
      a. Visitors under the influence of drugs or alcohol.
      b. Insufficient space is available.
      c. The visitor refuses to submit to a pat down search or, if reasonable suspicion exists, to a strip search.
      d. The visitor refuses or fails to produce sufficient identification or falsifies identifying information.
      e. A visitor violates institutional visiting rules, provided that such rules are posted and a copy has been sent to the visitor.
      f. Visitor fails to prevent children from disturbing other persons in the visiting area.
      g. The visitor and inmate engage in excessive physical contact. With contact visits, an inmate and visitor may embrace and kiss briefly at the beginning and end of the visit. An inmate and visitor may hold hands during the remainder of the visit. These contact restrictions shall not apply to small children.
      h. Other reasons exist for denying, terminating or suspending a visit which are reasonably necessary to preserve the security of the institution and reasonable order in the visiting room.
   2. Prior to the termination of a visit or suspension of visiting privileges for any of the above reasons, less restrictive alternatives will be resorted to, if reasonably possible under the circumstances. Such alternatives may include warning the inmate and/or visitor of improper conduct and/or transferring the visit to a non-contact visiting area.
   3. Whenever a visit is terminated, a report shall be prepared by the official taking the action. Such reports shall state the specific reasons for the action. A copy of the report shall be given to the inmate and to the visitor.
   4. Visiting privileges shall be suspended only by the superintendent or his designee, except where the suspension is imposed as part of a formal disciplinary proceeding (visiting may be suspended as a disciplinary sanction only when the offense specifically involves visiting or where the sanction is isolation, in which case visiting shall be suspended automatically for the duration of the isolation). Prior to suspending visits, a notice shall be given to both the inmate and the visitor of the reasons for the possible suspension and they shall be allowed to submit written (or, if time demands, oral) statements in opposition to the proposed suspension.
      a. Based on the information provided by the staff and by the inmate and/or visitor, the superintendent may remove an individual's name from an approved visiting list for a specified period, indefinitely, or permanently. A written notice of the superintendent's decision, including a statement of rea-

sons therefore, shall be given to the inmate and to the visitor. The statement of reasons may be deleted to the extent it would jeopardize the security of the institution or the safety of any individual. In the case of an indefinite suspension, the notice shall include a date when reapplication for visiting privileges may be made on behalf of the visitor.

b. The Superintendent may temporarily suspend visiting privileges pending the completion of the above process.

III. PROCEDURES FOR VISITING

A. Setting
   1. Each institution shall provide a visiting room for inmates and their guests and an area for non-contact visiting.
   2. The visiting room shall be set up with the comfort and privacy of the visitors in mind and shall be arranged so as to allow for contact visiting.
      a. It shall be furnished in an informal style wherever possible, and shall include small tables, arm chairs, settees and other informal furnishings.
      b. It shall include no partitions of any kind between inmates and guests.
      c. Where past experience or other relevant, substantial information exists to show that a contact visit would disrupt the security or order of the institution, a non-contact visit may be required.
   3. To maintain and strengthen family ties, entire families shall be encouraged to visit an inmate together.
      a. These visits shall be conducted in private surroundings apart from the general visitation room.
      b. A portion of the visiting room shall also be equipped and set up to provide a diversion for the children of these visitors where space is available.

B. Security
   1. The visiting room and procedures shall be devised so as to insure the security of the institution.
   2. Prior to the visit, all visitors shall be:
      a. Registered as guests and identified.
      b. Checked to determine that they have been approved for visitation.
      c. Advised of all visiting regulations by the placing of such rules in a conspicuous place for all to see.
      d. Searched by a scanning device or frisked. If after these methods have been used, there is still a reasonable suspicion that the person is carrying contraband, a further consensual search may be undertaken. Visitors shall be requested to submit to such further searches only following the approval of an official designated by the superintendent, who shall be of the rank of lieutenant or above, who shall evaluate the grounds asserted to justify the search. A report shall be made following each such search which shall contain the names of the searching officers and the official who approved the search, the reasons for the search, the extent of the search, and what, if anything, was found.
      e. No body cavity (anal or genital) searches shall be conducted by correctional personnel. If a search less intrusive than such a body cavity search is insufficient to allay suspicions that the visitor is smuggling, the visitor shall be denied access to the contact visiting area or denied admission to the institution, as appropriate.
   3. All inmates shall be frisked prior to entering the visiting room.
   4. All inmates shall be frisked or strip-searched upon leaving the visiting room to prevent the introduction of contraband into the institution.
   5. The institution shall post a large sign in the lobby or other entrance stating that "ALL VISITORS ARE SUBJECT TO SEARCH PRIOR TO BEING ALLOWED TO VISIT ANY INMATE."

C. Supervision
   1. The institutional staff is responsible for the maintenance of order in the visiting room. This shall be accomplished while also maintaining a courteous attitude toward the inmate and his visitors.
   2. The staff shall not interfere with the actions of the inmate or his visitors unless they are found to be a risk to the institution's security.
   3. At no time will a conversation between inmate and visitor be eavesdropped on or monitored.

D. Provisions shall be made to allow visits for persons in segregated confinement, including disciplinary segregation, administrative segregation, and protective custody.

Commentary

At least in facilities for convicted persons (as opposed to jails, housing pretrial detainees), courts have generally refused to hold that visiting is a constitutional right of either the inmate or the potential visitor, *White v. Keller*, 438 F.Supp. 110 (D. Md., 1977). However, prisoners do have a general right to communicate with persons in the free world, a right which may be afforded through a variety of means including visiting, mail, and telephone calls, *Pell v. Procunier*, 417 U.S. 817 (1974). Therefore, in matters of visitation, the courts have generally granted prison administrators a wide range of discretion. However, because there is at least some constitutional significance to visiting and because the courts have recognized the importance for an inmate to maintain his family and community ties, courts will consider at least some forms of visiting questions, particularly if it appears that an institution's visiting policy is unreasonably restrictive or that decisions concerning visiting are being made arbitrarily, or upon inaccurate information. Courts may also intervene when visiting policy is based totally on the unlimited discretion of the administrator, *Houston Chronicle Publishing Company v. Kleindienst*, 364 F.Supp. 719 (S.D. Tex., 1973). For an extensive review of case law pertaining to visits, see Prison Visitation, National Association of Attorneys General, May, 1977.

The model seeks to avoid the pitfalls of unconstitutionality by removing some questionable restrictions. Further, it reduces the chance of lawsuits by eliminating the amount of discretion available to the administrator and by including some limited due process protections at certain stages.

SELECTION OF VISITORS

"Inmates should be encouraged to maintain close contact with members of their families and desirable friends through visiting. . ." ACA *Manual of Correctional Standards*, 542 (1966). To achieve this goal and to screen prospective visitors properly, an inmate should be allowed to submit his own visitors' list. This is in keeping with the *National Advisory Commission on Criminal Justice* standard which provides that, "(o)ffenders should have the right to communicate in person with individuals of their own choosing." §2.17 (1973); see also *Response of the American Correctional Association to Correctional Standards of the National Advisory Commission*, §2.17 (1976). It will also allow the institution the opportunity of doing security clearances prior to visits.

The model does not attempt to list categories of persons eligible for visits, but rather lists certain criteria for rejecting proposed visitors. The model generally puts the burden on the institution to justify the exclusion of a potential visitor, as opposed to requiring that the inmate establish that a particular visitor will have a positive influence on the inmate. However, it should be noted in this regard that a requirement that a visit lead to a "genuinely constructive relationship and . . . further the inmate's rehabilitation" was approved by a federal district court in Georgia, *Hamilton v. Saxbe*, 428 F.Supp. 1101 (N.D. Ga., 1976).

Exclusions of persons from a proposed visiting list should be made only where substantial information exists to justify the decision, see ACA Standards §4351.

Where a proposed visitor is excluded from a visiting list, notice of the exclusion and the specific reasons should be provided to the inmate, who should be given the opportunity to appeal the decision to the superintendent, who presumably was not involved in the original decision to exclude the individual. If the superintendent was so involved, the appeal should go to a higher official. It is important that the reasons be set out with particularity since standard

"boilerplate" reasons (such as simply stating that the person was excluded because he was "a threat to the security of the institution") probably will not be accepted by a court and are of little or no benefit for anyone attempting to review the action. The appeal may be made in writing, although there is nothing to prevent the superintendent from meeting with the inmate and/or the potential visitor, or discussing the matter with them by telephone.

It is inevitable that there will be a need from time to time to allow visits by persons who are not on an inmate's approved visitors' list. The model recognizes this and therefore requires that a procedure be devised by the superintendent or his representative to be able to handle requests for such special visits quickly.

Contact between attorneys or their representatives and inmates is a common occurrence in a correctional setting, and unlike visiting between inmates and other persons, is of direct constitutional significance since attorney-inmate visits clearly involve the inmate's right of access to the courts, *Bounds v. Smith*, 430 U.S. 817 (1977). This right should be facilitated by allowing for visitation during normal institutional hours and also providing for special consideration for after hours visits, based on special circumstances, see National Advisory Commission Standards, §2.2 (1973), ACA Standards §4281.

It is also essential that there be a method by which the attorney and the inmate can exchange documents without them being read and can engage in confidential communication. Any inspection of documents by institutional officers must be done in the presence of the attorney, see *Souza v. Travisono*, 368 F.Supp. 959 (D.R.I., 1974), aff'd 498 F.2d 1120 (1st Cir., 1974). Furthermore, law students are entitled to the same privileges as attorneys when they are working for a law clinic, see *Procunier v. Martinez*, 416 U.S. 396 (1974).

CONDITIONS FOR VISITING

The times for visitation, the frequency of the visits and the number of visitors allowed to visit an inmate at one time should be developed to obtain optimum use of the visitation facilities, dependent in large measure upon the staff available for supervision.

The model calls for flexible visiting hours, in keeping with its intention to encourage visits. Seven-day visiting is hoped for as it "would permit visitors to come on days when they are not employed," National Advisory Commission Standards, at 68; see also *Jones v. Wittenberg*, 330 F.Supp. 707, 717 (N.D. Ohio, 1971). For similar reasons, the model requires that time be allocated for evening visits.

The amount of time allowed for visiting should be reasonable under the circumstances and the length of visits should be limited "only by the institution's schedule and space and personnel constraints . . . " ACA Standards §4351.

The number of visitors who may see an inmate at any one time should also be limited only by such things as space and personnel limitations.

PROCEDURES FOR VISITING

A. Setting

The setting of the visiting room should be arranged with the security of the institution uppermost in mind. However, it should be flexible enough to allow the diverse needs of the inmates to be taken into account. At least in correctional facilities housing convicted persons, there is no right to contact visits, *Bono v. Saxbe*, 450 F.Supp. 934 (E.D. Ill., 1978), *Oxendine v. Williams*, 509 F.2d 1405 (4th Cir., 1975). Courts have split on the question of whether there is a right to contact visits for pretrial detainees, and the model does not attempt to deal with the pretrial detainee situation, see *Feeley v. Sampson*, 570 F.2d 364 (1st Cir., 1978), *Rhem v. Malcolm*, 371 F.Supp. 594 (S.D.N.Y., 1974), aff'd 507 F.2d 333 (2nd Cir., 1974). Much case law regarding the rights of pretrial detainees should be re-examined in light of the Supreme Court's decision in *Bell v. Wolfish*, 25 CrL 3053 (1979) because the Court rejected the strict standard of need that many lower courts had said the state must show to justify an infringement upon the rights of pretrial detainees.

Despite the fact that courts have held that there is no right to contact visits, the conventional practice in a great many institutions allows for contact visiting and ACA Standards §4352 requires an opportunity be provided for contact visits, indicating that "the use of devices that preclude physical contact should be avoided except in instances of substantiated security risk."

It is obvious that an institution should maintain facilities for both contact and non-contact visiting since a general ban on contact visits may become more difficult to justify in light of current practice. On the other hand, an inability to offer non-contact visits may require the total exclusion of visitors in specific cases. To be able to require non-contact visits thus allows institutional security needs to be protected in a manner less restrictive than an outright ban on visits.

The model also requires that visiting rooms be informal, reflecting the language of the *National Advisory Commission Standards* which call upon correctional authorities to provide "appropriate rooms for visitation that allow ease and informality of communication in a natural environment as free from institutional or custodial attributes as possible," Sec. 2.17. See also ACA Standards §4352. It is felt that an informal setting is more conducive to relax conversation and thus more beneficial to all concerned, see *Barnes v. Government of Virgin Islands*, 415 F.Supp. 1218 (D. St.Croix, 1976), and *Rhem v. Malcolm*, supra.

Although allowing family visits to take place away from the main visiting room, the model makes no mention of conjugal visitation. It should be noted, however, that such visitation has been allowed for some inmates in both Mississippi and California. On

the other hand, the failure to grant conjugal visitation privileges has been found not to constitute cruel and unusual punishment, even though the lack of conjugal visits may have some adverse psychological affect on the inmate, *Imprisoned Citizens Union v. Shapp*, 451 F.Supp. 893 (E.D. Pa., 1978).

Finally, it should be noted that the model encourages visits by entire families, including children. Setting up a diversionary area for children will make such family visits easier. Furlough programs, where possible, should also be considered, see ACA Standards §4353.

Given the importance of visiting, special provisions need to be taken to assure that persons in segregated status receive visits, see ACA Standards §4210, 4354. Because of the variety of security problems that such visits may involve, the regulations do not attempt to go into detail about such visits, see New York State Department of Correctional Services Regulations, Title VII Sec. 301.6. Suffice it to say, visiting privileges for persons in such status should be as equivalent to the privileges afforded the general population as is reasonably possible, although courts have recognized that segregation justifies more restrictive visiting than is available to the general population, *Bono v. Saxbe*, supra, *Stewart v. Gates*, 450 F.Supp. 583 (C.D. Cal., 1978).

B. Security

Efficient procedures should be developed by which inmates can be searched prior to their entering the visiting room and after leaving the area. These procedures can both minimize the need to search visitors, as well as lessen the occurrence of contraband entering the institution.

Post-visit strip searches, conducted on all inmates following a visit, were found constitutional by the Supreme Court in *Bell v. Wolfish*, 25 Cr.L. 3053 (1979). However, the court warned against the abuse of such search powers. Therefore, such searches should be done in as dignified, professional atmosphere as possible, recognizing the substantial intrusion on an indivdual's privacy that strip searches entail, under the best of circumstances.

Both pat-down searches and the use of metal detectors may be employed on visitors. These shall be used to the minimal amount necessary, so as not to infringe unduly upon the privacy of the individual.

Should "reasonable suspicion" exist that an individual is attempting to smuggle material into the institution, and such material is not revealed through a pat-down or metal detector search, an additional strip search may be required as a condition of entering the institution. Such searches cannot be made against the person's will. In this context "reasonable suspicion" is defined as a "subjective suspicion, supported by objective, articulable facts, that would reasonably lead an experienced and prudent correctional officer to suspect an individual is carrying contraband."

The rules also require that the approval of a relatively high ranking institutional official be obtained before a strip search is requested. Such official would evaluate the reasons for the proposed strip search. Officials given this responsibility should have some discussion with legal counsel so as to be able to develop a better concept of "reasonable suspicion."

Wherever strip searches are undertaken, it is important that a detailed record be made concerning the search and the reasons for it. Such a record may be useful not only in administratively reviewing search decisions, but also may be vital in the defense of any litigation that might arise as a result of the search.

Note that the rules do not allow cavity probe searches of visitors, even with consent. If a strip search and visual examination still leaves a suspicion of possible smuggling, the visit should either be simply not allowed or, more preferably, transferred to the non-contact area. Probe searches should probably require medical personnel to perform, see Draft Federal Standards, Security and Control, Std. 013. Because of their highly intrusive nature, they probably require a greater showing of cause than other searches. They are likely to provoke incidents and litigation between staff and visitors and/or inmates for the same reason. Since non-contact visits should, in virtually all cases, prevent the passage of contraband, it is felt that it is simply unnecessary to insist that visitors be subjected to probe searches.

One significant factor in determining the extent of an individual's rights under the 4th Amendment, which prohibits unreasonable searches and seizures, is the expectation of privacy that the individual has in a given context. There may be some reasonable expectation of privacy upon one's entering a prison, *Bonner v. Coughlin* supra, but by stating specifically that anyone entering the institution is subject to search, the institution helps dispel or reduce expectations of privacy that potential visitors may bring to the institution, *U.S. v. Lilly*, 576 F.2d 1240 (5th Cir. 1978).

C. Termination of Visits

The model provides grounds for denying or terminating a particular visit and for suspending all visiting privileges of an individual for varying periods of time.

A visit should not be denied or terminated unless clear grounds exist and other, less harsh alternatives are not useful or available. It is probably not possible to identify, specifically, all situations which may warrant termination of a visit and, therefore, the list of grounds in the model is somewhat open-ended. Particularly when choosing to terminate or deny a visit on the basis of one or more of the non-specific grounds, there should be convincing evidence of the need for such action, see ACA Standards §4351. Detailed written reports of such actions should be promptly prepared.

Where a suspension of visits is proposed, a review procedure is provided under which both the inmate and the visitor have the right to submit written or, in some cases, oral, statements in opposition to the proposed suspension. These statements, along with the reports generated by the staff concerning the reasons, are considered by the superintendent. This procedure is similar to the one provided for excluding

persons from the visiting list. The procedure is modeled after one required by the Supreme Court in the area of prisoner mail censorship, *Procunier v. Martinez*, 416 U.S. 396 (1974).

The model does not set out time limits for the appeal since situations may demand that the appeal be handled very quickly, if possible, as would be the case where a person travels a long distance for a series of visits, only to have a suspension procedure begun on the basis of an incident in the first visit.

The suspension procedure described in the model should be distinguished from suspensions of visits which occur as an incident to a full institutional disciplinary hearing. Except for the situation in which isolation is imposed as a sanction (which presumably automatically suspends visits for the period of isolation), visiting privileges should not be removed as a sanction for a violation of a disciplinary rule except when the infraction is somehow related directly to visiting.

D. Supervision

"It is the responsibility of the staff member in charge of the visiting room to make certain that all visits are conducted in a quiet, orderly and dignified manner." Virginia Division Sec. 292.231 (1975). In doing so, officers should attempt to present a good appearance and be pleasant, articulate and tactful at all times.

The supervision of the visiting room should also be achieved without any monitoring or eavesdropping on any inmate-visitor conversation. This prohibition should not needlessly tie the hands of prison officials since visual alertness should be sufficient to uncover any immediate problems which arise from the actual visit, particularly when combined with the power to search inmates following visits, see Tentative Draft of Standards Relating to the Legal Status of Prisoners, §6.2(f), American Bar Association (1977).