

# National Prosecution Standards



**Fourth Edition**  
with Revised Commentary  
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# Introduction

These standards are intended to be an aspirational guide to professional conduct in the performance of the prosecutorial function. Unless otherwise indicated, they are intended to apply to the chief prosecutor (by whatever title) in any office, as well as to deputy and assistant prosecutors.

These standards are intended to supplement rather than replace the existing rules of ethical conduct that apply in a jurisdiction. Generally, these standards should be construed in such a way that they are consistent with existing law and applicable rules of ethical conduct. These standards are intended to be guides for prosecutors in the day-to-day performance of the prosecution function, but the problems of professionalism and ethics are too varied to be subject to unvarying rules. Thus, the decision whether or not to follow one or more of these standards may or may not constitute an unacceptable lack of professionalism, depending on the attendant circumstances. These standards are not intended to: (a) be used by the judiciary in determining whether a prosecutor committed error or engaged in improper conduct; (b) be used by disciplinary agencies when passing upon allegations of violations of rules of ethical conduct; (c) create any right of action in any person; or (d) alter existing law in any respect.

The accompanying commentary is intended to help prosecutors understand and interpret these standards but is not an official part of the standards. If the commentary appears inconsistent with the text of the standard, the text should guide the prosecutor's actions.

# Definitions

## **“Jurisdiction”**

Means the political area over which the prosecutor’s authority extends. However, in the context of applicable laws and rules of ethical conduct, “jurisdiction” includes a state as well.

## **“Knows,” “Has Knowledge,” or “Within the Knowledge of”**

Means actual knowledge. “Misconduct”—Conduct defined as misconduct by the relevant Rules of Ethical Conduct.

## **“Prosecutor”**

Unless otherwise specifically indicated, means any person performing the prosecution function.

## **“Rules of Ethical Conduct”**

Refers to rules of professional conduct, rules of attorney conduct, rules of professional responsibility, or codes of attorney conduct as adopted by the various states or jurisdictions to regulate attorney conduct. The term does not refer to the ABA Model Rules of Professional Conduct.

## **“Special Prosecutor”**

Means any person who performs the prosecution function in a jurisdiction who is not the chief prosecutor elected or appointed in the jurisdiction, or an assistant or deputy prosecutor in the jurisdiction.

## General Standards

1. The Prosecutor's Responsibilities
2. Professionalism
3. Conflicts of Interest
4. Selection, Compensation, and Removal
5. Staffing and Training
6. Prosecutorial Immunity

### 1. The Prosecutor's Responsibilities

#### 1-1.1 Primary Responsibility

The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected.

#### 1-1.2 Societal and Individual Rights and Interests

A prosecutor should zealously protect the rights of individuals, but without representing any individual as a client. A prosecutor should put the rights and interests of society in a paramount position in exercising prosecutorial discretion in individual cases. A prosecutor should seek to reform criminal laws whenever it is appropriate and necessary to do so. Societal interests rather than individual or group interests should also be paramount in a prosecutor's efforts to seek reform of criminal laws.

#### 1-1.3 Nondiscriminatory Decisions

The decision to charge or not to charge an individual, as well as other decisions made throughout the case, shall not be influenced by the race, gender, religion, national origin, sexual orientation, or other such trait of the individual, unless relevant to an element of the offense.

#### 1-1.4 Full-Time/Part-Time

The chief prosecutor in a jurisdiction should be a full-time position. A full-time prosecutor, whether the chief prosecutor or otherwise, should neither maintain nor profit from a private legal practice. A chief prosecutor may serve part-time in those jurisdictions that are unable

or unwilling to fund a full-time prosecutor, but while serving as a part-time prosecutor may not engage in professional conduct that is inconsistent with the need for prosecutorial independence.

### **1-1.5 Rules of Conduct**

A prosecutor shall abide by all applicable provisions of the rules of ethical conduct in his or her jurisdiction.

### **1-1.6 Inconsistency in Rules of Conduct**

To the extent prosecutors are bound by his or her jurisdiction's rules of ethical conduct that are inconsistent with these standards, they shall comply with the rules but endeavor to seek modification of those rules to make them consistent with these standards.

### **1-1.7 Duty to Respond to Misconduct**

A prosecutor is obligated to respond to professional misconduct that has, will, or has the potential to interfere with the proper administration of justice:

- a. Where the prosecutor knows that another person associated with the prosecutor's office has engaged or intends to engage in professional misconduct that could interfere with the proper administration of justice, the prosecutor should address the matter in accordance with internal office procedures.
- b. If the office lacks adequate internal procedures to address allegations of professional misconduct, a prosecutor who learns of the misconduct may, in the first instance, request that the person desist from engaging in the misconduct. If such a request is, or is likely to be, futile or if the misconduct is of a sufficiently serious nature, a prosecutor should report the misconduct to a higher authority within the prosecutor's office.
- c. If, despite a prosecutor's best efforts, no action is taken in accordance with the prior procedures to remedy the misconduct, a prosecutor should report the misconduct to appropriate officials outside the prosecutor's office (to the extent permitted by the law and rules of ethical conduct of the state).
- d. A prosecutor's failure to report known misconduct may itself constitute a violation of the prosecutor's professional duties.

### **Commentary**

A prosecutor is responsible for the presentation of the truth. Justice is not complete without the truth always being the primary goal in all criminal proceedings. A prosecutor is not a mere advocate and unlike other lawyers, a prosecutor does not represent individuals or entities, but society as a whole. In that capacity, a prosecutor must exercise independent judgment in reaching decisions while taking into account the interest of victims, witnesses, law enforcement officers, suspects, defendants and those members of society who have no direct interest in a particular case, but who are nonetheless affected by its outcome.

A prosecutor acts zealously when they pursue justice with great energy or enthusiasm. As a representative of society as a whole, a prosecutor should take an active role in the legislative process when proposals dealing with the criminal justice system are being considered. In that role, the prosecutor once again should exercise his or her independent judgment in supporting legislation in the best interest of society.

Inherent in the prosecutors' duty is to ensure that decisions made during a case, including whether or not to charge a person, are nondiscriminatory. Prosecutors should not react and make decisions based upon political or public pressure. It is the prosecutor's obligation to maintain a higher duty to ensure that the law is enforced appropriately, fairly and in an unbiased manner.

A full-time chief prosecutor confers many advantages on his or her jurisdiction. Among other advantages, the prosecutor is not distracted by a private law practice; is readily available for consultation with law enforcement officers; is more accountable to society for his or her decisions and performance; and, is not vulnerable to the various potential conflicts of interest that can plague a part-time prosecutor.

Despite those advantages, there are many part-time prosecutors in the United States. This situation is generally created by the societal preference for local accountability and control in locations where the sparse population, geographic size of the jurisdiction, budget and caseload do not warrant that the position be approached as a full-time one. The position of the standard is that the office be approached on a full-time basis insofar as that is possible in any given jurisdiction.

Whether full-time or part-time, the position should be approached as a career and not as a steppingstone or sideline. This means that the prosecutor is prepared to bring to his public duties an orientation of primacy. No matter what other activities the prosecutor is involved in, his public duties come first. A part-time prosecutor should not represent persons in criminal matters when it interferes with his duties and responsibilities as a prosecutor.

It is important for prosecutors to become involved in the rule making process and to be involved in local jurisdiction processes in adopting the rules.

Using appropriate procedures and in appropriate fora, a prosecutor may challenge such code provisions believed in good faith to be unjust or inapplicable. The existence of a code or rule does not eliminate the duty of the prosecutor to seek justice and serve the public interest. In this sense, the role of the prosecutor is not always the same as other members of the bar. If a prosecutor chooses to disregard a code or rule because of a belief that his or her duty to seek justice requires the same, it should be done with the awareness that the licensing authority in the jurisdiction may well disagree with that determination.

Because the responsibility to seek justice is one borne by each individual prosecutor, one cannot turn a blind eye or a deaf ear to misconduct by another prosecutor that will or has the potential to interfere with that responsibility. To prepare for such a situation, a chief prosecutor should establish an internal office procedure to be used when necessary. In the absence of such a procedure, a prosecutor should report the misconduct to a higher authority inside the prosecutor's office.

If, despite a prosecutor's best efforts, no action is taken in accordance with the prior procedures to address the misconduct, a prosecutor should report the misconduct to appropriate officials outside the prosecutor's office to the extent permitted by the law and rules of ethical conduct of the state. In the event that the prosecutor believes that action taken by a higher authority in the office is inadequate, the prosecutor should consider discussing the matter with a designated ethical advisor or a statewide ethical adviser before deciding what other action should be taken.

## 2. Professionalism

### 1-2.1 Standard of Conduct

A prosecutor should conduct himself or herself with a high level of dignity and integrity in all professional relationships, both in and out of court. Appropriate behavior includes, but is not limited to, the following:

- a. A prosecutor should act with candor, good faith, and courtesy in all professional relationships.
- b. A prosecutor should act with integrity in all communications, interactions, and agreements with opposing counsel. A prosecutor should not express personal animosity toward opposing counsel, regardless of personal opinion.
- c. A prosecutor should at all times display proper respect and consideration for the judiciary, without foregoing the right to justifiably criticize individual members of the judiciary at appropriate times and in appropriate circumstances.
- d. A prosecutor should be punctual for all court appearances. When absence or tardiness is unavoidable, prompt notice should be given to the court and opposing counsel.
- e. A prosecutor should conduct himself or herself with proper restraint and dignity throughout the course of proceedings.
- f. A prosecutor should treat witnesses fairly and professionally and with due consideration. In questioning the testimony of a witness, a prosecutor should not engage in a line of questioning intended solely to abuse, insult or degrade the witness. Examination of a witness's credibility should be limited to legally permitted impeachment techniques.
- g. A prosecutor should avoid obstructive and improper tactics. Examples of such tactics include, but are not limited to, knowingly:
  - a. Making frivolous objections, or making objections for the sole purpose of disrupting opposing counsel;
  - b. Attempting to proceed in a manner that is obviously inconsistent with a prior ruling by the court;
  - c. Attempting to ask clearly improper questions or to introduce clearly inadmissible evidence; or
  - d. Engaging in dilatory actions or tactics.

## Commentary

A prosecutor's obligation to comply with the rules of ethical conduct of his or her jurisdiction is a fundamental and minimal requirement. When a prosecutor falls below that standard, he or she may expect sanctions impacting on a particular case or on the individual prosecutor.

The dignity and honor of the profession call for compliance with a higher standard of conduct—one of professionalism. This standard requires the prosecutor to bring integrity, fairness, and courtesy into all interactions, whether they are with victims, witnesses, law enforcement officers, opposing counsel, the court, jurors, or defendants.

This standard follows the lead of many state and local bar associations that have created codes of professionalism. It should be used to inspire and invigorate all prosecutors, from the recently admitted to the very experienced, as all can be affected by the stress of the situations encountered by prosecutors. This especially applies in litigation, where emotions run highest, and the adversary setting generates a competitive orientation.

While professionalism is a word of elusive definition, the standard lists a number of types of conduct that must be considered. It is strongly recommended that wherever prosecution adopts and abides by a code of professionalism, the defense bar should reciprocate.

## 3. Conflicts of Interest

### 1-3.1 Conflict Avoidance

A prosecutor should not hold an interest or engage in activities, financial or otherwise, that conflict, have a significant potential to conflict, or are likely to create a reasonable appearance of conflict with the duties and responsibilities of the prosecutor's office.

### 1-3.2 Conflicts with Private Practice

In jurisdictions that do not prohibit private practice by a prosecutor:

- a. The prosecutor in his private practice should not represent clients in any criminal or quasi-criminal related matters, regardless of the jurisdiction where the case is pending;
- b. The prosecutor should avoid representing to private clients or prospective clients that the status of a prosecutor could be an advantage in the private representation;
- c. The prosecutor should not indicate his or her status as a prosecutor on any letterhead, announcement, advertising, or other communication involved in the private practice, and should not in any manner use the resources of the prosecutor's office for the purpose of such non-prosecutorial activities;
- d. The prosecutor should excuse himself or herself from the investigation and prosecution of any current client of the prosecutor and should withdraw from any further representation of that client.



### 1-3.3 Specific Conflicts

In all jurisdictions, including those prohibiting private practice by prosecutors:

- a. The prosecutor should excuse himself or herself from the investigation and prosecution of any former client involving or substantially related to the subject matter of the former representation, unless, after full disclosure, the former client gives informed written consent permitting the prosecutor's involvement in the investigation or prosecution.
- b. The prosecutor should excuse himself or herself from the investigation and prosecution of any matter where information known to the prosecutor by virtue of a prior representation and subject to the attorney-client privilege would be pertinent to the criminal matter, unless, after full disclosure, the former client gives informed written consent permitting the prosecutor's involvement in the investigation or prosecution.
- c. The prosecutor should excuse himself or herself from the investigation and prosecution of any person who is represented by a lawyer related to the prosecutor as a parent, child, sibling, spouse, or domestic partner, or who has a significant financial relationship with the prosecutor.
- d. The prosecutor should excuse himself or herself from any investigation, prosecution, or other matter where personal interests of the prosecutor would cause a fair-minded, objective observer to conclude that the prosecutor's neutrality, judgment, or ability to administer the law in an objective manner may be compromised.
- e. If an assistant or deputy prosecutor learns of the potential of a specific conflict, he or she should immediately report the matter to the chief prosecutor or a designee thereof.

### 1-3.4 Officer Involved Shootings

The local or state prosecutor with primary jurisdiction should retain the authority to prosecute cases involving "Officer Involved Shootings," however:

- a. If the prosecutor believes that his/her relationship with the involved local law enforcement agency would impact the prosecutor objectively handling the case, then recusal should be considered;
- b. If the prosecutor believes that public perception of the integrity of his/her office and public confidence in the handling of the case would negatively be impacted, the prosecutor should consider seeking assistance from other prosecutorial sources such as State or Local prosecutors from other jurisdictions, the State Attorney General, federal prosecutors, or a special prosecutor, who is not paid by the hour or where compensation does not depend on charging decisions;
- c. If the prosecutor involves the use of a Grand Jury to make the charging decision, in order to ensure fairness and a complete review, he/she should make certain that all available evidence, including testimony from law enforcement officers, alleged victims, experts, including use of force experts, lay witnesses and family members is presented;
- d. The prosecutor should always insist on as much transparency as possible without compromising the evidence in the case and should be mindful of the interest of the law enforcement officers, victims, victim's family members and the public at large.

### 1-3.5 Conflict Handling

Each prosecutor's office should establish procedures for handling actual or potential conflicts of interest. These procedures should include, but are not limited to:

- a. The creation of firewalls and taint or filter teams to ensure that prosecutors with a conflict are not improperly exposed to information or improperly disclose information; and
- b. Methods to accurately document the manner in which conflicts were handled to ensure public trust and confidence in the prosecutor's office.

### 1-3.6 Special Prosecutors

Where an actual or potential conflict of interest exists that would prevent the prosecutor's office from investigating or prosecuting a criminal matter, the prosecutor's office should appoint, or seek the appointment of a "special prosecutor," or refer the matter to the appropriate governmental authority as required by law. Under those circumstances where a special prosecutor is appointed:

- a. The special prosecutor should be a member of the state bar in good standing, with appropriate experience in the subject matter of the appointment, and should be perceived as having sufficient detachment from the prosecutor's office so as not to be influenced by any actual or potential conflict;
- b. The special prosecutor should have the authority only over the case or cases for which he or she is appointed; and
- c. Subject to the need to avoid the appearance of a conflict, a chief prosecutor and his or her assistants and staff should give all appropriate assistance, cooperation, and support to a special prosecutor.

### Commentary

There are few topics of ethical orientation more pervasive than conflicts of interest. Conflicts may arise not only from relationships with current or former clients, but also with a prosecutor's other activities—financial or otherwise.

Conflicts of interest problems are founded on the premise of the inability to serve two masters with foreseeable different interests that compete or contend.

Conflicts present themselves differently to the prosecutor, compared to the private practitioner, because the prosecutor does not initially select those subject to prosecution. Nor is there usually a choice of which prosecution office should proceed.

The standards recognize potential conflicts in all jurisdictions involving former clients or information obtained by virtue of former representation and allow the prosecutor to proceed on the case only if the individual makes a counseled waiver permitting the prosecutor's involvement.

Prosecutors recognize the importance of avoiding conflicts of interest to ensure that an investigation into the potential criminal misconduct of a law enforcement officer is conducted with integrity and independence. Thus, prosecutors should take reasonable steps to avoid conflicts when investigating those law enforcement agencies in their jurisdictions that

they interact with on a daily basis. Prosecutors should be supportive of enacting systems and providing resources to allow a state or local prosecutor to transfer jurisdiction when appropriate. The elected prosecutor of the jurisdiction involved is in the best position to seek justice for the members of that community; indeed, that prosecutor has been elected by the constituents to do precisely that. Prosecutions involving the criminal misconduct of police officers are some of the most difficult cases to try. When prosecutors are called upon to review use of force incidents, they can only file charges if the amount of force used was illegal; prosecutors cannot charge an officer who may have used force that was just ill-advised. There is no pool of more capable, experienced, dedicated trial lawyers than state and local prosecutors. By ensuring that an impartial state or local prosecutor is provided the resources and support to review police misconduct, prosecutors can be confident they can hold bad actors within the law enforcement community accountable.

The extent to which firewalls and filters may be used depend upon the size of the office and jurisdiction, the media coverage of the matter, the type of matter concerned, and the position of the conflicted prosecutor in the office. If such methods are or are likely to be ineffective, the chief prosecutor should seek a qualified special prosecutor and offer appropriate assistance.

## **4. Selection, Compensation, and Removal**

### **1-4.1 Qualifications**

At the time of filing for election, appointment, or hiring, and for the duration of the term of office or employment, a prosecutor shall be a member in good standing of the state's bar, except as otherwise provided by law. Chief prosecutors should be residents of the jurisdiction that they serve.

### **1-4.2 Compensation; Responsibilities of the Chief Prosecutor**

Chief prosecutors should be compensated commensurate with their responsibilities. The salary of the full-time chief prosecutor should be at least that of the salary of the chief judge of general trial jurisdiction in the chief prosecutor's district and should not be lowered during a term of office. Factors that should be considered in determining compensation include, but are not limited to:

- a. The benefits to the jurisdiction of encouraging highly competent people to seek a position of prosecutor with a career orientation; and
- b. The level of compensation of people with analogous responsibilities in the private practice of law, in private industry, and in public service.

### **1-4.3 Compensation of Assistant and Deputy Prosecutors**

The compensation of the chief prosecutor should not serve as a basis for the highest compensation of assistant prosecutors. Factors that should be considered in determining the compensation for an assistant prosecutor include, but are not limited to:

- a. The benefits to the jurisdiction of encouraging highly competent people to seek a position of assistant prosecutor with a career orientation; and
- b. The level of compensation of people with analogous responsibilities in the private practice of law, in private industry, and in public service.

Factors that may not be considered in setting the compensation for an assistant prosecutor include, but are not limited to:

- a. Characteristics of the assistant prosecutor that are irrelevant to his or her ability to perform the job and historically have been the basis of invidious discrimination, including race, gender, religion, national origin, and sexual orientation;
- b. Partisan political affiliation or activity; and
- c. Revenues generated by that particular assistant prosecutor's performance such as asset forfeitures or collection of fees.

#### **1-4.4 Benefits**

A chief prosecutor should seek to ensure that all assistant attorneys have access to a benefits program commensurate with their responsibilities. These benefits should include indemnification or insurance to pay all costs of defense against, and judgments rendered in, civil lawsuits arising from the prosecutor's performance of his or her official duties.

#### **1-4.5 Workload**

Except in extraordinary circumstances, a prosecutor should not maintain, and should not be asked to maintain, a workload that is inconsistent with the prosecutor's duty to ensure that justice is done in each case.

#### **1-4.6 Removal**

A chief prosecutor shall hold office during his or her term of office and shall only be removed by procedures consistent with due process and governing law. Factors that may not be taken into account in the removal of a prosecutor include, but are not limited to, the following:

- a. Characteristics of the prosecutor that are irrelevant to his or her ability to perform the job and historically have been the basis of invidious discrimination, including race, gender, religion, national origin, and sexual orientation.
- b. Partisan activities that are legal and ethical unless those activities interfere with the efficient administration of the office.
- c. The refusal to participate in partisan activities.

#### **1-4.7 Discharge of Assistant and Deputy Prosecutors**

Assistant and deputy prosecutors are subject to removal according to the laws of their jurisdictions and the procedures in their offices. Factors that may not be taken into account in the removal of a prosecutor include, but are not limited to, the following:

- a. Characteristics of the prosecutor that are irrelevant to his or her ability to perform the job and historically have been the basis of invidious discrimination, including race, gender, religion, national origin, and sexual orientation.
- b. Partisan activities that are legal and ethical unless those activities interfere with the efficient administration of the office.
- c. The refusal to participate in partisan activities.

## Commentary

Given the preference for involvement with the represented community, the need to be available for consultation with law enforcement personnel, and the need to be available in the event of an emergency or unusual situation, the chief prosecutor should be a resident of his or her jurisdiction. Even though, in some jurisdictions, disbarment of the prosecutor would not disqualify him or her from holding the office, the public interest would dictate resignation in that situation.

Provision of an adequate salary is an absolute necessity if the office of prosecutor is to function at maximum efficiency. An adequate salary is essential for attracting capable candidates to the position of prosecutor. Without such compensation, capable persons who might otherwise be attracted to the prosecutor's office are diverted to private practice of law or other endeavors.

The salary provided the prosecutor should be at least that of the salary of the judge of general trial jurisdiction in the district of the prosecutor. As noted by the National Advisory Commission on Criminal Justice Standards and Goals, Courts 230 (1973):

For purposes of salary, the prosecutor should be considered to be on the same level as the chief judge of the highest trial court of the local criminal justice system. Both positions require the exercise of broad professional discretion in the discharge of the duties of the offices. It is therefore reasonable that the compensation for the holders of these offices has the same base.

Provision for an adequate salary level is also essential to reduce the rapid turnover of local prosecutors. The skills and judgment required by a prosecutor are developed with time and experience. To retain the best representatives of the people, the salary and benefits exchanged for services must be commensurate with the salary and benefits available in other areas for the expertise developed. Without the ability to earn a salary sufficient to justify remaining in the prosecutor's office, the office becomes a training ground for private practitioners and the people are denied the best representation.

A prosecutor has the responsibility to seek justice in every case. Ensuring that a matter has been properly investigated and evaluating how it should be handled are time consuming. In those cases that go to trial, the preparation required to proceed effectively is filled, in many instances, with education regarding experts in various fields and creation of technological presentations and exhibits which are increasingly necessary to effectively explain the prosecution's theory of the case.

Because of the need to thoroughly investigate, evaluate, prepare and try a variety of cases, prosecutors should not be overwhelmed by large numbers of cases needing disposition. If they are, the quality of representation afforded the people suffers and the difficulty in retaining good, experienced prosecutors increases.

Without addressing specific reasons for the removal from office of the chief prosecutor or assistant prosecutors, the standard requires that such actions be subject to procedural due process. Equally important is the necessity that such removals are not undertaken because of prejudice against the prosecutor's race, gender, religion, national origin or sexual orientation.

Engaging in partisan political activities, or the refusal to engage in the same should not be a basis for removal unless the activity interferes with the efficient operation of the office.

Prosecutors should be mindful of their responsibility to seek justice. Should a prosecutor find himself or herself in a situation in which the public trust in the office has diminished to the extent that he or she can no longer fulfill that primary responsibility, resignation should be considered.

Given the litigious nature of some persons involved in the criminal justice system, a program providing indemnification or insurance to pay all costs incurred by the prosecutor in defending against civil lawsuits and in paying judgments arising from the performance of his or her official duties is essential. That benefit will enable a prosecutor to seek justice despite the threats of civil litigation that, even if totally unfounded, can consume time and resources to defend.

## 5. Staffing and Training

### 1-5.1 Transitional Cooperation

When an individual has been elected or appointed prosecutor, the incumbent prosecutor should, when practicable, fully cooperate in an in-house orientation of the incoming prosecutor to allow for an effective transition consistent with the principles of professional courtesy. This cooperation may include, when possible, designating the incoming prosecutor a special assistant prior to the time the incoming prosecutor assumes office, so that the incoming prosecutor may be briefed on significant ongoing proceedings and deliberations within the office, including grand jury or other investigations.

### 1-5.2 Assistant and Deputy Prosecutors

- a. Assistant and deputy prosecutors, by whatever title, should be selected by the chief prosecutor and should serve at the chief prosecutor's discretion, unless otherwise provided by law or contract.
- b. Assistant and deputy prosecutors should be active members of the state bar in good standing, except as otherwise provided by law.
- c. Assistant and deputy prosecutors should be selected on the basis of their achievements, experience, and personal qualifications related to their ability to successfully perform the work of the prosecutor's office. Personal or political considerations that have no legitimate bearing on the ability to perform the required work should not play a role in the hiring, retention, or promotion of assistant and deputy prosecutors. Recruitment efforts should also be made in order to hire a diverse staff that reflects the composition of the community.
- d. Absent unusual circumstances, a chief prosecutor should seek a commitment for a minimum number of years of employment at the time of hiring or promoting assistant or deputy prosecutors, conditioned upon continuing good performance.
- e. When a new chief prosecutor takes office, professional discretion should be exercised in favor of retaining those with seniority and experience alongside suitable work performance history prior to the consideration of any dismissals simply because of working under a prior administration.

### 1-5.3 Orientation and Continuing Legal Education

At the time they commence their duties and at regular intervals thereafter, prosecutors should participate in formal training and education programs. Prosecutors should seek out continuing legal education opportunities that focus specifically on the prosecution function and:

- a. Chief prosecutors should ensure that all prosecutors under his or her direction participate in appropriate training and education programs. Chief prosecutors should also be knowledgeable of and make use of appropriate national training programs for both orientation and continuing legal education for both himself or herself and the prosecutors in his or her office.
- b. Chief prosecutors should support all prosecutors under his or her direction in training programs sponsored by a state or national association or organization.
- c. Prosecutors with supervisory responsibilities should include in their continuing training the study of management issues, such as staff relationships and budget preparation.
- d. The chief prosecutor should ensure that each new prosecutor becomes familiar with these standards, as well as rules of ethical conduct and professionalism that have been adopted in the jurisdiction.
- e. Chief prosecutors should identify one or more sources, both within and outside the office, to which the prosecutors can turn for guidance on questions related to ethical conduct and professionalism.
- f. Prosecutors should be diligent in meeting or exceeding requirements for continuing legal education in those jurisdictions where the requirements are mandatory.
- g. Adequate funds should be allocated in the prosecutor's budget to allow for both internal training programs and attendance at external training events.

### 1-5.4 Office Policies and Procedures

Each prosecutor's office should develop written and/or electronically retrievable statements of policies and procedures that assist in the performance of those who work in the prosecutor's office.

#### Commentary

1-5.1: Criminal investigations, trial preparation, trials, and the day-to-day operation of the prosecutor's office do not coincide with election cycles. Therefore, it is important for the efficient representation of the people that the transition from one prosecutor's term to another be as seamless as possible. Because of the confidential character of much of the activity in a prosecutor's office, it may be that the most appropriate manner in which to orient an incoming chief prosecutor is through his or her appointment as a special prosecutor, so that briefings on confidential matters can be accomplished. It is important for both the outgoing and incoming prosecutors to remember that his or her responsibility to seek justice for the people of the community may require the setting aside of campaign differences in a professional manner.

1-5.2: In addition to confirming that prospective assistants are members in good standing of the bar of the jurisdiction, the chief prosecutor should carefully examine the assets they would bring to the office. An assessment of their educational background, work experience, judgment, written and oral communication skills, trial advocacy skills and other personal qualifications without regard to who they know should form the basis for hiring, promotion and retention decisions.

The recruitment of qualified minorities is an essential aspect of this goal and should be incorporated into the hiring practices and procedures of all prosecution offices. While it is not the responsibility of the prosecutor to meet predetermined quotas, the office benefits by having a diverse staff that reflects the community that is served.

It is also desirable for the chief prosecutor to request that all prospective assistant or deputy prosecutors agree to serve for a minimum time period if hired; such a time commitment is preferable given the extensive training and acquired experience any new hire needs before they can deliver their best work for an office.

While recognizing the authority of a newly elected chief prosecutor to hire and fire assistant prosecutors, the practice of dismissing assistant prosecutors solely because they worked for a prior administration is not favored. The automatic dismissal of assistant prosecutors who have dedicated their talent and career to serving the community as a prosecutor can have a significant negative effect on the community and can discourage attorneys from dedicating their career to the profession. Newly elected chief prosecutors are encouraged to give strong consideration to retaining senior assistant prosecutors who bring a breadth of experience, expertise, institutional knowledge and specific casework that cannot be replaced.

1-5.3: Conceptually, staff training can be divided into two broad categories. The first, which might be termed "orientation," would seek to provide new assistants or deputies, as well as chief prosecutors, with an understanding of their responsibilities in the criminal justice system, and with the technical skills they will be required to utilize. Orientation for the chief prosecutor should center on office management skills, especially for larger jurisdictions. A basic orientation package for assistants could include familiarization with office structure, procedures, and polices; the local court system; the operation of local police agencies; and training in ethics, professional conduct, courtroom decorum, and relationships with the court and the defense bar.

A second aspect of training which should be included in each prosecutor's training program is continuing education. First and foremost, the prosecutor must abide by any continuing legal education requirements of his or her jurisdiction. The content of the training should be relevant to the duties of the prosecutor. For the chief prosecutor and other prosecutors in management positions, training on personnel, management and budget issues would be appropriate. For other prosecutors, concentration on substantive law, rules of evidence, forensic evidence, trial advocacy, and other matters relevant to their duties should be sought. While some of the largest offices have training divisions which can provide much of the training needed, the chief prosecutor should be cognizant that it is important to have exposure to what is going on throughout the national criminal justice community. Prosecutors benefit from this exposure because it allows them to stay current regarding new defenses, jointly address concerns confronting prosecutors, and learn techniques that can improve their ability to seek justice for their communities.



In addition to providing opportunities for prosecutors to learn the information and skills required to perform their duties, the chief prosecutor must be diligent in requiring his or her prosecutors to be thoroughly familiar with his or her rules of ethical conduct and professional responsibilities. At an absolute minimum, the chief prosecutor must ensure that all prosecutors in his or her office have a working knowledge of the ethical rules and professional codes applicable to the jurisdiction as well as these standards. In addition, the chief prosecutor should work to create an atmosphere in which the discussion of ethical and professional considerations is encouraged. The chief prosecutor should also make known persons and procedures that can be utilized if more private consultation is desired.

By calling for the allocation of funds in the prosecutor's budget, this standard may help to emphasize the essential role of training in assuring efficient and effective performance of prosecutorial duties while disabusing the notion that training is a frill or an extra to be cut at the first sign of any pressure on the budget.

1-5.4: A prosecutor's office should have written policies and procedures to aide in the effective orientation and training of new staff, as well as providing a reference guide or handbook for employees on how the office functions. These would consist of non-substantive law matters, such as an equal opportunity statement, sexual harassment policy and workplace violence policy. Other such policies would include conditions of employment, hours of work, available leaves, and employment actions such as discipline.

Prosecutors without statements of policies and procedures should consult with their local, state, and national associations and other prosecution offices to lessen the burden of the initial development.

## 6. Prosecutorial Immunity

### 1-6.1 Scope of Immunity

When acting within the scope of his or her prosecutorial duties, a prosecutor should enjoy the fullest extent of immunity from civil liability. The chief prosecutor should take steps to see that all costs, including attorneys' fees and judgments, associated with suits claiming civil liability against any prosecutor within the office arising from the performance of their duties should be borne by the prosecutor's funding entity.

#### Commentary

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the U.S. Supreme Court ruled that prosecutors enjoy absolute immunity from Civil Rights Actions brought under Section 1983, 42 U.S.C., when acting within the scope of their duties in initiating and pursuing a criminal prosecution and in presenting the state's case. The Court noted that although such immunity leaves the genuinely wronged criminal defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty, the alternative of qualifying a prosecutor's immunity would outweigh the broader public interest in that it would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.

The Court did not extend such absolute immunity to actions taken by a prosecutor outside of the scope of his or her duties as aforesaid. Thus, *Imbler* did not change pre-existing law with respect to the performance of duties that traditionally are viewed as investigative duties falling primarily within the police function.

Although there has been a multitude of case law subsequent to *Imbler* discussing the prosecutor's immunity for "administrative" and "investigative" duties, no bright line rule has been established.

In order to ensure that prosecutors are free to vigorously and fearlessly perform their essential duties, the prosecutor's funding source should provide the costs, including attorney fees and judgments associated with civil suits against the prosecutor and his or her staff. No prosecutor should be expected to function without full coverage for actions arising out of the performance of his or her duties.

# Relationships

1. Local Organizations
2. State Criminal Justice Organizations
3. National Criminal Justice Organizations
4. Other Prosecutorial Entities
5. Law Enforcement
6. The Court
7. Suspects and Defendants
8. Defense Counsel
9. Victims
10. Witnesses
11. Community-Based Programs
12. Prisons
13. Parole and Early Release
14. The Media
15. Funding Entity
16. The Public
17. Non-Governmental Entities

## 1. Local Organizations

### 2-1.1 Chief Prosecutor's Involvement

The chief prosecutor should be involved in local entities established and maintained in his or her jurisdiction for the purpose of enhancing the effectiveness, efficiency, and fairness of the administration of criminal justice, to the extent practicable and to the extent the prosecutor reasonably believes such entities are legitimately committed to protecting public safety. The obligations a prosecutor undertakes on behalf of community organizations should extend only to those that he or she can fulfill in a diligent and competent manner.

### 2-1.2 Information Input

To the extent permitted by law, the chief prosecutor should provide such criminal justice entities with information, advice, and data pertinent to the solution of problems identified in

the jurisdiction and should consider the implementation of appropriate proposals designed to address and resolve such problems.

### **2-1.3 Organization Establishment**

In those jurisdictions where there are no local inter-agency entities established for the enhancement of the effective, efficient, and fair administration of criminal justice, the chief prosecutor should determine the potential benefits of such organizations and, if deemed beneficial, provide leadership in their establishment.

### **2-1.4 Community Prosecution**

The chief prosecutor should be mindful of opportunities to engage school officials, community youth organizations, social service agencies, neighborhood crime watch groups, and other such organizations with law enforcement agencies, including the prosecutor's office, in efforts to prevent and detect crime.

### **2-1.5 Enhancing Prosecution**

The chief prosecutor should participate in state and local bar associations for the purpose of enhancing and advancing the goals of the prosecution function in the legal community.

## **2. State Criminal Justice Organizations**

### **2-2.1 Need for State Association**

Each state should have a professional association of prosecuting attorneys for the purpose of serving and responding to the needs of its membership and enhancing the prosecution function. The chief prosecutor should be an active member of his or her state association and should allow his or her assistants and deputies to be members of and participate in the state association. Each state association should provide services that are most conducive to development at the statewide level, including, but not limited to, the following:

- a. Continuing legal education;
- b. Training of newly elected prosecutors and their staffs;
- c. Management training;
- d. Support for in-house training programs;
- e. Information dissemination (newsletters, bulletins, etc.);
- f. Sharing transcripts of testimony of defense experts for purposes of cross-examination;
- g. Technical assistance in planning, management, litigation, and appeals, including the maintenance of data and brief banks;
- h. Promulgating model office policies and procedures;
- i. Coordinating resources not otherwise available or frequently used;
- j. Monitoring legislative developments and drafting model legislation;

- k. Maintaining liaisons between the offices of various prosecutors;
- l. Developing innovative programs; and
- m. Developing and monitoring computer systems.

### **2-2.2 Enhancing Prosecution**

The chief prosecutor should participate, to the extent possible, in statewide committees, task forces and other entities for the purpose of enhancing and advancing the goals of the prosecution function. The obligations a prosecutor undertakes in statewide entities should extend only to those that he or she believes can be fulfilled in a diligent and competent manner.

## **3. National Criminal Justice Organizations**

### **2-3.1 Enhancing Prosecution**

The chief prosecutor should take an active role, to the extent possible, in national criminal justice organizations that exist for the purpose of enhancing and advancing the goals of the prosecution function. The obligations a prosecutor undertakes in national organizations should extend only to those that he or she believes can be fulfilled in a diligent and competent manner.

### **2-3.2 Prosecutorial Input**

The chief prosecutor should seek to ensure that national criminal justice organizations undertake all reasonable measures to include the substantial involvement and views of incumbent state and local prosecutors in the research and studies and promulgation of standards, rules, and protocols that impact on the prosecutor and the prosecution function.

### **Commentary**

The prosecutor should participate in local, state, and national affairs for the improvement of the criminal justice system. Activities that the prosecutor might undertake include provisions of information and advice to governmental bodies and citizens' groups, review and consideration of pending state and national legislation, and participation in criminal justice-related programs or projects. A good prosecutor is a good attorney and would be expected to be active in his local and state bar associations.

The standards recognize the rapid growth in community organizations in the last 20 years devoted to specific interests, such as DUI enforcement, rape prevention/counseling programs, spousal and child abuse prevention, drug education programs, and neighborhood watch programs, to name just a few. An interested and informed citizenry can be a valuable partner in law enforcement. The standards encourage prosecutors in communities lacking such grass-roots organizations to consider appropriate ways and means whereby citizen interest in their formation can be stimulated.

Because the office of the prosecutor is a local one, the responsibilities placed on this office are probably more diverse than those at any other level of government which may have the capacities for specialization. For example, citizen complaints may range from how to cope with a neighbor's children to how to collect on a bad check. Expectations from law

enforcement agencies and the courts are equally diverse and more demanding. In many jurisdictions, the prosecutor is also the attorney for his county. This responsibility may demand an expertise in taxation, school law, zoning, property law, employee disciplinary law, health law, environmental law, and labor relationships.

If every prosecutor's office were designed on a level of specialization necessary to address each area it is responsible for, it would not only be a tremendous (and no doubt prohibitive) financial burden, but also an enormous duplication of effort on a county-by-county or district-by-district basis. On the other hand, local initiative, flexibility, and accountability are essential factors that must be maintained in prosecution. Thus, one method of alleviating this problem is through a statewide association of prosecuting attorneys, a concept that NDAA has long fostered.

Such an association should be made up of all local prosecutors in a state and should have a full-time staff. This organization must be responsive to the needs of its members. As a result, the various functions will differ. However, those areas of concentration may include those items set forth in the standard.

Because the purpose of such an association is to serve prosecutors, it is imperative that they be involved and support the operation of the association. Membership should be the responsibility of all prosecuting attorneys, and dues should be paid through the prosecutor's budget. Membership should not be limited to chief prosecutors but should be open to assistants as well.

In addition, prosecutors who recognize the value of the functions of their state bar associations and prosecutors' associations should be willing to commit time in volunteer support, such as serving on committees.

Likewise, the locally elected prosecutor and his staff should participate in and support their national organization for the advancement of the interests of effective law enforcement. The organization provides a forum for the local prosecutor that no other organization can and an effective voice in national legislative and policy-making activities. The programs of training, publications, technical assistance, and focused activities (such as drug enforcement, child abuse enforcement, environmental law enforcement, etc.), provide the local prosecutor with a perspective that reaches beyond the state level. The failure of local prosecution to be active in local, state, and national associations will result in the advancement of competing entities. At the same time, it is important that prosecutors not volunteer their time unrealistically and are able to meet the demands of their undertakings.

## 4. Other Prosecutorial Entities

### 2-4.1 Prosecutorial Cooperation

In recognition of their mutual goal of serving the interests of justice, the prosecutor should cooperate with other federal, state, military, tribal and local prosecutorial entities in the investigation, charging, dismissal, or prosecution of cases that may be of common concern to their respective offices.

### **2-4.2 Coordinated Prosecutions**

The prosecutor should establish procedures for ascertaining, to the extent possible, the likelihood that the defendant will be investigated and/or prosecuted by other jurisdictions for similar conduct, and coordinate prosecutions with the relevant prosecutorial agencies, in order to avoid unnecessarily duplicative investigations and/or prosecutions and to avoid impediments to prosecution such as defense claims of double jeopardy or grants of immunity.

### **2-4.3 Resource Sharing**

The prosecutor should share resources and investigative information with other prosecutorial entities, when permitted by law and to the extent necessary, to ensure the fullest attainment of the interests of justice, without regard to political affiliation or partisan interest.

### **2-4.4 Duty to Report Misconduct**

When a prosecutor has knowledge of misconduct or incompetence by another prosecutor, he or she should report that information in accordance with Standard 1-1.6. When the misconduct or incompetence involves the conduct of a prosecutor from another prosecutorial entity and it has the potential to interfere with the proper administration of justice, the chief prosecutor should report such conduct to the supervisor of the other prosecutorial entity. When the chief prosecutor has direct knowledge of a violation of the rules of ethical conduct by a prosecutor in another office, he or she shall also report such ethical misconduct to the appropriate bar disciplinary authority in the relevant jurisdiction, provided such misconduct raises a substantial question as to the prosecutor's fitness to practice law.

### **2-4.5 Furtherance of Justice**

The office of the prosecutor and the office of the state attorney general, where separate and distinct entities, should cooperate whenever practicable in the furtherance of justice.

### **2-4.6 Attorney General Assistance**

In those states where the attorney general has criminal law responsibilities, the state attorney general may assist in local prosecutions at the request of the local prosecutor or otherwise as authorized by law. The state attorney general may also, when requested, play a role in mediating between local prosecutors when the possibility arises of prosecution in multiple jurisdictions, if such mediation is necessary to avoid injustice or the inefficient use of law enforcement resources.

### **Commentary**

Every prosecutor, regardless of jurisdiction, has the responsibility to seek justice. Given our highly mobile society and the increasing methods by which crimes are committed, the quest for justice must sometimes cross jurisdictional lines. For that reason and to fully comply with their primary responsibility, prosecutors at all levels should cooperate to the fullest extent possible. Such cooperation can result in more efficient and effective investigations, the avoidance of double jeopardy claims, and a fuller awareness of the consequences of grants of immunity.

With increased cooperation, there is the increased possibility of a prosecutor gaining knowledge of another prosecutor's misconduct or incompetency. Just as one cannot turn a blind eye or deaf ear to such conduct in one's own jurisdiction, a prosecutor cannot ignore misconduct in another. The standard outlines the required course of action.

Intervention by the attorney general that is not requested is not likely to foster necessary, positive working relationships. The standard recommends that intervention by the state attorney general be only at the request of the local prosecutor. The major burden of law enforcement in America falls upon local law enforcement, and it is to the local chief prosecutor that such agencies turn for the prosecution of their cases and the initiation of investigations.

## **5. Law Enforcement**

### **2-5.1 Communications**

The chief prosecutor should actively seek to improve communications between his or her office and other law enforcement agencies. The prosecutor should prepare and encourage the use of uniform information sharing systems by all criminal investigative agencies within his or her jurisdiction.

### **2-5.2 Case Status Advisements**

When it is practical to do so, the chief prosecutor should keep local law enforcement agencies informed of cases in which they were involved and provide information on those cases in order to aid law enforcement officers in the performance of their duties.

### **2-5.3 Law Enforcement Training**

The chief prosecutor should encourage, cooperate with and, where possible, assist in law enforcement training. The prosecutor should also urge local law enforcement officers to participate in national, state, and regional training courses available to them.

### **2-5.4 Prosecution Assistance in Training**

The chief prosecutor should assist in the on-going training of law enforcement officers by conducting periodic classes, discussions, or seminars to acquaint law enforcement agencies within their jurisdiction with recent court decisions, legislation, and changes in the rules of criminal procedure.

### **2-5.5 Liaison Officer**

The chief prosecutor should request that each major law enforcement agency within his or her jurisdiction assign at least one officer specifically to the prosecutor's office. That officer should serve as a liaison between offices and should be available to perform the duty of informing concerned officers within the officer's agency of the progress and disposition of criminal cases.



### 2-5.6 Legal Advice

Although law enforcement agencies or individual law enforcement officers are not clients in criminal cases or employees of the prosecutor's office, the prosecutor may provide independent legal advice to local law enforcement agencies concerning specific prosecutions. This advice may include the proper interpretation of the criminal laws, the sufficiency of evidence to commence criminal charges or arrest, the requirements for obtaining search warrants for physical evidence and electronic surveillance, and similar matters relating to the investigation of criminal cases. The prosecutor should serve in such an advisory capacity to promote lawful investigatory methods that will withstand later judicial inquiry. The prosecutor should encourage law enforcement officers to seek legal advice as early as possible in the investigation of a criminal case. Where possible, the prosecutor should identify a primary point of contact within the prosecutor's office to receive and refer legal inquiries from particular law enforcement agencies. However, the prosecutor should be aware that activities of this nature that go beyond the traditional prosecution function could result in the loss of her/his immunity afforded by the courts from civil liability suits.

#### Commentary

The maintenance of good relationships between the prosecuting attorney and the law enforcement agencies within the community is essential for the smooth functioning of the criminal justice system. Both parties have the burden of fostering, maintaining, and improving their working relationship and developing an atmosphere conducive to a positive exchange of ideas and information.

The criminal justice system, of which the police are only one element, is a structure of law. Many times, this structure suffers from seemingly contradictory court decisions, public pressure, and the problems that arise in trying to balance effective law enforcement and the protection of the rights of individuals. The police face many of these problems. To alleviate these problems, the prosecutor could educate the police in the area of pre-trial criminal procedure, including search and seizure law, the arrest process, the use of force, and interrogation. In particular, with respect to the various exclusionary rules pertaining to the admissibility of evidence, the prosecutor has a responsibility to educate the police on the effect of court decisions in general and their application in specific cases where evidence was suppressed by a trial court. In performing such a function, the prosecutor must be aware of and follow the constraints imposed by duties of candor and restrictions on communication with represented persons or parties that may be included in ethical and professional codes to which they are subject.

The prosecutor has a large stake in the training and professionalization of local law enforcement. Its handling of a case is often crucial to the prosecutor's success. Therefore, the prosecutor should encourage the local police to participate to the fullest extent possible in training programs operated on state, regional, and national levels. If such a program does not exist or is not available to police in the jurisdiction, it is in the prosecutor's best interest to promote the development of such a program. Such training should result in more successful prosecutions. Besides the face value effectiveness of police training, it is an excellent opportunity to establish personal rapport and communications with individual police officers.

The prosecutor should advise the police on the legal aspects of criminal investigations. This advisory function pertains only to criminal matters and should not be confused with the function of police in-house counsel. Assuming the role of an advisor to any member of the police department on civil or personal matters is beyond the scope of the duties of the office of prosecuting attorney. In many cases, such a role would place the prosecutor in a position of possible conflict of interest with other duties prosecution is obliged to perform.

Furthermore, the prosecuting attorney may be restricted from any active participation in the police function by the threatened loss of immunity to civil damages in instances where participation is beyond the scope of advisor and, therefore, not an integral part of the judicial process. The prosecutor must always be cognizant that his quasi-judicial immunity afforded by the courts in civil liability suits is limited to actions taken in advancement of the traditional prosecution function.

The responsibility for sound communications between the prosecutor and law enforcement agencies is mutual. It is a goal of the prosecutor to keep police informed of developments in investigations, trials, and related matters. Both entities must seek to develop and implement systems and procedures that facilitate and enhance communications. One method of providing a consistent flow of information about all criminal matters is the development and use of a uniform information sharing system. Such systems ensure that all information necessary for successful investigations and prosecutions is available to all concerned parties in a timely manner.

## 6. The Court

### 2-6.1 Judicial Respect

A prosecutor shall display proper respect for the judicial system and the court at all times.

### 2-6.2 Respect in the Courtroom

A prosecutor should vigorously pursue all proper avenues of argument. However, such action must be undertaken in a fashion that does not undermine respect for the judicial function.

### 2-6.3 Improper Influence

A prosecutor should not seek to unfairly influence the proper course of justice by taking advantage of any personal relationship with a judge, or by engaging in any ex parte communication with a judge on the subject matter of the proceedings other than as authorized by law or court order.

### 2-6.4 Suspicion of Criminal Misconduct

When a chief prosecutor has a reasonable suspicion of criminal conduct by a member of the judiciary, the prosecutor should take all lawful investigatory steps necessary to substantiate or dispel such suspicions and, if substantiated, should initiate prosecution or refer the case to another prosecutor's office for review or appoint a special prosecutor in the case.

### 2-6.5 Responsibility to Report Misconduct

When a prosecutor has knowledge of conduct by a member of the judiciary that may violate the applicable code of judicial conduct and/or that raises a substantial question as to the judge's fitness for office, the prosecutor has the responsibility to report that knowledge to his or her supervisor or if the chief prosecutor, directly to the relevant judicial conduct authority in his or her jurisdiction.

### 2-6.6 Application for Recusal

When a prosecutor reasonably believes that it is warranted by the facts, circumstances, law, or rules of judicial conduct, the prosecutor may properly seek that judge's recusal from the matter.

### Commentary

The prosecutor is an officer of the court, a public official accountable to those of his jurisdiction, and a hub of the criminal justice system. All of these dimensions influence the prosecutor's relationships with the court.

The standard recognizes that judges, like all figures in the criminal justice system, are individuals of diverse talents, skills, and temperaments. While some are of superior character, others suffer from human frailties not uncommon in our society. Thus, while the prosecutor needs to have proper respect for the institution of the judiciary, at the same time, he has a responsibility to guard against the infrequent abuses from those who fail to honor their responsibilities while serving on the bench.

While this approach may require a delicate balance, it is necessary both inside and out of the courtroom. As is true of all National Prosecution Standards, effective justice is the paramount issue. Therefore, the prosecutor should neither undermine respect for the judicial function nor in any manner attempt to unfairly influence the court.

When judicial scandals are uncovered, they become an indictment of the entire criminal justice system, creating a public perception that all those involved in the system are corrupt. The prosecutor must assume the role of guardian against injustice and corruption. It is unacceptable to turn a deaf ear to suspicions of criminal activity or misconduct. The standard places a duty on the prosecutor to follow through with a thorough investigation when there is reasonable suspicion of criminal activity by a member of the judiciary. If the investigation dictates prosecution, the prosecutor must take the appropriate steps to see that it is commenced.

The standards make it clear that the prosecutor has responsibilities not only when misconduct is at the level of criminal activity, but also when a judge demonstrates the inability to carry out his duties with a minimal level of competence.

## 7. Suspects and Defendants

### 2-7.1 Communications with Represented Persons

A prosecutor should respect a suspect's and defendant's constitutional right to the assistance of counsel. A prosecutor should also take steps to ensure that those persons working at his or her direction respect a suspect's and defendant's constitutional right to the assistance of counsel. Notwithstanding the foregoing:

A prosecutor may communicate with a defendant or suspect in the absence of his counsel when either (1) counsel has consented to the communication or (2) the communication is authorized by law or court rule or order.

A prosecutor may communicate with a witness who is also charged as a defendant in an unrelated criminal matter about the witness's upcoming testimony without the advance permission of the witness's attorney so long as the prosecutor does not discuss the criminal charges pending against the witness and the communication does not violate any rules or laws of the jurisdiction.

### 2-7.2 Communication with Unrepresented Defendants

When a prosecutor communicates with a defendant charged with a crime who is not represented by counsel, the prosecutor should make certain that the defendant is treated with honesty, fairness, and with full disclosure of his or her potential criminal liability in the matter under discussion.

A prosecutor should identify himself or herself to the defendant as a prosecutor and make clear that he or she does not represent the defendant. If legally required under the circumstances, the prosecutor should advise the defendant of his or her rights.

If a prosecutor is engaged in communications with a charged defendant who is not represented by counsel and the defendant changes his or her mind and expresses a desire to obtain counsel, the prosecutor should terminate the communication to allow the defendant to obtain counsel, or to secure the presence of counsel. When appropriate, the prosecutor should advise the defendant on the procedures for obtaining appointed counsel.

### 2-7.3 Unsolicited Communications

A prosecutor may receive, accept and use unsolicited written correspondence from defendants, regardless of whether the defendant is represented by counsel. If the prosecutor does not know that the defendant is represented by counsel, a prosecutor may receive unsolicited oral communications from defendants, of which he or she has no advance notice, without any duty of first ascertaining whether or not there is a valid reason for the communication or whether or not the defendant is represented by counsel. However, the situation may arise where a defendant who has been charged with a crime is represented by counsel, but requests to communicate with a prosecutor on the subject of the representation out of the presence of his or her counsel. Before engaging in such communication, the prosecutor should first ascertain whether the defendant has expressed a valid reason to communicate with the prosecutor without the presence of his or her attorney, and if so, should thereafter communicate with the defendant only if authorized by law or court order.

### 2-7.4 Plea Negotiations

If a prosecutor enters into a plea negotiation with a defendant who is not represented by counsel, he or she should seek to ensure that the defendant understands his or her rights, duties, and liabilities under the agreement. When possible, the agreement should be reduced to writing and a copy provided to the defendant. The prosecutor should never take unfair advantage of an unrepresented defendant. The prosecutor should not give legal advice to a defendant who is not represented by counsel, other than the advice to secure counsel.

### 2-7.5 Right to Counsel

If a prosecutor is engaged in communications with a defendant who is not represented by counsel or whose counsel is not present, and the defendant changes his mind and expresses a desire to obtain counsel, or to have counsel present, the prosecutor should terminate the communication in order to allow the defendant to obtain counsel, or to secure the presence of his or her counsel. When appropriate, the prosecutor should advise the defendant on the procedures for obtaining appointed counsel.

### 2-7.6 Communications with Represented Persons During Investigations

A prosecutor performing his or her duty to investigate criminal activity should neither be intimidated nor discouraged from communicating with a defendant or suspect in the absence of his or her counsel when the communication is authorized by law or court rule or order. A prosecutor may advise or authorize a law enforcement officer to engage in undercover communications with an uncharged, represented suspect in the absence of the suspect's counsel, provided such a communication is authorized by law or court order.

### Commentary

Relationships with defendants is a sensitive area of a prosecutor's function. There must be a balancing of the general desirability to have defendants represented by counsel in their dealings with prosecutors and the right of defendants to represent themselves in traffic cases and minor misdemeanors, and even in felonies or serious misdemeanors under certain circumstances.

The standard recognizes that prosecutors are sometimes contacted by defendants without the knowledge of their counsel and give good reasons for their direct communications with the prosecutor. For example, a defendant may express that his attorney was hired by another person with an interest in keeping him quiet, to his legal detriment. In drug cases where couriers are caught transporting large amounts of drugs or cash, defendants may have attorneys appear, bail them out, and begin representation without the express authority of the defendant. Defendants complain that these attorneys are working for other interests, but they are afraid to discharge them because of actual or assumed danger. Similarly, a defendant may be the officer, employee, or agent of a corporation and face individual charges in addition to those against the corporation, where counsel for the corporation represents that he is also counsel for the individual. This situation may exist without the individual's knowledge or without the individual's knowledge of an inherent conflict of interest in the representation.

Prosecutors must be aware that in dealing with represented defendants, there are not only constitutional limitations on their communications, but also, in most jurisdictions, there are limitations imposed by ethical rules, which generally cannot be waived by the represented defendant. That being said, prosecutors may have the right under some uncommon circumstances to communicate with a represented defendant without prior knowledge or presence of his or her attorney. In these and other circumstances, prosecutors might be advised to seek authority from the court or the appointment of “shadow counsel” to interview the defendant and report to the court concerning what action might be appropriate. Some jurisdictions may provide other legal avenues that a prosecutor might use in such circumstances.

Prosecutors also often receive unsolicited letters from defendants. They should have the right to receive them and use them in any legal manner.

The standard provides that prosecutors communicating with unrepresented defendants should be certain that they are treated fairly and that defendants be made aware of what could happen to them as the result of whatever actions are taken. For example, suppose a defendant wishes to become a witness for the state in return for a recommendation by the prosecutor that he receive a suspended sentence. The prosecutor must make it known that he cannot guarantee the desired sentence but can only make a recommendation (if that be the case) and that the defendant might indeed be sentenced to a jail term, even with his cooperation on behalf of the state. If local rules or the legal circumstances require *Miranda*-type warnings be given, the prosecutor should so advise the defendant before any conversation. The standard assumes that a prosecutor will tell a defendant if he intends to use the communications against him. There are circumstances in which a prosecutor will agree to receive information from a defendant but not use it against him. However, to ensure fairness to an unrepresented defendant, he should not be subjected to the liability of incriminating statements without a prior warning and waiver of rights.

The standard recognizes that many defendants wish to negotiate a plea with the prosecutor without representation. Many such defendants are experienced with the system or do not wish the expense of representation. In these circumstances, the prosecutor is held to full disclosure of the defendant’s liabilities and a standard of fairness. The prosecutor should make certain that a defendant receives as favorable a disposition as he would have had had he been represented in the circumstances. The desirability of written plea agreements is also noted. The standard recognizes the general legal requirement of fulfilling a defendant’s desire for counsel—even if he originally expressed a desire not to be represented or to have counsel present and assisting him—or to obtain counsel if he cannot afford to pay for representation. The defendant’s wishes in this regard are recognized as paramount. The prosecutor should make a record of any communications with represented defendants that take place in the absence of counsel.

Prosecutors have a duty to investigate criminal activity. This may involve communicating with witnesses who are also defendants or suspects in unrelated cases. Ordinarily such communications must be made with the approval of the witness/defendant’s counsel because the witness is seeking some benefits in the “subject matter of the representation.” Whenever a witness/defendant seeks any benefit in his own case, the communication does involve the “subject matter of the representation,” and counsel must be included. In circumstances that remain completely unrelated to the witness/defendant’s case (the subject of the

representation), a communication may be “authorized by law” even though counsel was not consulted. In circumstances involving “undercover” investigations of an uncharged but represented suspect, a prosecutor can advise police officers to communicate with the suspect so long as the communication is specifically “authorized by law.”

In some jurisdictions, these standards may be inconsistent with case precedent and/or rules of professional conduct. The prosecutor must proceed with caution and seek to avoid any action that would jeopardize the case or result in misconduct under applicable rules.

## **8. Defense Counsel**

### **2-8.1 Standards of Professionalism**

The prosecutor should comply with the provisions of professionalism as identified in Standard 1-2.1 in his or her relationships with defense counsel, regardless of prior relationships with or animosity toward the attorney. The prosecutor should attempt to maintain a uniformity of fair dealing among different defense counsel.

### **2-8.2 Propriety of Relationships**

In all contacts with members of the defense bar, the prosecutor should strive to preserve proper relationships.

### **2-8.3 Cooperation to Assure Justice**

The prosecutor should cooperate with defense counsel at all stages of the criminal process to ensure the attainment of justice and the most appropriate disposition of each case. The prosecutor need not cooperate with defense demands that are abusive, frivolous, or made solely for the purpose of harassment or delay.

### **2-8.4 Disclosure of Exculpatory Evidence**

The prosecutor shall make timely disclosure of exculpatory or mitigating evidence, as required by law and/or applicable rules of ethical conduct.

### **2-8.5 Suspicion of Criminal Conduct**

When a prosecutor has reasonable suspicion of criminal conduct by defense counsel, the prosecutor has a responsibility to take appropriate action.

### **2-8.6 Responsibility to Report Ethical Misconduct**

When an assistant or deputy prosecutor has knowledge of ethical misconduct by defense counsel that raises a substantial question as to the attorney’s fitness to practice law, the prosecutor should report such conduct to his or her supervisor. Any prosecutor who has knowledge of ethical misconduct by defense counsel which raises a substantial question as to the attorney’s fitness to practice law should report such conduct directly to the appropriate bar disciplinary authority in his or her jurisdiction. When such misconduct occurs during the course of litigation, the prosecutor should also report it to the judge presiding over the case or to his or her supervisor, if required by office policy, and may seek sanctions as appropriate.

## 2-8.7 Avoiding Prejudice to Client

When the prosecutor believes that the defense counsel has engaged in misconduct, remedial efforts should be directed at the attorney and not at his or her client. The prosecutor should at all times make efforts to ensure that a defendant who is not involved in misconduct is not prejudiced by the unlawful or unethical behavior of his or her attorney.

### Commentary

As with the judiciary, appropriate professional consideration is due opposing counsel. All actions directed at opposing counsel and all deliberations with opposing counsel should be conducted with candor and fairness and should be presented without any express or implied animosity or disrespect. The prosecutor should strive to maintain uniformity of fair dealing with all defense counsel and should endeavor to not allow any prior animosity or bad feelings toward a particular defense attorney to work to the detriment of that attorney's client.

In the spirit of seeking justice in all cases, the prosecutor should cooperate with defense counsel in providing information and other assistance as volunteered by the prosecutor or reasonably requested by defense counsel. In the event defense counsel makes demands that are abusive, frivolous or made solely for the purpose of delay, the prosecutor need not cooperate with such demands and may seek court guidance on what must be provided. The prosecutor must be mindful that at all times, even when defense counsel is not acting in a professional manner, there are discovery obligations dictated by law and ethical codes that must be fulfilled.

If at any time during his or her association with defense counsel a prosecutor suspects the attorney of involvement in criminal activity, the prosecutor should take such action as necessary, including speaking to a supervisor, judge, law enforcement, state bar representative or other proper authority.

The standard requires that an assistant or deputy prosecutor who has knowledge of ethical misconduct by defense counsel which raises substantial question as to the attorney's fitness to practice law report such conduct to his or her supervisor. The assistant or deputy prosecutor needs to be aware that in some jurisdictions, such action may not be sufficient to comply with the ethical rules, and failure to report the defense attorney's misconduct, if the chief prosecutor does not, may, in itself, be misconduct by the assistant prosecutor. The timing of such report should be coordinated so as not to prejudice the defendant.

One continuing myth that pervades the judicial process is the misconception that the defense attorney should be allowed greater leeway in the presentation of his case than the prosecutor. This leeway is often sought to be justified on the grounds that it is necessary to counter-balance the more prolific resources of the state brought to bear upon a single individual. Such reasoning is fallacious, however, when viewed in relation to the purpose of the adversary proceeding and the safeguards already provided therein. The courtroom is not a stage but a forum, and uniformity of trial decorum by defense and prosecuting attorneys should be maintained by the court to prevent undue influence on judge and jury that might result from theatrical behavior. The prosecutor should be able to bring to the court's attention the failure to maintain such uniformity and should maintain the high standards of conduct befitting a professional advocate in public service.



## 9. Victims

### 2-9.1 Information Conveyed to Victims

Victims of crimes should be informed of all important stages of criminal justice proceedings to the extent feasible, upon request or as required by law. The prosecutor should be aware of any obligations imposed by victims' rights legislation in his or her particular jurisdiction. The prosecutor should take care to balance the extent of information provided to the victim with the need to protect the integrity of the case and process.

### 2-9.2 Victim Orientation

To the extent feasible and when it is deemed appropriate by the chief prosecutor, the prosecutor's office should provide an orientation to the criminal justice process for victims of crime and should explain prosecutorial decisions, including the rationale used to reach such decisions. Special orientation should be given to child and spousal abuse victims and their families, whenever practicable.

### 2-9.3 Victim Assistance

To the extent feasible and unless a legal obligation to provide such assistance is imposed by law on another governmental entity, the chief prosecutor should develop policies and procedures for providing services to victims of crimes, including, but not limited to the following:

- a. Assistance in obtaining the return of property held in evidence;
- b. Assistance in applying for witness fees and compensation if provided for by law or local rule;
- c. Assistance in obtaining restitution orders at the sentencing;
- d. Assistance in appropriate employer intervention concerning required court appearance;
- e. Assistance with necessary transportation and lodging arrangements;
- f. Assistance in reducing the time the victim has to wait for any court appearance to a minimum; and
- g. Assistance in reducing overall inconvenience whenever possible and appropriate.

### 2-9.4 Cooperative Assistance

The prosecutor should work with other law enforcement agencies to:

- a. Cooperate with victim advocates for the benefit of providing direct and referral services to victims of crime; and
- b. Assist in the protection of a victim's right to privacy regarding a victim's Social Security number, birth date, address, telephone number, place of employment, name (when the victim is a minor or a victim of sexual assault,) or any other personal information unless either a court finds it necessary to that proceeding or disclosure is required by law.

### **2-9.5 Facilities**

Whenever possible, the chief prosecutor should take steps to ensure that victims have a secure and comfortable waiting area that avoids the possibility of making contact with the defendants or friends and families of the defendants.

### **2-9.6 Victim Compensation Program**

The prosecutor should be knowledgeable of the criteria for victim compensation under state law, and should inform victims with potential compensable claims of the existence and requirements of victim compensation programs within the jurisdiction.

### **2-9.7 Victim Assistance Program**

To the extent feasible, the chief prosecutor should develop and maintain a victim assistance program within the staffing structure of the office to provide services and give assistance to victims of crime.

### **2-9.8 Victim Protection**

The prosecutor should be mindful of the possibility of intimidation and harm arising from a victim's cooperation with law enforcement. The prosecutor should be aware of programs available in his or her jurisdiction to protect witnesses to crime and should make referrals and recommendations for program participation where appropriate.

## **10. Witnesses**

### **2-10.1 Information Conveyed to Witnesses**

The prosecutor should keep witnesses informed of:

- a. All pre-trial hearings which the witnesses may be required to attend; and
- b. Trial dates and the scheduling of that witness's appearance.

### **2-10.2 Contacts by Defense with Witnesses**

The prosecutor shall not advise a witness (including victims) to decline to meet with or give information to the defense. The prosecutor may advise a witness that they are not required to provide information to the defense outside of court and the prosecutor may also inform a witness of the implications and possible consequences of providing information to the defense.

### **2-10.3 Represented Witnesses**

When the prosecutor is informed that a witness has obtained legal representation with respect to the criminal proceeding, the prosecutor should arrange all out-of-court contacts with the witness regarding the subject of that proceeding through the witness's counsel.

### **2-10.4 Jailhouse Informant**

The prosecutor should evaluate evidence provided by a jailhouse informant to ensure the information provided is truthful. In doing so, the prosecutor should consider factors such as the history of the informant, the motive of the informant, the source of the information, and whether there is independent corroborating evidence.

### **2-10.5 Witness Interviewing and Preparation**

The prosecutor shall not advise or assist a witness to testify falsely. The prosecutor may discuss the content, style, and manner of the witness's testimony, but should at all times make efforts to ensure that the witness understands his or her obligation to testify truthfully.

### **2-10.6 Expert Witnesses**

When a prosecutor determines that the testimony of an expert witness is necessary, the independence of the expert should be respected and if it is determined that a fee be paid to an expert witness, the fee should be reasonable and should not depend upon a contingency related to the outcome of the case.

### **2-10.7 Witness Assistance**

To the extent feasible and unless a legal obligation to provide such assistance is imposed by law on another governmental entity, the chief prosecutor should develop policies and procedures for providing the services to witnesses of crimes including, but not limited to, the following:

- a. Assistance in applying for witness fees, if available, and appropriate compensation if provided for by law or local rule;
- b. Assistance in appropriate employer intervention concerning required court appearance(s);
- c. Assistance in necessary transportation and lodging arrangements, if appropriate;
- d. Assistance in minimizing the time the witness has to wait for any court appearance; and
- e. Assistance in reducing overall inconvenience whenever possible and appropriate.

### **2-10.8 Witness Protection**

The prosecutor should be mindful of the possibility of intimidation and harm arising from a witness's cooperation with law enforcement. The prosecutor should be aware of programs available in his or her jurisdiction to protect witnesses to crime and should make referrals and recommendations for program participation where appropriate.

### **2-10.9 Facilities**

Whenever possible, the chief prosecutor should take steps to ensure that witnesses have a secure and comfortable waiting area that avoids the possibility of the witnesses making contact with defendants or the families and friends of defendants.

### **2-10.10 Enforcement of Crimes Against Witnesses**

The prosecutor, working with other law enforcement agencies, should assign a high priority to the investigation and prosecution of any type of witness intimidation, harassment, coercion, or retaliation, including any such conduct or threatened conduct against family members or friends.

### **2-10.11 Witness Assistance Program**

To the extent feasible, the chief prosecutor should develop and maintain a witness assistance program within the staffing structure of the office to provide services and give assistance to witnesses.

#### **Commentary**

Effective prosecution includes a sound understanding of the value of victims and witnesses within the criminal justice system. The necessity of individuals reporting crimes and following through with identifications, statements, and testimony is self-evident. The standard, however, identifies obligations of the prosecutor and others to facilitate the relationship with victims and witnesses.

Both victims and witnesses need notice of developments in criminal cases. Witnesses need to make arrangements in order to be available to testify, while victims may be more concerned with release decisions in apprehension of their personal safety and the safety of their families.

Important stages of the proceedings for which notice should be provided to victims and witnesses include the following: filing of charges; any hearing or proceeding that could result in the release of the offender; date of trial; and case resolutions and plea offers. Prosecutors should also be familiar with and comply with their duties under ever-evolving victims' rights laws and amendments to the Constitutions governing their jurisdiction. In addition to notice requirements, victims also have a true interest in learning facts and information relating to the case. The prosecutor should be mindful that she has an obligation not only to the victim but also to ensuring that a fair trial is afforded to the defendant. This obligation requires the prosecutor to balance the amount of information shared with the victim against the need to protect the integrity of the case. The prosecutor should be sensitive to the needs of the victim and, when possible, share those parts of the case with the victim when it would not otherwise interfere with the ability to provide a fair trial. Unless the jurisdiction has laws to the contrary, the prosecutor should not be obliged to share the entire file to the victim, witnesses or any interested party. Instead, the prosecutor should be given the authority to determine what information can be released during the course of the investigation and prosecution within the bounds of their ethical obligations.

Prosecution should not assume that victims or witnesses are familiar with the terminology, procedures, or even location of the courts. At a minimum, prosecutors should be sensitive to this. Ideally, there should be a formal orientation program or written information on the procedural steps in a criminal prosecution available to all victims and witnesses.

Such an orientation program should be part of a number of services provided. Prosecutors should have a leading role in the development and maintenance of victim/witness assistance programs. The standard suggests the type of assistance that should be available, such as employer intervention and reduction in inconvenience.

In addition to a program of assistance, the standard calls for appropriate facilities for victims and witnesses to avoid the possibility of contact with the defendant or his friends and family.

As central a figure as the prosecutor is to relationships with victims and witnesses, he is certainly not the sole source to accommodate the needs of victims and witnesses. Addressing these needs should be a cooperative effort. For example, one of the greatest needs of victims and witnesses is the assurance of their safety. They are most vulnerable to threats, harassment, and intimidation. Their protection is primarily a law enforcement function. While prosecution should work with the police to minimize this, it is essentially a cooperative effort.

## 11. Community-Based Probation Programs

### 2-11.1 Knowledge of Programs

Prosecutors should be cognizant of and familiar with all community-based programs to which offenders may be sentenced, referred as a condition of probation, or referred as a diversionary disposition.

### 2-11.2 Need for Programs

In jurisdictions where community agencies providing services such as employment, education, family counseling, and substance abuse counseling are needed but not provided by community agencies, the chief prosecutor should encourage the agencies to provide such services. The prosecutor's office should be available as a source of public information for such community-based agencies.

### 2-11.3 Notice

The prosecutor's office should take steps to ensure that the prosecutor's office and appropriate law enforcement agencies are notified of individuals participating in work-release programs in their jurisdiction.

## 12. Prisons

### 2-12.1 Knowledge of Facilities

Prosecutors should be cognizant of, and familiar with, all penal facilities located within the jurisdiction to which offenders prosecuted in the jurisdiction may be sentenced.

Where practicable, the chief prosecutor should attempt to ensure that new prosecutors hired by his or her office have an opportunity, as part of their initial training, to tour the penal institutions in their jurisdictions to which defendants may be sentenced.

### 2-12.2 Improvement at Correctional Institutions

The chief prosecutor should support the creation of innovative programs in institutions, including educational/behavioral services, provided that such programs do not adversely impact justice and appropriate offender accountability.

### **2-12.3 Prosecutor as Resource**

The prosecutor's office should be available as a source of information for prisons and jails and their intake divisions, to include the identification of multiple and career offenders

### **2-12.4 Notice**

The chief prosecutor should take steps to ensure that any institution holding an offender should notify both the prosecutor and law enforcement agencies at the time of an escape, prior to any temporary or final release, and prior to parole consideration.

### **2-12.5 Corrections Advisory Committee**

To the extent practicable, the chief prosecutor should participate in any established statewide correctional advisory committee involving representatives from all components of the criminal justice system and responsible members of the public.

## **13. Parole and Early Release**

### **2-13.1 Prosecution as Resource**

To the extent permitted by law, the prosecutor's office should be available as a source of information for the parole board, the department of corrections, or other supervisory agency considering or monitoring an offender's release from custody.

### **2-13.2 Information System**

When the chief prosecutor deems it appropriate, he or she should assist in the development and maintenance of an information system to keep the prosecutor's office informed of parole decisions concerning individuals from, or planning to reside in, the jurisdiction.

### **2-13.3 Parole Board and Release Discretion**

The chief prosecutor should be cognizant of the discretion vested in parole boards and in other entities or agencies authorized by law to make release from custody decisions, and he or she should address abuses of this discretion that come to his or her attention.

### **2-13.4 Right to Appear**

The chief prosecutor should advocate that prosecutors and victims have the opportunity to receive sufficient advance notice of and appear at hearings for parole, pardon, commutation, and grant of executive clemency, or be permitted to otherwise provide information at such hearings. Upon receipt of such notice, the prosecutor should endeavor, to the extent possible, to notify the victims of such crimes residing within the prosecutor's jurisdiction and local law enforcement agencies of this information.

### **2-13.5 Early Release**

The chief prosecutor should oppose the early release of offenders where the release decision is made by correctional authorities solely or primarily on the basis of overcrowding of the correctional facility, unless such release is mandated by court order.

### 2-13.6 Notice of Release

The prosecutor should seek to have the prosecutor's office, law enforcement agencies, and victims notified of all releases from confinement or commitment of individuals from facilities within the jurisdiction, or releases from confinement or commitment of individuals outside the jurisdiction who plan to reside in the jurisdiction. For purposes of this standard, "release from confinement or commitment" includes changes in a convicted person's custody status due to parole, pardon, commutation, grant of executive clemency, service of sentence, or release from court-ordered commitment to a mental health facility.

### 2-13.7 Sexually Dangerous Persons

Where the prosecutor is entitled to petition the court for civil commitment or continued detention of a prisoner after the term of the prisoner's sentence has expired based on a finding of sexually dangerous person status, the prosecutor should take steps to ensure that the board of prisons and parole notify the prosecutor's office of the prisoner's upcoming release date sufficiently in advance of that date to enable the prosecutor to file such a petition in a timely manner.

### Commentary

Community-based programs often present viable alternatives to traditional institutions for less-serious offenders. In addition, the concept of supplementing incarceration with community-based services has been advanced in recent years. The responsibilities placed upon community-based agencies mandates an increasing need for coordination and communication with the prosecutor. The degree of the prosecutor's input into such agencies may have as wide a spectrum, as those programs do themselves. At the most basic level, the prosecutor must be cognizant of all community services which offenders in the jurisdiction may be sentenced to, referred to as a condition of probation, or referred to as part of a diversionary program. In addition, it is important for the prosecutor to be available as a resource to these services. The chief prosecutor should be in a position to supply these agencies with information concerning offenders who have been referred to community programs.

Some prosecutors have chosen to play an active role in community-based operations. Developing and implementing programs under the auspices of the office has been initiated on a wide scale in recent years. Diversionary and citizen volunteer programs are examples of the input the prosecutor's office may have. In addition, prosecutors are active in local, regional, and statewide planning boards with an emphasis on developing such programs, such as Drug Treatment Courts, Veterans Courts and Mental Health Dockets. Where basic community services such as employment, adult education, family counseling, and substance abuse counseling are not provided or are inadequate, the prosecutor should consider having input in their development or upgrading. The prosecutor's involvement in such planning and advisory boards is important because of his or her position as the chief local law enforcement official.

The prosecutor should be aware of services and programs offered by prison and detention facilities for offenders. Also, just as for probation and community agencies, the prosecutor's insight into the background and behavior of individuals should be viewed as a resource by officials in this area. Correctional systems may employ an elaborate intake formula without utilizing all previously developed background information concerning offenders. In this situation, the prosecutor should be available as a resource both to offer initial information and to verify facts derived from other sources.

Prosecutors should have input into the prison system because of their positions as concerned leaders in the criminal justice system. Where correctional institutions need upgrading, the prosecutor should strive for better facilities and services within the prison setting, as well as better trained staff. The ability of the prosecutor to have valid input on upgrading facilities is dependent on his knowledge of the prison facilities within his state. The prosecutor, therefore, must be knowledgeable about the conditions of such facilities.

The prosecutor can also assist in the identification of multiple offenders. The prosecutor should encourage and support experimental efforts in regard to sentencing practices. Concepts such as mandatory prison sentences for multiple offenders of certain crimes should be closely examined.

As with all the other components discussed here, the prosecutor must urge cooperation. The prosecutor must be considered as a resource to both parole boards and supervisory personnel. In addition, the prosecutor should receive information concerning individuals who have been approved for release from institutions and who are planning to reside in the jurisdiction. And fundamental to the protective function of the prosecutor, he must have an opportunity to oppose parole release decisions that are not in the best interest of the community. Additionally, prosecutors charged with the commitment of sexually dangerous persons should develop procedures with the prisons from which release of such persons will occur to ensure that the prosecutor has sufficient time to prepare the petition for commitment prior to release.

Although prison overcrowding poses problems in the criminal justice system, early release programs that have as their primary motivation the alleviation of overcrowding in detention facilities should be opposed. Often such programs are a result of budget constraints or a reaction to jail litigation attacking conditions of confinement. Conditions of incarceration, however, are an improper basis for release of offenders and the standard takes an unequivocal position against it. The solution for prison overcrowding and related problems lies with the appropriate legislative bodies but is not to be found in simply releasing offenders. The prosecutor should support legislative proposals that solve this problem in the appropriate manner by allocating additional public funds for the construction and maintenance of needed facilities. Likewise, the prosecutor should oppose every program of early release based primarily on the problems facing our correctional system. Inappropriate release of offenders undermines every advance achieved in improving the criminal justice system.



## 14. The Media

### 2-14.1 Media Relationships

The prosecutor should seek to maintain a relationship with the media that will facilitate the appropriate flow of information to and from the public. An appropriate and professional relationship with the media is necessary to promote public accountability and transparency in government.

### 2-14.2 Balancing Interests

The prosecutor should strive to protect both the rights of the individual accused of a crime and the needs of citizens to be informed about public dangers and the conduct of their government. The prosecutor may provide sufficient information to the public so that citizens may be aware that the alleged perpetrator of a crime has been arrested and that there exists sufficient competent evidence with which to proceed with prosecution.

Subject to Standard 2-14.4 and applicable rules of ethical conduct, information may be released by the prosecution if such release will aid the law enforcement process, promote public safety, dispel widespread concern or unrest, or promote confidence in the criminal justice system. The prosecutor should refrain from making extrajudicial comments before or during trial that promote no legitimate law enforcement purpose and that serve solely to heighten public condemnation of the accused.

### 2-14.3 Information Appropriate for Media Dissemination by Prosecutors

Prior to and during a criminal trial the prosecutor may comment on the following matters:

- a. The accused's name, age, residence, occupation, family status, and citizenship;
- b. The substance or text of the charge such as the complaint, indictment, information, and, where appropriate, the identity of the complainant;
- c. The existence of probable cause to believe that the accused committed the offense charged;
- d. The identity of the investigating and arresting agency, the length and scope of the investigation, the thoroughness of the investigative procedures, and the diligence and professionalism of the law enforcement personnel in identifying and apprehending the accused;
- e. The circumstances immediately surrounding the arrest, including the time and place of arrest, the identity of the arresting officer or agency, resistance, pursuit, possession and use of weapons, and a description of items seized at the time of arrest or pursuant to a search warrant; and
- f. Information contained in a public record, the disclosure of which would serve the public interest.

### **2-14.4 Restraints on Information**

Prior to and during a criminal trial the prosecutor should not make any public, extrajudicial statement that has a substantial likelihood of materially prejudicing a judicial proceeding. In particular, from the commencement of a criminal investigation until the conclusion of trial, the prosecutor should not make any public, extrajudicial statements about the following matters, unless the information is part of the public record of the criminal proceeding:

- a. The character, reputation, or prior criminal conduct of a suspect, accused person or prospective witness;
- b. Admissions, confessions, or the contents of a statement or alibi attributable to a suspect or accused person;
- c. The performance or results of any scientific tests or the refusal of the suspect or accused to take a test;
- d. Statements concerning the credibility or anticipated testimony of prospective witnesses;
- e. The possibility of a plea of guilty to the offense charged or to a lesser offense, or the contents of any plea agreement.

### **2-14.5 Public Responses**

The prosecutor may make a reasonable and fair reply to comments of defense counsel or others. A public comment made by a prosecutor pursuant to this paragraph shall be limited to statements reasonably necessary to mitigate the effect of undue prejudice created by the public statement of another. In no event should a prosecutor make statements prohibited by Standard 2-14.4 or applicable rules of ethical conduct.

### **2-14.6 Law Enforcement Policy on Information**

The prosecutor should assist law enforcement and other investigative agencies in understanding their statutory responsibilities with respect to the release of criminal justice information. The prosecutor should also assist in the training of law enforcement agencies within his or her jurisdiction on subject matters to avoid when discussing pending criminal investigations or prosecutions with the media.

### **2-14.7 Judicial Decisions**

The prosecutor may inform the public of judicial decisions that are contrary to law, fact, or public interest, but a prosecutor should not make any public statement that he or she knows to be false, or with reckless disregard for its truth or falsity, as to the integrity or qualifications of a judge.

### **2-14.8 Verdicts**

A prosecutor should not make any public statement after trial that is critical of jurors but may express disagreement with or disappointment in the jury verdict.

## Commentary

A primary requirement for the proper functioning of the prosecutor's office is the establishment of public trust in the ability of the prosecutor to effectively represent the public in seeking to attain justice. In order to maintain that public trust, the prosecutor must be accountable for his or her actions. The media is a primary player in testing that accountability. The media reports information regarding: events leading up to criminal investigations and charges; the progress of the case through the court system; the performance of the law enforcement officers and prosecutors in the conduct of the investigation and the court proceedings; and, the results of court proceedings.

Because of the prosecutor's unique role as a representative of all of the people in the quest for justice, it would be unfair for him or her to diminish the rights of a defendant to a trial by an unprejudiced jury of his or her peers by broadcasting information through the media where it would go untested by the time-tested procedures incorporated into our criminal justice system.

At the same time, as a representative of the people with the duty to assure that justice is achieved, the prosecutor must be allowed to provide sufficient information to assure the public that community safety is being maintained and that the criminal justice system is operating properly. Maintaining such a balance is the purpose behind these standards.

The prosecutor should take an active role in training law enforcement agencies in his or her jurisdiction on the limitations on public statements. By conducting such advance training, the prosecutor proactively reduces the possibility of comments by law enforcement personnel that are in conflict with the law and legal rules. By that means, the prosecutor also reduces the incidents of challenges to venue and other matters relating to the ability of a defendant to receive a fair trial. The content and extent of a prosecutor's comments regarding judicial decisions are some of the most litigated ethical provisions. At a minimum, a prosecutor cannot knowingly make false or reckless statements about the integrity or qualifications of a judge and jury verdicts. Further, a prosecutor may not engage in conduct with a juror designed to alter that jurors conduct in future jury service.

## 15. Funding Entity

### 2-15.1 Assessment of Need

The chief prosecutor should cooperate with his or her funding entity by providing an assessment of resources needed to effectively administer the duties of the office.

### 2-15.2 Independent Revenue

The budget for prosecution should be independent of and unrelated to revenues resulting from law enforcement and criminal justice activities, such as fines, forfeitures and program fees. The prosecutor may expend revenues from forfeited assets only as permitted by law.

## Commentary

The basic premise of this standard is adequate funding. Little can happen in the way of system improvements in general, and the prosecutor's office in particular, without adequate funding. Added responsibilities by the legislature to the duties and responsibilities of the prosecutor should not be enacted without appropriate funding in the budget.

An expectation persists among funding bodies that funds for law enforcement can be generated from fines and forfeitures. The latter aspect, in particular, is the result of misconceptions concerning the potential for revenue generation that have grown up along with the relatively recent state and federal forfeiture statutes. Such remedies were never intended to be primary sources of revenue, and the notion that they can be "budgeted" into criminal justice agencies is totally misguided. To the extent that such remedies provide some funds for law enforcement agencies, this benefit is at best collateral to their primary purpose. Such revenues are not predictable and, therefore, it is doubly wrong for funding sources to rely upon them when considering budget requests from prosecutors.

## 16. The Public

### 2-16.1 Community Organizations

The prosecutor should encourage the formation and growth of community-based organizations interested in criminal justice, crime prevention, and the punishment and rehabilitation of offenders.

### 2-16.2 Staff Liaison

With respect to such organizations and to the extent that the prosecutor has the resources to do so, the chief prosecutor should assign an appropriate staff member(s) to act as liaison to such organizations and provide qualified speakers from the prosecutor's office to address and appear before such groups on matters of common interest.

### 2-16.3 Public Education

The chief prosecutor should use all available resources to encourage citizen involvement in the support of law enforcement and prosecution programs and issues. The chief prosecutor should educate the public about the programs, policies, and goals of his or her office and alert the public to the ways in which the public may be involved and benefit from those programs, policies, and goals.

### 2-16.4 Advisory Role

Because the prosecutor has the responsibility of exercising discretion and making ultimate decisions, the role of public interest and citizen groups must be understood to be advisory only.

## Commentary

Since the prosecutor's work is intimately involved with crime in the community, the prosecutor can contribute significantly to crime prevention by lending personal support and the support of the prosecutor's office to existing community crime prevention programs. Further, the prosecutor can lend expertise to criminologists, city planners, and others as they make plans for the growth and development of the community in a way best suited to deter criminal activity. The standard has been developed to serve as a guide to prosecutors in implementing their role in community crime prevention. It recognizes the need for the prosecutor to not only interact with community crime prevention and social service organizations that are community-based, but also to take a hand in the formation of such citizen groups where they presently do not exist.

## 17. Non-Governmental Entities

### 2-17.1 Generally

In all dealings with a non-governmental entity, the chief prosecutor should place the public interest above all other considerations.

### 2-17.2 Financial and Resource Assistance

- a. Where permitted by law, a prosecutor's office may accept financial or resource assistance from a non-governmental source when such assistance is specifically approved by the chief prosecutor;
- b. When determining whether to accept assistance from a non-governmental source, the chief prosecutor should give priority consideration to the public interest over the private interests of a non-governmental source, especially when the assistance relates to a specific case or cases rather than office-wide assistance;
- c. The chief prosecutor should consider whether accepting assistance from a non-governmental source will create the appearance of undue influence;
- d. The chief prosecutor should have office procedures in place that protect the independent exercise of discretion of the office from the undue influence of a non-governmental resource that has provided assistance to the office during the investigation and prosecution of specific cases or types of cases. These procedures should include requirements for strict bookkeeping and accounting of any assistance received, whether financial or resource assistance, and if required by law, disclosure procedures.

## Commentary

In times of strained budgets and inadequate resources, an offer of assistance from a non-government funding source should be carefully examined to make certain that no illegal or unethical strings are attached. If the prosecutor should decide to accept the assistance, he or she must be diligent in keeping track of the funds or equipment provided. In addition, the prosecutor must be vigilant to not allow the assistance to interfere with his or her independent exercise of prosecutorial discretion.

# Investigations

1. Investigations Generally
2. Warrant Review
3. Grand Jury Investigations
4. Grants of Immunity

## 1. Investigations Generally

### 3-1.1 Authority to Investigate

A prosecutor should have the discretionary authority to initiate investigations of criminal activity in his or her jurisdiction. The exercise of this authority will depend upon many factors, including, but not limited to, available resources, adequacy of law enforcement agencies' investigation in a matter, office priorities, and potential civil liability. Prosecutors should be cognizant of the limits of qualified immunity in their jurisdiction. Prosecutors should also avoid becoming a necessary witness in at case; it is prudent to have an investigator present when conducting an interview of a potential witness if possible.

### 3-1.2 Fairness in Investigations

A criminal investigation should not begin or be continued if it is motivated in whole or part by the victim or perpetrator's race, ethnicity, religion, sexual orientation, or political affiliation unless these factors are an element of a crime or relevant to the perpetrator's motive. Nor should an investigation be motivated, in whole or significant part, by partisan political pressure or professional ambition or improper personal considerations.

### 3-1.3 Prosecutor's Responsibility for Evidence

A prosecutor is ultimately responsible for evidence that will be used in a criminal case. A prosecutor who knows or who is aware of a substantial risk that an investigation has been conducted in an improper manner, or that evidence has been illegally obtained by law enforcement, must take affirmative steps to investigate and remediate such problems.

### 3-1.4 Illegally Obtained Evidence

A prosecutor should not knowingly obtain evidence through illegal means, nor should the prosecutor instruct or encourage others to obtain evidence through illegal means.

### 3-1.5 Undercover Investigations

Although prosecutors may not normally make false statements or engage in conduct involving deception, a prosecutor may, to the extent permitted by law, engage in or direct law enforcement investigations that involve such conduct. A prosecutor should take all reasonable steps to ensure that any such investigations do not create an unnecessary risk of harm to innocent parties, perpetuate a fraud on the court, or interfere with a defendant's constitutionally protected right to counsel or right to a fair trial. Nothing in this standard precludes a prosecutor from engaging in a duly authorized investigation of judicial or court officers, or members of the bar.

### 3-1.6 Prosecutorial Investigators

Chief prosecutors should employ properly trained investigators to assist with case preparation, supplement law enforcement investigations, conduct original investigations, and carry out other duties as assigned by the prosecutor. The chief prosecutor should seek investigative resources from appropriate funding authorities.

#### Commentary

While the vast majority of criminal investigations are undertaken by law enforcement agencies, there are times when the prosecutor must use his or her authority to initiate or continue an investigation. Some instances where such action by the prosecutor would be appropriate are: where the law enforcement agency that would normally conduct the investigation has a conflict of interest; where the investigation has been handled improperly and is in need of re-investigation; where the investigation calls for expertise that is available in the prosecutor's office; and, where the law enforcement agencies do not have sufficient resources to conduct the investigation.

Given the prosecutor's responsibility to seek justice for all the people, there are axioms regarding investigations that follow. A prosecutor should not conduct an investigation motivated by any characteristics of the victim or perpetrator that are categories irrelevant to the elements of the crime or the motive. The prosecutor should not conduct an investigation in an illegal or improper manner, nor should he or she allow his or her agents to do so.

Undercover investigations are at times the only effective way of obtaining evidence by which to prosecute criminal conduct. Because of the importance of these investigations, prosecutors should make reasonable efforts to see that prosecutors are not precluded from conducting such investigations. Those efforts might include seeking a clarification or modification of rules of ethical conduct.

To avoid duplicative investigations, it is important that each governmental entity with investigative responsibilities, be they local law enforcement or others, advise the prosecutor of investigations in the jurisdiction.

While prosecutors enjoy absolute immunity from civil liability related to their performance of "prosecutorial" functions, *Burns v. Reed*, 500 U.S. 478, 486 (1991), courts look to "the nature of the function performed, not the identity of the actor who performed it," *Forrester v. White*, 484 U.S. 219, 229 (1988) when determining whether absolute immunity applies in a particular situation. Functions that serve as an "integral part of the judicial process" or that are "intimately associated with the judicial process" are absolutely immune from civil suits.

*Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). However, functions which are more “investigative” or “administrative” in nature, because they are more removed from the judicial process, are subject only to qualified immunity. *Burns*, 500 U.S. at 486. Therefore, a prosecutor should exercise caution when entering into an investigation.

## 2. Warrant Review

### 3-2.1 Search and Arrest Warrant Review

The prosecutor’s office should develop and maintain a system for providing law enforcement with the opportunity for a prompt legal review of search and arrest warrant applications before the applications are submitted to a judicial officer, as long as the law on qualified immunity in their jurisdiction does not make it imprudent to do so.

### 3-2.2 Electronic Surveillance Review

The prosecutor’s office should review and approve the use of all electronic surveillance by law enforcement entities that are within the prosecutor’s jurisdiction.

### 3-2.3 Law Enforcement Training

The prosecutor’s office should assist in training law enforcement personnel within the prosecutor’s jurisdiction on the law applicable to the issuance and execution of search and arrest warrants.

## Commentary

Given the number and nature of requirements for the issuance of arrest, search and surveillance warrants that will withstand motions to suppress and other legal attacks, the role of the prosecutor in providing legal assistance to law enforcement agencies is essential. The standard suggests the prosecutor’s review of warrants and applications for the same, whenever practical. This review would assure propriety that will enhance the probability of the conviction of the guilty.

A prosecutor should be aware that, in a qualified immunity analysis, their conduct will be judged on what a reasonable prosecutor would believe was lawful in light of “clearly established law” and “information possessed” at the time of the challenged conduct.

In addition to the review, the prosecutor’s involvement in police training on the technical requirements and the design of uniform forms would also increase the probability that the resulting warrants would withstand defense challenges.

## 3. Grand Jury Investigations

### 3-3.1 Scope of Grand Jury Investigations

Unless the law of the jurisdiction specifically permits otherwise, a prosecutor should not use a grand jury investigation to:

- a. Assist solely in a non-criminal matter; or
- b. Gather evidence solely for the use at trial against a defendant who already has been charged by indictment or information.



### 3-3.2 Counsel for Witnesses

In jurisdictions where counsel for a witness is not permitted in the grand jury room but is permitted to consult with the witness outside the room, the prosecutor should grant a witness's reasonable requests to consult with counsel during questioning. If the decision whether to allow such consultation rests with the grand jury, the prosecutor should recommend to the grand jury that the witness be given reasonable opportunities to consult with counsel.

### 3-3.3 Subpoenaing the Target of an Investigation

In jurisdictions where it is permissible to call a person to testify before the grand jury even though the person is the target of the investigation, the following procedures should apply:

- a. The chief prosecutor or his or her designee should approve all efforts to have a target of the investigation testify before a grand jury;
- b. The target should be informed in writing of his or her status before any grand jury appearance and advised in writing to obtain legal advice as to his or her rights;
- c. To avoid the appearance of unfairness, the prosecutor should make reasonable efforts to secure the target's grand jury appearance voluntarily rather than through a subpoena; and
- d. At the outset of his or her appearance before the grand jury, the target should be informed of his or her rights as provided in Standard 3- 3.4.

### 3-3.4 Grand Jury Warnings

Before questioning a grand jury witness who is the target or subject of the investigation, a prosecutor should warn the witness as follows:

- a. If the truthful answer to a question would tend to incriminate you in criminal activity, you may refuse to answer the question;
- b. Anything you say may be used against you by the grand jury or in a later legal proceeding;
- c. If you have retained counsel with you, the grand jury will grant your reasonable requests to consult with your counsel before answering a question.
- d. These warnings should be given on the record, and the prosecutor should obtain from the witness an affirmation that he or she understands the warnings given.

### 3-3.5 Evidence Before the Grand Jury

Unless otherwise required by the law or applicable rules of ethical conduct of the jurisdiction, the following should apply to evidence presented to the grand jury:

- a. A prosecutor should disclose any credible evidence of actual innocence known to the prosecutor or other credible evidence that tends to negate guilt, as required by law or applicable rules of ethical conduct;
- b. A prosecutor should not present evidence to the grand jury that the prosecutor knows was obtained illegally by law enforcement;

- c. In the absence of a valid waiver, a prosecutor should not seek information from a witness that the prosecutor knows or believes is covered by a valid claim of attorney-client privilege;
- d. A prosecutor should not take any action that could improperly influence the testimony of a grand jury witness;
- e. If the prosecutor is convinced in advance of a grand jury appearance that any witness will invoke his or her Fifth Amendment privilege against self-incrimination rather than provide any relevant information, the prosecutor should not present the witness to the grand jury unless the prosecutor plans to challenge the assertion of the privilege or to seek a grant of immunity. The grand jury may be informed of the reason the witness will not appear;
- f. The prosecutor should inform the grand jury that it has the right to hear in person any available witness or subpoena pertinent records;
- g. A prosecutor should not present evidence to the grand jury that the prosecutor knows to be false;
- h. A prosecutor should not knowingly make a false statement of fact or law to the grand jury.

### **3-3.6 Request by a Target to Testify**

Except as otherwise governed by the law of the jurisdiction, the prosecutor should grant requests by the target of an investigation to testify before the grand jury unless such a request:

- a. Would unduly burden or delay the grand jury proceedings;
- b. Would clearly provide information that is irrelevant to the investigation;
- c. Would be inconsistent with the need to preserve the secrecy of the investigation;
- d. Is made for an improper purpose.
- e. Before a request to testify is granted, the target should be required to waive on the record his or her Fifth Amendment privilege against self-incrimination.

### **3-3.7 Grand Jury Subpoenas**

While a prosecutor should zealously pursue all relevant information that is within the scope of a criminal investigation, reasonable efforts should be made to minimize the burden of investigation on third party witnesses. A prosecutor should consider in good faith requests to limit or otherwise modify the scope of subpoenas that are claimed to impose an undue burden on the recipients.

### **3-3.8 Termination of Target Status**

If a person has previously been notified or made aware that he or she was the target of a grand jury investigation and the prosecutor elects not to seek an indictment or the grand jury fails to return a true bill and no further investigation against the target is contemplated, the prosecutor should notify the person he or she is no longer a target, unless doing so is inconsistent with the effective enforcement of the criminal law.

## Commentary

In those jurisdictions that may use grand juries to investigate criminal activity and initiate charges, the procedures for the activities of the jurors, prosecutors, law enforcement officers, and witnesses are generally set forth in considerable detail in the statutes and case law of the jurisdiction.

As a result, the standards addressing the grand jury investigation are intended to encourage prosecutors to conduct the grand jury investigations with a sense of fairness. In order for the criminal justice system to remain viable, a large majority of the people must believe in its fairness and effectiveness. Provisions such as allowing a witness to consult with counsel, notification of target status, warning regarding the use of testimony, and allowing a target to testify allow the prosecutor to describe and defend the system by arguing that those provisions show it to be an effective tool in the pursuit of justice.

## 4. Grants of Immunity

### 3-4.1 Immunity Generally

A prosecutor should not grant or request immunity for a witness without the prior approval by the chief prosecutor or his or her designee. Approval should be granted only after careful consideration of the public interest. A grant of immunity should be in writing and should describe the scope and character of the immunity granted.

### 3-4.2 Granting or Requesting Immunity—The Public Interest

Factors that should be considered before deciding whether to grant or request immunity from prosecution for a witness include, but are not limited to:

- a. The likelihood that a grant of immunity will produce truthful information from the witness;
- b. The value of the witness's testimony or information to the investigation or prosecution;
- c. The impact on the witness's perceived credibility if he or she testifies before a grand jury or trial jury pursuant to a grant of immunity;
- d. The likelihood of prompt and full compliance with a compulsion order, and the effectiveness of available sanctions if there is no such compliance;
- e. The witness's relative culpability in connection with the offenses being investigated or prosecuted, and his or her criminal history;
- f. The possibility of successfully prosecuting the witness prior to compelling his or her testimony; and
- g. The likelihood of future physical harm to the witness if he or she testifies under a compulsion order.

### **3-4.3 Prosecution After Grants of Immunity**

Any prosecution of a witness who has previously been immunized should be approved by the chief prosecutor or his or her designee. The prosecutor's office should take reasonable steps to ensure that any decision to pursue a subsequent prosecution of an immunized witness is not perceived as a breach of a prosecutorial commitment.

### **3-4.4 Grants of Immunity to Compel Testimony on Behalf of a Defendant**

Except as otherwise required by law, a prosecutor is not obligated to grant or seek immunity to compel information on behalf of a defendant. A prosecutor may immunize or seek to immunize a defense witness if the prosecutor believes that it is necessary for a just prosecution.

#### **Commentary**

There are some prosecutions, usually those in which more than one person carried out the criminal act or acts, where the cooperation and testimony of one or more of the wrong doers is required for the successful prosecution of the most culpable. In those situations in which the person whose testimony is needed cannot be persuaded to cooperate in any other way, a grant of immunity may be required.

Because the grant of immunity carries with it very serious implications, only the chief prosecutor, the person most directly accountable to the people, should exercise the authority to grant immunity. Again, keeping in mind the need to maintain public trust in the criminal justice system, the chief prosecutor should carefully examine the factors set forth in the standards before exercising his or her discretion.

# Pre-Trial Considerations

1. Screening
2. Charging
3. Diversion
4. Pretrial Release
5. First Appearance
6. Preliminary Hearing
7. Forfeiture
8. The Grand Jury Charging Function
9. Discovery
10. Case Scheduling and Priority

## 1. Screening

### 4-1.1 Prosecutorial Responsibility

The decision to initiate a criminal prosecution should be made by the prosecutor's office. Where state law allows criminal charges to be initiated by law enforcement or by other persons or means, prosecutors should, at the earliest practical time, decide whether the charges should be pursued.

### 4-1.2 Prosecutorial Discretion

The chief prosecutor should recognize and emphasize the importance of the initial charging decision and should provide appropriate training and guidance to prosecutors regarding the exercise of their discretion.

### 4-1.3 Factors to Consider

Prosecutors should screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest. Factors that may be considered in this decision include:

- a. Doubt about the accused's guilt;
- b. Insufficiency of admissible evidence to support a conviction;
- c. The negative impact of a prosecution on a victim;

- d. The availability of adequate civil remedies;
- e. The availability of suitable diversion and rehabilitative programs;
- f. Provisions for restitution;
- g. Likelihood of prosecution by another criminal justice authority;
- h. Whether non-prosecution would assist in achieving other legitimate goals, such as the investigation or prosecution of more serious offenses;
- i. The charging decisions made for similarly situated defendants;
- j. The attitude and mental status of the accused;
- k. Undue hardship that would be caused to the accused by the prosecution;
- l. A history of non-enforcement of the applicable law;
- m. Failure of law enforcement to perform necessary duties or investigations;
- n. The expressed desire of an accused to release potential civil claims against victims, witnesses, law enforcement agencies and their personnel, or the prosecutor and his personnel, where such desire is expressed after having the opportunity to obtain advice of counsel and is knowing and voluntary;
- o. Whether the alleged crime represents a substantial departure from the accused's history of living a law-abiding life;
- p. Whether the accused has already suffered substantial loss in connection with the alleged crime;
- q. Whether the size of the loss or the extent of the harm caused by the alleged crime is too small to warrant a criminal sanction;

#### **4-1.4 Factors Not to Consider**

Factors that should not be considered in the screening decision include the following:

- a. The prosecutor's individual or the prosecutor's office rate of conviction;
- b. Personal advantages or disadvantages that a prosecution might bring to the prosecutor or others in the prosecutor's office;
- c. Political advantages or disadvantages that a prosecution might bring to the prosecutor;
- d. Characteristics of the accused that have been recognized as the basis for invidious discrimination, insofar as those factors are not pertinent to the elements or motive of the crime;
- e. The impact of any potential asset forfeiture to the extent described in Standard 4-7.4.

### **4-1.5 Information Sharing**

The prosecutor should attempt to gather all relevant information that would aid in rendering a sound screening decision. The prosecutor's office should take steps to ensure that other government and law enforcement agencies cooperate in providing the prosecutor with such information.

### **4-1.6 Continuing Duty to Evaluate**

In the event that the prosecutor learns of previously unknown information that could affect a screening decision previously made, the prosecutor should reevaluate that earlier decision in light of the new information.

### **4-1.7 Record of Declinations**

Where permitted by law, a prosecutor's office should retain a record of the reasons for declining a prosecution.

### **4-1.8 Explanation of Declinations**

The prosecutor should promptly respond to inquiries from those who are directly affected by a declination of charges.

### **Commentary**

It could be argued that screening decisions are the most important made by prosecutors in the exercise of their discretion in the search for justice. The screening decision determines whether or not a matter will be absorbed into the criminal justice system.

While the decision may be very easy at times, at others it will require an examination of the prosecutor's beliefs regarding the criminal justice system, the goals of prosecution, and a broad assortment of other factors. These standards set forth some of the considerations that may be relevant to an informed screening decision as well as some that should not be used in making the determination. The prosecutor should take care to recognize any of the listed factors that are not appropriate for use in his or her jurisdiction.

## **2. Charging**

### **4-2.1 Prosecutorial Responsibility**

It is the ultimate responsibility of the prosecutor's office to determine which criminal charges should be prosecuted and against whom.

### **4-2.2 Propriety of Charges**

A prosecutor should file charges that he or she believes adequately encompass the accused's criminal activity and which he or she reasonably believes can be substantiated by admissible evidence at trial.

### **4-2.3 Improper Leveraging**

The prosecutor should not file charges where the sole purpose is to obtain from the accused a release of potential civil claims.

#### 4-2.4 Factors to Consider

The prosecutor should only file those charges that are consistent with the interests of justice. Factors that may be relevant to this decision include:

- a. The nature of the offense, including whether the crime involves violence or bodily injury;
- b. The probability of conviction;
- c. The characteristics of the accused that are relevant to his or her blameworthiness or responsibility, including the accused's criminal history;
- d. Potential deterrent value of a prosecution to the offender and to society at large;
- e. The value to society of incapacitating the accused in the event of a conviction;
- f. The willingness of the offender to cooperate with law enforcement;
- g. The defendant's relative level of culpability in the criminal activity;
- h. The status of the victim, including the victim's age or special vulnerability;
- i. Whether the accused held a position of trust at the time of the offense;
- j. Excessive costs of prosecution in relation to the seriousness of the offense;
- k. Recommendation of the involved law enforcement personnel;
- l. The impact of the crime on the community;
- m. Any other aggravating or mitigating circumstances.

#### Commentary

Following an initial screening decision that prosecution should be initiated, the charging decision is the prerogative and responsibility of the prosecutor. The charging decision entails determination of the following issues:

- a. What possible charges are appropriate to the offense or offenses; and
- b. What charge or charges would best serve the interests of justice?

In making a charging decision, the prosecutor should keep in mind the power he or she is exercising at that point in time. The prosecutor is making a decision that will have a profound effect on the lives of the person being charged, the person's family, the victim, the victim's family, and the community as a whole. The magnitude of the charging decision does not dictate that it be made timidly, but it does dictate that it should be made wisely with the exercise of sound professional judgment.

There will be times when information not known at the time of charging will influence future actions in a case. While it is advisable to gather all information possible prior to charging, that is simply an unrealistic expectation. The prosecutor must balance the importance of gathering information and the importance of public safety interests when determining when he or she has sufficient information to make a charging decision.



While commencing a prosecution is permitted by most ethical standards upon a determination that probable cause exists to believe that a crime has been committed and that the defendant has committed it, the standard prescribes a higher standard for filing a criminal charge. To suggest that the charging standard should be the prosecutor's reasonable belief that the charges can be substantiated by admissible evidence at trial is recognition of the powerful effects of the initiation of criminal charges. Pursuant to the prosecution's duty to seek justice, the protection of the rights of all (even the prospective defendant) is required.

The means by which a prosecutor elects to implement charging decisions is closely related to the mechanism utilized in reaching screening decisions; indeed, the two functions may be appropriately combined in a single individual or office division.

Diversion participation should only be done at the prosecutor's discretion, and the prosecutor should not yield to external pressures in either selecting a charge or deciding if diversion alternatives are a proper course of action. Diversion may be done at any stage of the proceeding, but with the option of continued prosecution. That does not preclude diversion alternatives after a formal charge. At that stage, the threat of criminal prosecution is even greater to the accused, and thus positive participation in diversion alternatives and favorable results may be more likely.

Initial standards or guidelines for charging will be established by the chief prosecutor only. In the one-person office, the chief prosecutor will also act as the agent for implementing these guidelines. Larger offices may find it convenient, particularly in respect to minor offenses, to delegate much of the responsibility for charging to selected individuals or to establish a separate office division for intake procedures. The designated individuals or office division should be responsible for reaching initial charging decisions, subject to review and approval by the chief prosecutor.

The chief prosecutor should establish guidelines by which charging decisions may be implemented. For the one-person office this formulation process will provide consistency of operation and an incentive to develop and articulate specific policies. The same holds true for other size offices.

Some prosecution offices employ vertical prosecution with great success, making the use of guidelines important for consistent application.

### **3. Diversion**

#### **4-3.1 Prosecutorial Responsibility**

The decision to divert cases from the criminal justice system should be the responsibility of the prosecutor. The prosecutor should, within the exercise of his or her discretion, determine whether diversion of an offender to a treatment alternative best serves the interests of justice.

#### **4-3.2 Diversion Alternatives**

A prosecutor should be aware and informed of the scope and availability of all alternative diversion programs. The prosecutor's office should take steps to help ensure that all diversion programs are credible and effective.

### 4-3.3 Need for Programs

In jurisdictions in which diversion programs are deemed insufficient by the chief prosecutor, the prosecutor's office should urge the establishment, maintenance, and enhancement of such programs as may be necessary.

### 4-3.4 Information Gathering

The prosecutor should have all relevant investigative information, personal data, case records, and criminal history information necessary to render sound and reasonable decisions on diversion of individuals from the criminal justice system. The chief prosecutor should take steps to ensure the enactment of appropriate legislation and court rules to enable the prosecutor to obtain such information from appropriate agencies.

### 4-3.5 Factors to Consider

The prosecutor may divert individuals from the criminal justice system when he or she considers it to be in the interest of justice and beneficial both to the community and to the individual. Factors which may be considered in this decision include:

- a. The nature, severity, or class of the offense;
- b. Any special characteristics or difficulties of the offender;
- c. Whether the defendant is a first-time offender;
- d. The likelihood that the defendant will cooperate with and benefit from the diversion program;
- e. Whether an available program is appropriate to the needs of the offender;
- f. The impact of diversion and the crime on the community;
- g. Recommendations of the relevant law enforcement agency;
- h. The likelihood that the defendant will recidivate;
- i. The extent to which diversion will enable the defendant to maintain employment or remain in school;
- j. The opinion of the victim;
- k. Provisions for restitution;
- l. The impact of the crime on the victim; and
- m. Diversion decisions with respect to similarly situated defendant.

### 4-3.6 Diversion Procedures

The process of diverting a defendant should include the following procedures:

- a. A signed agreement or court record specifying all requirements for the accused;
- b. A signed waiver of speedy trial requirements, where applicable;

- c. The right of the prosecutor, for a designated time period, to proceed with the criminal case when, in the prosecutor's judgment, such action would be in the interest of justice;
- d. Appropriate mechanisms to safeguard the prosecution of the case, such as admissions of guilt, stipulations of facts, and depositions of witnesses.

#### 4-3.7 Record of Diversion

A record of the defendant's participation in a diversion program, including the reasons for the diversion, should be created for each case and maintained by the prosecutor's office for subsequent use by law enforcement, unless prohibited by law.

#### 4-3.8 Explanation of Diversion Decision

Upon request, the prosecutor should provide adequate explanations of diversion decisions to victims, witnesses, law enforcement officials, the court, and statewide diversionary program(s) and, when deemed appropriate, to other interested parties.

#### Commentary

An alternative available to prosecutors in the processing of a criminal complaint is that of diversion - the channeling of criminal defendants and even potential defendants, into programs that may not result in a criminal conviction. The purposes of diversion programs include:

- a. Unburdening court dockets and conserving judicial resources for more serious cases;
- b. Reducing the incidence of offender recidivism by providing community-based rehabilitation that would be more effective and less costly than the alternatives available in continued criminal prosecution.
- c. Determination of the appropriateness of diversion in a specified case will involve a subjective determination that, after consideration of all circumstances, the offender and the community will both benefit more by diversion than by prosecution.

Prosecutors have long been at the forefront in utilizing community and court programs as alternatives to traditional penalties while addressing public safety and offender rehabilitation. Dating back to 1989, when the first Drug Treatment Court was created in Dade County, FL, prosecutors have been integral to the success of alternative therapeutic programs. See [www.uscourts.gov/sites/default/files/72\\_1\\_2\\_0.pdf](http://www.uscourts.gov/sites/default/files/72_1_2_0.pdf). With the leadership of the nations' prosecutors, other diversionary programs such as Mental Health Dockets and Veterans' Courts have also been successfully created and implemented to address criminal behavior and the underlying causes of the behavior.

The chief prosecutor should promulgate guidelines outlining the approach and criteria under which he wishes diversion determinations to be made. These guidelines will aid in providing a policy that is both uniform and in accordance with the intentions of the prosecutor.

Equally important as protecting the rights of the individual is the necessity to protect the interests of society. It must be remembered that the individual involved in the diversion process is accused of having committed a criminal act and is avoiding prosecution only because an alternative procedure is thought to be more appropriate and more beneficial.

## 4. Pretrial Release

### 4-4.1 Prosecutorial Responsibility

A prosecutor should consider not opposing a non-monetary bond for defendants accused of low-level, non-violent crimes. In other instances, a prosecutor should request that bail be set at an appropriate amount, whether secured or unsecured, to ensure that the defendant appears at all required court proceedings, and, where allowed by law, does not pose a danger to any person or to the community. Where permitted by law, a prosecutor should request that the defendant be held without bail if the prosecutor reasonably believes the accused:

- a. Would present a significant danger to any person or the community if he or she were released prior to trial;
- b. Is likely to tamper with evidence, attempt to improperly influence witnesses, or otherwise interfere with the orderly resolution of the criminal case; or
- c. Is a substantial flight risk.

### 4-4.2 Alternatives to Pretrial Incarceration

Prosecutors should recommend bail decisions that facilitate pretrial release rather than detention to the extent such release is consistent with the prosecutor's responsibilities set forth in Section 4-4.1.

### 4-4.3 Bail Amount Request

A prosecutor, or the appropriate entity in their jurisdiction, should attempt to gather adequate information about the facts of the crime and the defendant's circumstances and history to request an appropriate bail amount, to include the use of a pretrial risk assessment tool, if one is available. Among the factors a prosecutor or court may consider in determining the proper amount to request are:

- a. The defendant's employment status and history;
- b. The defendant's financial condition, ability to raise funds and source of funds;
- c. The defendant's length and character of residence in the community, and the nature and extent of the accused's family ties to the community;
- d. The nature and severity of the crime, the strength of the evidence, and the severity of the sentence that could be imposed on conviction, to the extent these factors are relevant to the risk of non-appearance and the commission of other crimes while awaiting trial;
- e. The defendant's criminal record, including any record of appearance or non-appearance on other criminal charges;
- f. The likelihood of the defendant attempting to harm anyone, intimidate witnesses or victims, or to tamper with the evidence;
- g. Identification of responsible members of the community who would vouch for the accused's reliability;

- h. Any other factors indicating the defendant's ties to the community.
- i. A prosecutor should not seek a bail amount or other release conditions that are greater than necessary to ensure the safety of others and the community and to ensure the appearance of the defendant at trial.

#### **4-4.4 Continuing Obligation**

If, after the initial bail determination is made, the prosecutor learns of new information that makes the original bail decision inappropriate, the prosecutor should take steps to request a modification the accused's bail status or conditions.

#### **4-4.5 Periodic Reports**

In certain situations, a prosecutor should consider requesting periodic reports on detained defendants to determine if continued detention under the current conditions is appropriate. The prosecutor's office should be informed of any violations of pretrial release conditions of a defendant released pending trial, and should seek revocation of release status, higher bail and/or appropriate sanctions as deemed necessary, in accordance with applicable law or court rules.

#### **Commentary**

The prosecutor's recommendation regarding bail amounts and conditions will be shaped to some extent by the laws and procedures in his or her jurisdiction. The procedures may range from the use of a summons to arrest and a request to hold the defendant without bail under appropriate conditions.

These provisions recognize a respect for the presumption of innocence, and therefore state a clear preference for release of defendants pending trial. However, because a prosecutor must represent the public interest, the standards also recognize that in some circumstances in which the defendant is a significant flight risk, or where there is a threat to harm or intimidate witnesses or victims or to destroy or manipulate evidence, setting no bail or setting bail in an amount where the defendant will not be able to meet the conditions is appropriate.

Once the conditions for pre-trial release have been established, the person or agency responsible for monitoring the defendant's compliance should keep the prosecutor apprised of the defendant's performance. The prosecutor should continue to exercise reasonable discretion in determining whether modification of the conditions, either to lessen the requirements or to seek sanctions or incarceration, should be sought.

## **5. First Appearance**

### **4-5.1 Prosecutorial Responsibility**

The prosecutor should work with law enforcement and the courts to see that the accused is brought before a judicial officer without unnecessary delay.

### 4-5.2 Prosecutor's Role

A prosecutor need not be present at the first appearance unless required by statute, rule, or court order. When the prosecutor is present at the first appearance, he or she should, to the extent practicable, ensure that:

- a. Bond is set commensurate with the offense charged;
- b. The charges are correct and appropriate;
- c. Any schedule of future proceedings that the court sets avoids unnecessary delay.
- d. If the accused is not represented by counsel at the first appearance, a prosecutor should not seek a waiver from the accused of a preliminary hearing or other pretrial right.

#### Commentary

Although prosecutors usually do not control when a first appearance occurs, they should work very closely with law enforcement and the courts to establish standard procedures to assure the filing of accurate charges without unnecessary delay, but with sufficient time for prosecutor input.

## 6. Preliminary Hearing

### 4-6.1 Prosecutor's Role

The prosecutor should appear at the preliminary hearing and present such reliable information as is required for a judicial officer to make the probable cause determination.

### 4-6.2 Waiver

Before accepting a waiver by the defendant of a probable cause determination, the prosecutor should be satisfied that the defendant's decision was knowing and voluntary. A defendant's opportunity to consult with counsel prior to the waiver is *prima facie* evidence of a valid waiver.

#### Commentary

Requirements for preliminary hearings vary considerably from jurisdiction to jurisdiction. These standards recognize the importance of a preliminary hearing when held and the responsibility of the prosecutor with the court to assure the fairness in the conduct of such a hearing.

## 7. Forfeiture

### 4-7.1 Forfeiture Laws

The prosecutor should support the enactment and enforcement of statutes that permit the forfeiture of property or money used in or obtained as a result of criminal activity.

### 4-7.2 Due Process

The prosecutor should ensure that the due process rights of the property owner are protected, whether or not that person is the one who committed the crime. The state or local government should provide notice to property owners of the seizure and provide an opportunity to be heard before a judicial officer. The government should bear the burden of proving that the money or property is either the proceeds of criminal activity or used in connection with criminal activity.

### 4-7.3 Impact on Private Counsel

The ability of defendants to secure private legal counsel of their choice should not be a consideration in the prosecutor's enforcement of forfeiture statutes.

### 4-7.4 Factors in Mitigation

A prosecutor may, in the exercise of his or her sound professional judgment, decide to remit, mitigate, or forgo the forfeiture of property to an owner or interest holder other than the wrongdoer. Factors a prosecutor may consider in making such a decision include whether an owner or interest holder has, to the prosecutor's satisfaction, established that:

- a. The interest was acquired and maintained in good faith without knowledge or substantial reason to know of the conduct that gave rise to the forfeiture;
- b. That the forfeiture would work a severe hardship on an otherwise innocent owner or interest holder; and
- c. That the property will not be used in furtherance of future criminal activity or benefit the one whose conduct subjected the property to forfeiture.

### 4-7.5 Impermissible Considerations

The fact that forfeited assets might be available to fund law enforcement efforts should not unduly influence the proper exercise of the prosecutor's discretion in the enforcement of forfeiture statutes or the criminal law, nor should forfeiture be improperly used as a substitute for criminal prosecution.

### Commentary

The concept that a person should not be allowed to profit from his or her wrongdoing is the underlying principle of forfeiture. Seizing profits from illegal activity and property used to facilitate a crime or criminal enterprise is an important tool to combat illegal activity by eliminating the financial gain associated with criminal conduct. It serves to deter individuals from committing crimes for fear of losing the proceeds and cash flow earned from illegal activity or losing property used in the commission of the crime, to include houses and cars. Criminal enterprises, such as cartels in the illegal drug trade, stand to gain tremendous profits by selling illegal narcotics, and they are better crippled by the loss of profits than prosecution of an individual drug runner. Furthermore, the seized assets can be used by law enforcement agencies to battle illegal activity by using the money or property to enhance investigations and prosecutions.

Forfeiture of seized property may occur when the wrongdoer does not own the property but hides it under subterfuge in another's name. The prosecutor should take care, however, to ensure that the named owner is knowledgeable that the money or property is being used in furtherance of criminal activity as opposed to an unknowing innocent owner.

Asset forfeiture laws were called into question over the *federal* laws that permitted seizure of assets without a judicial proceeding requiring the Government to prove that the assets were connected to criminal activity. Public concern was also voiced over the practice under *federal* laws to shift the burden to the property owner to prove that the assets were not connected to illegal activity and that the Government improperly took the assets.

State and local prosecutors adhere to the principle that the individual property owners' rights must be protected, and that due process should be afforded to all property owners.

The guiding principle for bringing a forfeiture action should be whether the property was used in or obtained as a result of criminal activity as opposed to whether the wrongdoer will have difficulty hiring defense counsel if the money or property is seized.

Frequently, ownership interests in property are mixed and forfeiture would have adverse results for others. The prosecutor, in his discretion, may determine when extenuating circumstances exist such that foregoing, remitting, or mitigating forfeiture is appropriate. These standards provide guidance in exercising that discretion. The purpose of forfeiture is to deter conduct giving rise to forfeiture and to remove the instrumentalities and proceeds of such conduct.

## 8. The Grand Jury Charging Function

### 4-8.1 Prosecutorial Responsibility

To the extent permitted by the jurisdiction's law or rules, a prosecutor appearing before a grand jury:

- a. May explain the law and express his or her opinion on the legal significance of the evidence;
- b. Should assist the grand jury with procedural and administrative matters appropriate to its work;
- c. May recommend that specific charges be returned;
- d. Should recommend that a grand jury not indict if the prosecutor believes that the evidence presented does not warrant an indictment under governing law, and he or she should encourage members of the grand jury to consider the fact that sufficient evidence must exist to enable the prosecutor to meet the state's burden of proof at trial;
- e. Should take all necessary steps to preserve the secrecy of the grand jury proceedings.



### 4-8.2 Evidence Before the Grand Jury

Unless otherwise required by the law or applicable rules of ethical conduct of the jurisdiction, the following should apply to evidence presented to the grand jury:

- a. A prosecutor should present to the grand jury any credible evidence or information of actual innocence or other credible evidence that a prosecutor reasonably believes tends to negate guilt, as required by law and applicable rules of ethical conduct;
- b. A prosecutor should not present evidence to the grand jury that the prosecutor knows was obtained illegally by law enforcement;
- c. In the absence of a valid waiver, a prosecutor should not seek information from a witness that the prosecutor knows or believes is covered by a valid claim of attorney-client privilege;
- d. A prosecutor should not take any action that could improperly influence the testimony of a grand jury witness;
- e. If the prosecutor is convinced in advance of a grand jury appearance that any witness will invoke his or her Fifth Amendment privilege against self-incrimination rather than provide any relevant information, the prosecutor should not present the witness to the grand jury unless the prosecutor plans to challenge the assertion of the privilege or to seek a grant of immunity. The grand jury may be informed of the reason the witness will not appear;
- f. The prosecutor should inform the grand jury that it has the right to hear in person any available witness or subpoena pertinent records;
- g. A prosecutor should not present evidence to the grand jury that the prosecutor knows to be false; and
- h. A prosecutor should not knowingly make a false statement of fact or law to the grand jury.

### 4-8.3 Impermissible Conduct

A prosecutor should take no action and should make no statements that have the potential to improperly undermine the grand jury's independence.

### 4-8.4 Hearsay Evidence

The prosecutor may present hearsay evidence to a grand jury in accordance with applicable law or court rule. However, hearsay evidence should only be presented to the grand jury when there is a good faith basis to believe that the evidence would be admitted at trial.

### 4-8.5 Statements of Record

In jurisdictions where grand jury proceedings are recorded, a prosecutor's advice, recommendations, and other communications with the grand jurors should be of record except as otherwise provided by law.

## Commentary

The standard outlines what action a prosecutor may be permitted without compromising the independence of the grand jury. Given the need to respect the independence of the grand jury, these standards impose a duty upon the prosecutor to conduct himself or herself with the same candor as is required before a court.

The function of the grand jury is to determine whether there is sufficient evidence to charge someone. The procedure before the grand jury is not a full trial on the merits and, so long as permitted by state law, allows for relaxed evidentiary rules. When hearsay is admitted in place of live direct testimony, the prosecutor should exercise great caution in introducing evidence that would not be able to be introduced directly in court unless it falls under a hearsay exception. It is prudent to ensure that the charge is brought on reliable evidence that is expected to be admissible at trial.

## 9. Discovery

### 4-9.1 Prosecutorial Responsibility

A prosecutor should, at all times, carry out his or her discovery obligations in good faith and in a manner that furthers the goals of discovery, namely, to minimize surprise, afford the opportunity for effective cross-examination, expedite trials, and meet the requirements of due process. To further these objectives, the prosecutor should pursue the discovery of material information, and fully and promptly comply with lawful discovery requests from defense counsel.

### 4-9.2 Duty to Disclose Exculpatory and Impeachment Evidence

Due process requires that the prosecutor provide defendants with any evidence that is favorable to them whenever that evidence is material to either their guilt or punishment, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. The “Brady Rule” applies to evidence that negates the guilt of the accused or evidence that mitigates the crime committed by the offender. Due process also requires that the Government disclose impeachment evidence for witnesses who will be testifying at trial, pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), and its progeny.

### 4-9.3 Continuing Duty

If at any point in the pretrial or trial proceedings the prosecutor discovers additional witnesses, information, or other material previously requested or ordered which is subject to disclosure or inspection, the prosecutor should promptly notify defense counsel and provide the required information.

### 4-9.4 Access to Evidence Not to Be Impeded

Unless permitted by law or court order, a prosecutor should not impede opposing counsel’s investigation or preparation of the case.

#### **4-9.5 Redacting Evidence**

When portions of certain materials are discoverable and other portions are not, a prosecutor should make good faith efforts to redact the non-discoverable portions in a way that does not cause confusion or prejudice the accused.

#### **4-9.6 Reciprocal Discovery**

A prosecutor should take steps to ensure that the defense complies with any obligation to provide discovery to the prosecution.

#### **4-9.7 Protection of Personal Identifying Information**

A prosecutor should, at all times, provide for the privacy and protection of victim's and potential witness's personal and identifying information. Personal Identifying Information should be protected and withheld if the prosecution can establish a good faith belief that to provide the information would subject a victim or potential witness to coercion, economic or physical harm. If necessary, the prosecution shall certify in writing and under seal to the court that to disclose PII may subject the victim or witness to substantial harm or coercion, or that there is other particularized, compelling need not to disclose.

#### **4-9.8 Protective Order**

The Court may, upon a sufficient showing, issue a protective order that denies, restricts, or defers discovery or inspection. When appropriate, the court may place a defendant and his counsel under a protective order against unwarranted disclosure of the materials that they may be entitled to inspect when disclosure might harm third parties. The Court may also issue a protective order to restrict or limit dissemination of discovery materials to ensure a fair and impartial trial or protect the integrity of legitimate law enforcement tactics or procedures.

#### **4-9.9 Work Product**

The work product of the prosecutor is exempt from discovery disclosures.

#### **Commentary**

Rules of Discovery vary significantly from jurisdiction to jurisdiction, including differences in interpretation of the legal requirements by various state and federal prosecutors. Therefore, these standards set out to discuss fairness and responsibility without direct reference to specific interpretations of the laws or rules of the various jurisdictions. The prosecutor should be familiar with and follow the rules and laws of their particular jurisdiction.

While it is well established that any doubt about whether something is subject to disclosure should be resolved in favor of the defendant, and that disclosure of material exculpatory and impeachment evidence is required, further disclosures may be required by statute, case law, and rules of ethical conduct in some jurisdictions.

Consistent with the duty to disclose imposed by the Constitution, other laws, and rules of ethical conduct, if information becomes known to the prosecutor after initial disclosures have been made, that information should be turned over promptly.

The prosecutor should educate and inform law enforcement agencies in his or her jurisdiction that the prosecutor, not the law enforcement officer or agency, is the arbiter of what information is disclosed to the defense. The law enforcement community should be encouraged to provide all information in its possession to the prosecutor so that he or she can make a disclosure decision. This includes disclosing whether any officers who may be testifying have been convicted of any crimes or disciplined by the law enforcement department for lying, dishonesty and/or theft.

The prosecutor's relationship with defense counsel or his or her opinion regarding the defendant is not a factor in the discovery process.

A protective order (PO) is a necessary and appropriate means of protecting third parties. A protective order that denies disclosure of otherwise discoverable material may be essential to protect witnesses from threats, harassment, bribery or other corrupt influences. A PO may also be an essential tool to limit dissemination of information that may influence a potential jury pool or protect important legitimate law enforcement functions.

When a question regarding the necessity for disclosure is not resolved amicably among the parties, consideration should be given to obtaining guidance from the court.

The attorney work product privilege permits attorneys to withhold from production the documents and other tangible things prepared in anticipation of litigation.

## 10. Case Scheduling and Priority

### 4-10.1 Prosecutorial Responsibility

A prosecutor should not seek or cause delays because of a lack of diligent preparation, nor should the prosecutor seek or cause delays for the purpose of disadvantaging the defendant or his or her counsel.

### 4-10.2 Factors to Consider in Setting Priorities

In setting case priority, the prosecutor should consider the following factors:

- a. Criminal cases should normally be given priority over civil cases;
- b. Whether the defendant is in pre-trial custody;
- c. Whether the defendant represents a significant threat of violence to others;
- d. Whether the victim is a child or family member of the defendant;
- e. Whether the defendant is a repeat offender;
- f. Whether the defendant is charged with a heinous crime;
- g. Whether the defendant is a public official;
- h. The age of the case;
- i. The availability of witnesses or other evidence;

- j. Any significant problems or interests of particular concern to the community;
- k. The need for and availability of scientific testing of evidence;
- l. The age, health and circumstances of victims and witnesses.

#### **4-10.3 Trial Scheduling**

A prosecutor shall exercise due diligence in preparing for trial and not cause or accede to any unreasonable delay. Some factors to be considered in deciding whether or not a delay is reasonable are:

- a. Whether the case is criminal or civil;
- b. Whether the defendant is in pre-trial custody;
- c. Whether the defendant constitutes a significant threat of violence to others;
- d. Whether the victim is a child or a family member of the defendant;
- e. The need for and availability of scientific testing of evidence;
- f. The age, health and circumstances of the victims and witnesses;
- g. Whether the defendant is a repeat offender;
- h. The seriousness of the crime(s);
- i. Whether the defendant is a public official;
- j. The age of the case;
- k. The availability of witnesses; and
- l. The existence of any other significant factor that requires or justifies a delay at the request of either party.

#### **Commentary**

In the pursuit of his or her duty to seek justice, the prosecutor needs to be mindful of the expression, “justice delayed is justice denied.” From the view of society, delays in disposition of violation of criminal laws create uncertainty regarding the reliability and efficiency of the criminal justice system. Victims and families of victims are left without a necessary ingredient for closure. Defendants are kept in a state of limbo about their future. In short, delay does not serve anyone’s best interests.

With that being said, the reality is that due to caseloads and the necessity for complete investigations by both the prosecution and defense, case disposition often takes longer than those involved would like. These standards set forth guidelines for keeping delay as short as reasonably possible.

# Juvenile Justice

1. Personnel and Resources
2. Qualification and Training of Prosecutors in Juvenile Court
3. Screening Juvenile Cases
4. Diversion
5. Charging and Diversion Criteria
6. Transfer to Criminal Court
7. Plea Agreements
8. Prosecutor's Role in Adjudication (Trial)
9. Dispositions
10. Victim Impact
11. Evaluation of Programs
12. Duty to Report

## 1. Juvenile Justice

The primary duty of the prosecutor is to seek justice while fully and faithfully representing the interests of the state. While the safety and welfare of the community, including the victim, is their primary concern, prosecutors should consider the special circumstances and rehabilitative potential of the juvenile to the extent they can do so without unduly compromising their primary concern. Formal charging documents for all cases referred to juvenile or adult court should be prepared or reviewed by a prosecutor. To the extent possible, a prosecutor should appear at all hearings concerning a juvenile accused of an act that would constitute a crime if they were an adult.

### 5-1.1 Personnel and Resources

The prosecutor's office should devote specific personnel and resources to fulfill its responsibilities with respect to juvenile delinquency proceedings, and all prosecutors' offices should have an identified juvenile unit or attorney responsible for representing the state in juvenile matters. For smaller and/or rural jurisdictions, it may be appropriate to combine resources when possible, however, specialized juvenile training should be made available to prosecutors who will appear in juvenile court in addition to their adult court commitments.

### 5-1.2 Qualification and Training of Prosecutors in Juvenile Court

Specialized training and experience should be required for prosecutors assigned to juvenile delinquency cases. Chief prosecutors should select prosecutors for juvenile court on the basis of their skill and competence, including knowledge of juvenile law, interest in working with children and youth, interest in community engagement, education, and experience. Entry-level attorneys in the juvenile unit should be as qualified as any entry-level attorney, and receive special, ongoing training regarding juvenile matters, including adolescent development.

### 5-1.3 Screening Juvenile Cases

The prosecutor or a designee should review all cases, which may be reviewed pursuant to their state statutes, for legal sufficiency and then decide whether a case will be diverted, formally petitioned with the juvenile court, or transferred to criminal court. If the facts of the case are not legally sufficient to warrant action, the matter should be terminated or returned to the referral source pending further investigation or receipt of additional reports.

### 5-1.4 Diversion

The prosecutor or a designee should be responsible for recommending which cases should be diverted from formal adjudication. No case should be diverted unless the prosecutor reasonably believes that they could substantiate the criminal or delinquency charge against the juvenile. Treatment, restitution, or public service programs developed in his or her office may be utilized, or the case can be referred to existing probation or community service agencies. To the extent possible, when determining the conditions of diversion, prosecutors should consider the individual treatment and service needs of the juvenile in order to tailor services accordingly. As much as possible, prosecutors should support efforts to address not only the needs of the juvenile, but also those of the juvenile's family that would help in rehabilitating the juvenile.

### 5-1.5 Charging and Diversion Criteria

The prosecutor or a designee must further review legally sufficient cases to determine whether they should be filed formally with the juvenile court, transferred or diverted for treatment, services, or probation. In determining whether to file formally or, where allowed by law, divert, the prosecutor or designated case reviewer should consider the following factors in deciding what result best serves the interests of the community and the juvenile:

- a. The seriousness of the alleged offense, including whether the conduct involved violence or bodily injury to others, including the victim;
- b. The role of the juvenile in that offense;
- c. The nature and number of previous cases presented by law enforcement or others against the juvenile, and the disposition of those cases;
- d. The juvenile's age, maturity, and mental status;
- e. The existence of appropriate treatment or services available through the juvenile court, child protective services, or through diversion;

- f. Whether the juvenile admits guilt or involvement in the offense charged (If allowed by statute), whether they accept responsibility for the conduct and the juvenile's attitude in regard to the crime;
- g. The dangerousness or threat posed by the juvenile to the person or property of others;
- h. The decision made with respect to similarly-situated juveniles; and
- i. Recommendations of the referring agency, victim, law enforcement, and advocates for the juvenile, in consideration of the juvenile's rehabilitative potential.

### **5-1.6 Transfer to Criminal Court**

The transfer of cases to criminal court should be reserved for the most serious, violent, and chronic offenders. Prosecutors should make transfer decisions on a case-by-case basis and take into account the individual factors and state requirements of each case including, among other factors, the gravity and violent nature of the current alleged offense, the record of previous delinquent behavior of the juvenile charged, and the availability of adequate treatment, services and dispositional alternatives in juvenile court.

### **5-1.7 Plea Agreements**

The decision to enter into a plea agreement should be governed by both the interests of the state and those of the juvenile, although the primary concern of the prosecutor should be protection of the community as determined in the exercise of traditional prosecutorial discretion. The prosecutor should also consider the juvenile's potential for rehabilitation.

### **5-1.8 Prosecutor's Role in Adjudication (Trial)**

At the adjudicatory hearing, the prosecutor should assume the traditional adversarial role of a prosecutor, acting in the best interests of justice and community safety.

### **5-1.9 Dispositions**

The prosecutor should take an active role in the dispositional hearing and make a recommendation consistent with community safety to the court after reviewing reports prepared by prosecutorial staff, the probation department, and others. In making a recommendation, the prosecutor should seek the input of the victim and consider the rehabilitative needs of the juvenile offender, provided that they are consistent with community safety and welfare.

### **5-1.10 Victim Impact**

Victims of crimes should be informed of all important stages of the criminal justice proceedings to the extent feasible, upon request or as required by law. The prosecutor should be aware of any obligations imposed by victims' rights legislation in his or her particular jurisdiction. The prosecutor should take care to balance the extent of information provided to the victim with the need to protect the integrity of the case and process.



### 5-1.11 Evaluation of Programs

The prosecutor should periodically review diversion and dispositional programs, both within and outside the prosecutor's office, to ensure that they provide appropriate supervision, treatment, restitution requirements, or services for the juvenile. The prosecutor should maintain a working relationship with all outside agencies providing diversion and dispositional services to ensure that the prosecutor's decisions are consistent and appropriate. If the prosecutor discovers that a juvenile or class of juveniles is not receiving the care and treatment envisioned in disposition or diversion decisions, the prosecutor should inform the court of this fact.

### 5-1.12 Duty to Report

If the prosecutor becomes aware that the directives and/or sanctions imposed by the court are not being administered by an agency to which the court assigned the juvenile or that a treatment provider is engaging in unethical or questionable practices, the prosecutor, at minimum, should report the concerns to the court.

### Commentary

Over the last twenty years, there has been significant attention paid to the field of juvenile justice. The decline in the number of juvenile delinquency cases since 1997, coupled with the increase in alternatives to incarceration and strategies based on research have created greater opportunities for prosecutors to serve a more expansive role in their respective communities. No longer confined to the courtroom, juvenile prosecutors play an important and influential role in delinquency prevention and early intervention efforts. They serve as leaders by creating innovative programs and policies that make crime prevention a key component of the community safety mission.

The prosecutor is charged to seek justice just as he does in criminal prosecutions. The prosecutor in the juvenile system, however, is further charged to give special attention to the circumstances and needs of the accused juvenile to the extent that it does not conflict with the duty to fully and faithfully represent the interests of the state. This balanced approach reflects the philosophy that the safety and welfare of the community is enhanced when juveniles, through counseling, restitution, or more extensive rehabilitative efforts and sanctions, are dissuaded from further criminal activity.

To efficiently carry out his or her duties, it is desirable that the prosecutor appear at all stages of the proceedings. In so doing, the prosecutor maintains a focus on the safety and well-being of the community at each decision-making level. Further, because the juvenile system is increasingly adversarial, the prosecutor fulfills an important role in addressing the positions of juvenile and social service advocates. The prosecutor's presence guarantees the opportunity to exercise continuous monitoring at each stage and broad discretion to ensure fair and just results.

These standards further emphasize professionalism in juvenile court work. They provide that attorneys in juvenile court should be experienced, competent, and interested. Because of the adversarial nature of juvenile proceedings, the prosecutor should be responsible for screening to determine whether there is sufficient evidence to believe that a crime was committed and that the juvenile committed it. A case should only be further processed if it is legally sufficient. "Legally sufficient" means a case in which the prosecutor believes that he

can reasonably substantiate the charges against the juvenile by admissible evidence at trial. These determinations should be made by the prosecutor.

After a determination of legal sufficiency, the next decision to be made is whether the case should be diverted, referred to juvenile court or transferred to criminal court. This decision has both legal and social implications. It should be made either by an experienced prosecutor who has an interest in juveniles or by other case screeners under the guidance of a prosecutor. The prosecutor, in exercising this function, should consider the rehabilitative needs of the juvenile while upholding the safety and welfare of the community. These decisions should be made without unreasonable delay. Prompt determinations generally promote confidence in the system and fairness to the victim, the community, and the juvenile. Further, prompt decisions are more likely to result in rehabilitation of the juvenile by providing more immediate attention.

Diversion of cases in juvenile court from the formal charging, adjudication, and disposition procedure has become common for less serious offenses. The impetus for such a procedure is that because juveniles are in the process of cognitive, moral, and social development, there is a unique opportunity presented at the juvenile court level to dissuade them from criminal activity. Advances in neuroscience confirm that the adolescent brain is undergoing significant development, and the neuroplasticity creates tremendous opportunity to influence youth in a positive way. However, science also confirms the tremendous vulnerability of the adolescent brain to drugs and alcohol. This is a concern for juvenile prosecutors. Many first-time or minor offenders will never enter the justice system again if their cases are handled properly through a robust diversion program. Treatment, restitution, or service programs often are viable alternatives to court processing. These standards describe the opportunity for prosecutors to be involved either in diversion programs based in their offices or through referral to existing probation or community service agencies.

In many jurisdictions, transfer of juveniles to criminal court is controlled by statute or practice. This standard simply provides guidance for prosecutors in using discretion to the extent that they participate in this process, and includes consideration of the rehabilitative potential of a juvenile offender. Given the general decline in the number of cases being transferred, this option should be reserved for serious, violent, and chronic offenders.

These standards reflect the consensus that plea agreements are appropriate for juvenile court. A plea agreement should only be entered into when there is sufficient admissible evidence to demonstrate a *prima facie* case that the juvenile has committed the acts alleged in the petition to which he is pleading guilty. The appropriateness and extent to which plea agreements are used are matters of office policy to be determined by the chief prosecutor. The prosecutor should always take steps to ensure that the resulting disposition is in the interest of the community with due regard being given to the rehabilitative needs of the juvenile.

In those matters that are not diverted or disposed of without trial the prosecutor should assume the traditional prosecution role in the adversarial process with respect to determination of guilt or innocence. This standard, therefore, suggests that the rules of evidence apply. Prosecutors should strive in the juvenile court setting to maintain a distinction between a factual determination of innocence or guilt and a determination of disposition. This approach promotes fairness to both the victim and the community and enhances the integrity of juvenile court findings.

Prosecutors should offer dispositional alternatives to the court that reduce risk and increase the protective factors that will make a juvenile successful in the future. When a juvenile presents a danger to the safety and welfare of the community, the prosecutor should voice this concern. On the other hand, when appropriate, the prosecutor may offer a dispositional recommendation that is less restrictive than what the juvenile court judge may contemplate imposing.

Given the unique role that prosecutors play across the justice continuum, they have a responsibility to ensure that all decisions are fair and just. They must base decisions on factors such as community safety, offender accountability, and rehabilitation. Race, ethnicity, and/or gender are never appropriate factors in decision-making. In order to ensure that decisions and policies are fair and equal, it is important to track case processing and outcomes. Data-driven practices are an important component of the fair administration of justice. Prosecutors should examine strategies and alternatives that decrease racial, ethnic, and gender disparities while maintaining community safety.

This standard also suggests that, to the extent possible, the prosecutor should take a leadership role in the community in assuring that a wide range of appropriate dispositional alternatives are available for youth who are adjudicated delinquents. In addition, the prosecutor is encouraged to follow up on cases to ensure that dispositions are upheld, court ordered sanctions are administered, and treatment is provided. Similarly, prosecutors, to the extent possible, should take an active role in prevention and early intervention efforts.

# Propriety of Plea Negotiation and Plea Agreements

1. General
2. Availability for Plea Negotiation
3. Factors for Determining Availability and Acceptance of Guilty Plea
4. Fulfillment of Plea Agreements
5. Record of Plea Agreement

## 1. General

### 6-1.1 Propriety

The prosecutor is under no obligation to enter into a plea agreement that has the effect of disposing of criminal charges in lieu of trial. However, where it appears that it is in the public interest, the prosecution may engage in negotiations for the purpose of reaching an appropriate plea agreement. When agreement is reached, it should be reduced to writing or put on the record in court, if practicable.

### 6-1.2 Types of Plea Negotiations

The prosecution, in reaching a plea agreement, may agree to a disposition of the case that includes, but is not limited to, one or more of the following commitments from the prosecution in exchange for a plea of guilty:

- a. To make certain recommendations concerning the sentence which may be imposed by the court if the defendant enters a plea of guilty or *nolo contendere*;
- b. To agree not to oppose sentencing requests made by the defense; or
- c. To dismiss, seek dismissal, or not oppose dismissal of an offense or offenses charged if the defendant enters a plea of guilty or *nolo contendere* to another offense or other offenses supported by the defendant's conduct;
- d. To dismiss, seek dismissal, or not oppose dismissal of the offense charged, or not to file potential charges, if the accused agrees not to pursue potential civil causes of action against the victim, witnesses, law enforcement agencies or personnel, or the prosecutor or his staff or agents;
- e. To agree to forego an ongoing investigation into other criminal activity of the defendant if the defendant enters a plea of guilty or *nolo contendere* to a presently charged offense or offenses; and/or

- f. To agree that the defendant and prosecution will jointly recommend a particular sentence to the court and that the prosecution will support the defendant's motion to withdraw his plea of guilty if the court exceeds this agreed upon sentencing recommendation.

### 6-1.3 Conditional Offer

Prior to reaching a plea agreement and subject to the standards herein and the law of the jurisdiction, the prosecutor may set conditions on a plea agreement offer, such as:

- a. The defendant's acceptance of the offer within a specified time period that would obviate the need for extensive trial preparation;
- b. The defendant's waiver of certain pre-trial rights, such as the right to discovery;
- c. The defendant's waiver of certain pre-trial motions such as a motion to suppress or dismiss; or
- d. The defendant's waiver of certain trial or post-trial rights, such as the right to pursue an appeal or post-conviction relief.

### 6-1.4 Uniform Plea Opportunities

Similarly situated defendants should be afforded substantially equal plea agreement opportunities. In considering whether to offer a plea agreement to a defendant, the prosecutor should not take into account the defendant's race, religion, sex, sexual orientation, national origin, or political association or belief, unless legally relevant to the criminal conduct charged.

## 2. Availability for Plea Negotiation

### 6-2.1 Willingness to Negotiate

The prosecutor should make known a policy of willingness to consult with the defense concerning disposition of charges by plea and should set aside times and places for plea negotiations, in addition to pre-trial hearings.

### 6-2.2 Presence of Defense Counsel

The prosecutor should not negotiate a plea agreement directly with a defendant who is represented by counsel in the matter, unless defense counsel is either present or has given his or her express permission for the prosecutor to negotiate directly with the defendant.

## 3. Factors for Determining Availability and Acceptance of Guilty Plea

### 6-3.1 Factors to Consider

- a. Prior to negotiating a plea agreement, the prosecution should consider the following factors:
- b. The nature of the offense(s);
- c. The degree of the offense(s) charged;

- d. Any possible mitigating circumstances;
- e. The age, background, and criminal history of the defendant;
- f. The expressed remorse or contrition of the defendant, and his or her willingness to accept responsibility for the crime;
- g. Sufficiency of admissible evidence to support a verdict;
- h. Undue hardship caused to the defendant;
- i. Possible deterrent value of trial;
- j. Aid to other prosecution goals through non-prosecution;
- k. A history of non-enforcement of the statute violated;
- l. The potential effect of legal rulings to be made in the case;
- m. The probable sentence if the defendant is convicted;
- n. Society's interest in having the case tried in a public forum;
- o. The defendant's willingness to cooperate in the investigation and prosecution of others;
- p. The likelihood of prosecution in another jurisdiction;
- q. The availability of civil avenues of relief for the victim, or restitution through criminal proceedings;
- r. The willingness of the defendant to waive his or her right to appeal;
- s. The willingness of the defendant to waive (release) his or her right to pursue potential civil causes of action arising from his or her arrest, against the victim, witnesses, law enforcement agencies or personnel, or the prosecutor or his or her staff or agents;
- t. With respect to witnesses, the prosecution should consider the following:
  - u. The availability and willingness of witnesses to testify;
  - v. Any physical or mental impairment of witnesses;
  - w. The certainty of their identification of the defendant;
  - x. The credibility of the witness;
  - y. The witness's relationship with the defendant;
  - z. Any possible improper motive of the witness;
  - aa. The age of the witness;
  - bb. Any undue hardship to the witness caused by testifying.

With respect to victims, the prosecution should consider those factors identified above and the following:

- a. The existence and extent of physical injury and emotional trauma suffered by the victim;
- b. Economic loss suffered by the victim;
- c. Any undue hardship to the victim caused by testifying.

### **6-3.2 Innocent Defendants**

The prosecutor should always be vigilant for the case where the accused may be innocent of the offense charged. The prosecutor must satisfy himself or herself that there is a sound factual basis for all crimes to which the defendant will plead guilty under any proposed plea agreement.

### **6-3.3 Candor**

The prosecutor should not knowingly make any false or misleading statements of law or fact to the defense during plea negotiations.

## **4. Fulfillment of Plea Agreements**

### **6-4.1 Limits of Authority**

The prosecutor should not make any guarantee concerning the sentence that will be imposed by the court or concerning a suspension of sentence. The prosecutor may advise the defense of the position the prosecutor will take concerning disposition of the case, including a sentence that the prosecutor is prepared to recommend to the court based upon present knowledge of the facts of the case and the offender, including his or her criminal history.

### **6-4.2 Implication of Authority**

The prosecutor should not make any promise or commitment assuring a defendant that the court will impose a specific sentence or disposition in the case. The prosecutor should avoid implying a greater power to influence the disposition of a case than the prosecutor actually possesses.

### **6-4.3 Inability to Fulfill Agreement**

The prosecutor should not fail to comply with a plea agreement that has been accepted and acted upon by the defendant to his or her detriment, unless the defendant fails to comply with any of his or her obligations under the same agreement or unless the prosecutor is authorized to do so by law. If the prosecutor is unable to fulfill an understanding previously agreed upon in plea negotiations, the prosecutor should give prompt notice to the defendant and cooperate in securing leave of court for the defendant to withdraw any plea and take such other steps as would be appropriate to restore the defendant and the prosecution to the position they were in before the understanding was reached or plea made.

#### 6-4.4 Rights of Others to Address the Court

The prosecutor should not commit, as part of any plea agreement, to limit or curtail the legal right of any victim or other person authorized by law to address the court at the time of plea or sentencing. The prosecutor should honor the legal rights of victims and other persons authorized by law to address the court.

#### 6-4.5 Notification of Media

Prior to the entry of a plea of guilty by the defendant in open court, the prosecutor should not make any extrajudicial comments to the media about either the possibility or existence of a plea agreement with the defendant, or of the nature or contents of any such agreement.

### 5. Record of Plea Agreement

#### 6-5.1 Record of Agreement

Whenever the disposition of a charged criminal case is the result of a plea agreement, the prosecutor should make the existence and terms of the agreement part of the record. The prosecutor should also maintain the reasons for the disposition in the case file.

#### 6-5.2 Reasons for *Nolle Prosequi*

Whenever felony criminal charges are dismissed by way of a *nolle prosequi* or its equivalent, the prosecutor should make a record of the reasons for his or her action.

#### Commentary

In the prosecutor's quest for justice, it is necessary and desirable to dispose of criminal cases without going to trial. There are few prosecutors who have the resources that would be required to try every case. Given that reality, most prosecutors actively engage in negotiations to reach appropriate dispositions in most cases.

Like other agreements between parties, most plea negotiations require some action by both the prosecutor and the defendant. Also, like most other agreements, plea negotiations should be conducted in an honest and forthright manner in which the prosecution is guided by representing the best interest of society while being mindful of duties of candor and to avoid overreaching in dealing with the defendant. The prosecutor should be careful not to agree to an action that he or she cannot perform. Likewise, the defendant should be aware that his or her failure to perform his or her part of the agreement might well result in the prosecutor's withdrawal from the agreement.

In the event that the prosecutor is for some reason unable to fulfill a portion of the agreement, he or she should do everything possible to help restore the defendant and the prosecution to their respective positions prior to the agreement.

Further, like in other agreements between adverse parties, it is best that the deal be in writing and placed on the record in the plea hearing.

A concern that is not common to other agreements is the possibility that an innocent defendant would be interested in a negotiated guilty plea in order to avoid exposure to a greater sentence. A prosecutor who considers all of the factors in these standards is in the best position to avoid such a miscarriage of justice.



1. Candor with the Court
2. Selection of Jurors
3. Relationships with Jury
4. Opening Statements
5. Presentation of Evidence
6. Examination of Witnesses
7. Objections and Motions
8. Arguments to the Jury

## 1. Candor with The Court

### 7-1.1 Veracity

The prosecutor shall not knowingly make a false statement of fact or law to a court. If a prosecutor learns that a previous statement of material fact or law made to the court by the prosecutor is incorrect, the prosecutor shall correct such misstatement in a timely manner.

### 7-1.2 Legal Authority

A prosecutor shall inform the court of legal authority in the controlling jurisdiction known to the prosecutor, including authority that is directly adverse to his or her position.

### 7-1.3 Evidence

A prosecutor shall offer evidence that is believed to be truthful and accurate. If a prosecutor learns that material evidence previously presented by the prosecutor is not truthful or accurate, the prosecutor shall take reasonable remedial measures to prevent prejudice caused by the false evidence.

### 7-1.4 Ex Parte Proceeding

A prosecutor, in an ex parte proceeding as authorized by law, shall inform the court of all material facts known to the prosecutor which he or she reasonably believes are necessary to make an informed decision by the court.

## Commentary

In order to make just, informed decisions, the court must have the most accurate information available regarding the facts and the law. A prosecutor, in his or her role as a minister of justice, must provide information to the court in an honest and forthright manner.

## 2. Selection of Jurors

### 7-2.1 Investigation

A prosecutor may conduct a pre-voir dire investigation of any prospective juror, but any such investigation shall not harass or intimidate prospective jurors. Prosecutors may conduct criminal history record checks of prospective jurors and, to the extent required by law or court order, share any conviction information with the court or defense for use in conducting the voir dire examination.

### 7-2.2 Voir dire Examination

A prosecutor should not conduct voir dire examination in such a manner as to cause any prospective juror unnecessary embarrassment; or intentionally use the voir dire process to present information that he or she knows will not be admissible at trial.

### 7-2.3 Peremptory Challenges

A prosecutor shall not exercise a peremptory challenge in an unconstitutional manner based on group membership or in a manner that is otherwise prohibited by law.

### 7-2.4 Duration

A prosecutor should conduct selection of the jury without unnecessary delay.

### 7-2.5 Identity of Jurors

In cases where probable cause exists to believe that jurors may be subjected to threats of physical or emotional harm, the prosecutor may request the trial court to keep their identities from the defendant or the public in general.

## Commentary

The primary purpose of the jury selection process is to empanel a jury that is representative of the community and does not have personal interests or prejudices for or against a party to the extent that they cannot render a verdict based upon the law and the facts. The standards set forth principles to be followed by prosecutors in conducting their part of the selection process.

In the permitted voir dire examination, consideration might be given to the court approved use of a questionnaire to gather basic information and serve as a time saving device.

In exercising peremptory challenges, the prosecutor should be mindful that as a representative of all of the people of his or her jurisdiction, it is important that none of those people be obstructed from serving on a jury because of their status as a member of a particular group.

The standard recognizes that in recent years jurors have sometimes been subjected to threats of violence. It recognizes the need to protect such jurors and adopts a probable cause test for cases in which the prosecution may request the court to keep their identity from the defendant and the public.

### 3. Relationships with Jury

#### 7-3.1 Direct Communication

A prosecutor should not intentionally speak to or communicate with any juror or prospective juror prior to or during the trial of a case, except while in the courtroom with all parties and the judge present and on the record.

#### 7-3.2 After Discharge

After the jury is discharged, in jurisdictions where permitted, the prosecutor may, unless otherwise prohibited by law, communicate with the jury as a whole or with any members of the jury to discuss the verdict and the evidence. The prosecutor may ask the court to inform jurors that it is not improper to discuss the case with the lawyers in the case after verdict, if the juror decides to do so. The prosecutor should not criticize the verdict, harass any juror, or intentionally seek to influence future jury service during such communication. A prosecutor should cease communication upon a juror's request.

#### Commentary

The prosecutor has a large responsibility in seeing that the criminal justice system is respected and improved. In that regard he or she must be careful to avoid any appearance of taking unfair advantage of a juror or jury. In post-trial contact, the prosecutor should not criticize the verdict or jurors' actions, as such might be seen as an attempt to influence the behavior of a juror or a person with whom the juror confides in any future instance of jury service.

### 4. Opening Statements

#### 7-4.1 Purpose

When permitted by law, a prosecutor may give an opening statement for the purpose of explaining the legal and factual issues, the evidence, and the procedures of the particular trial.

#### 7-4.2 Limits

A prosecutor should not allude to evidence unless he or she believes, in good faith, that such evidence will be available and admitted into evidence at the trial.

#### Commentary

The prosecutor should be guided by the principle that the opening statement should be confined to assertions of fact that he or she intends or, in good faith, expects to prove. Although it may be acceptable for the prosecuting attorney to state facts that are expected to be proved, such assertions should be founded upon the prosecutor's good faith and reasonable basis for believing that such evidence will be tendered and admitted into

evidence. The prosecutor should be zealous in maintaining the propriety and fairness which should characterize his or her conduct as an officer of the court whose duty it is to competently represent the citizenry of the state in seeking justice. So long as the prosecutor's remarks are guided by good faith and a reasonable belief that such assertions will ultimately be supported by the admissible evidence, the prosecution will have fulfilled the basic requirements of an opening statement.

## 5. Presentation of Evidence

### 7-5.1 Admissibility

A prosecutor should not mention or display, in the presence of the jury, any testimony or exhibit which the prosecutor does not have a good faith belief will be admitted into evidence.

### 7-5.2 Questionable Admissibility

When admissibility of evidence is reasonably questionable, a prosecutor should not publish or display the evidence to the jury prior to obtaining a ruling on the admissibility from the court.

#### Commentary

Consistent with the concepts of fairness that should be embraced by the prosecutor, he or she should not expose the jury to evidence of questionable admissibility without first seeking a ruling from the court.

## 6. Examination of Witnesses

### 7-6.1 Fair Examination

A prosecutor should conduct the examination of all witnesses fairly and with due regard for their reasonable privacy.

### 7-6.2 Improper Questioning

A prosecutor should not ask a question that implies the existence of a factual predicate that the prosecutor either knows to be untrue or has no reasonable objective basis for believing is true.

### 7-6.3 Purpose of Cross-Examination

A prosecutor should use cross-examination as a good faith quest for the ascertainment of the truth.

### 7-6.4 Impeachment and Credibility

A prosecutor may and should use cross-examination to test the credibility of a witness within the bounds of the rules of evidence. However, the prosecutor should not abuse this power in an attempt to ridicule, discredit or hold a fact witness up to contempt, if the prosecutor knows the witness is testifying truthfully.

## Commentary

If the criminal justice system is to retain credibility with the public, it must furnish a tribunal into which people can come to give information without the fear of being harassed or having their privacy unduly invaded. Our system requires that all witnesses, those brought in by both the prosecution and defense, be treated fairly. To ask a question that implies the existence of a factual predicate that is not true or for which the prosecutor has no reasonable objective basis for believing, is not fair and therefore not proper.

Without such limitations, the overzealous prosecutor could use the examination of a witness to imply the existence of whatever evidence might be needed in the hope that the jury would not consider too closely the fact that it was never really introduced.

Because cross-examination is to be used as a good faith quest for the truth, a prosecutor who knows the witness is testifying truthfully should not seek to ridicule or undermine the credibility of said witness beyond what the evidentiary rules would allow. That does not mean that the prosecutor cannot vigorously cross-examine a witness. The use of proactive techniques can elicit other information that is useful in establishing the prosecution's theory of the case.

In the end, if a prosecutor keeps in mind that his or her responsibility is to seek justice for all of the people of the community, then following the directives of these standards is simply a matter of common sense.

## 7. Objections and Motions

### 7-7.1 Procedure

When making an objection during the course of a trial, a prosecutor should formally state the objection in the presence of the jury along with a short and plain statement of the grounds for the objection. Unless otherwise directed by the court, further argument should usually be made outside the hearing of the jury.

### 7-7.2 Motions in Limine

Where permitted, a prosecutor should attempt to resolve by Motion in Limine prior to commencement of trial, any evidentiary matters when the prosecutor believes there may be an issue of admissibility before a judge or jury, to avoid unnecessary delays in the trial or to prevent the risk of prejudicial information before the trier of fact. Likewise, a prosecutor should also request the court to similarly resolve questions on the admissibility of defense evidence.

## Commentary

The admissibility of evidence, exhibits, demonstrations, or argument is left to the court for determination. Prosecutors should be sufficiently acquainted with the rules of evidence so they are able to predict the admissibility of evidence to a high degree of probability.

When the prosecutor has a good faith belief that the evidence, exhibit, demonstration, or argument being offered is not admissible, he or she should object and give a short statement of the basis for the objection. Since most, if not all, objections involve questions of law to be

ruled upon by the trial court, the legal arguments are of little or no concern to the jury. Such argument may also refer to factual matters that have not, up to that point in the proceedings, been brought out by sworn testimony and which, additionally, may not be brought out and/or may be inadmissible. This should not, however, preclude the trial court from giving the jury an explanation of the basis for the objection and/or its ruling sufficient to dispel the questions that could normally arise in the minds of the jurors, so that no unfavorable inferences will be drawn by them reflecting upon a party.

In order to conserve the time of the jury, witnesses and other interested parties, the prosecutor should attempt to have questions regarding the admissibility of evidence resolved prior to trial. In addition to the savings of court time, the pre-trial rulings will also allow for more efficient pre-trial preparation and, where permitted, the appeal of adverse rulings.

## 8. Arguments to the Jury

### 7-8.1 Characterizations

In closing argument, a prosecutor should be fair and accurate in the discussion of the law, the facts, and the reasonable inferences that may be drawn from the facts.

### 7-8.2 Personal Opinion

In closing argument, a prosecutor should not express personal opinion regarding the justness of the cause, the credibility of a witness or the guilt of the accused, assert personal knowledge of facts in issue, or allude to any matter not admitted into evidence during the trial.

### Commentary

Faced with closing argument, the final opportunity to espouse the people's theory of the case, prosecutors need to be keenly aware of the limitations on the methods available to them for that use. Closing arguments have been the ticket back to the trial court from many appellate courts that have uttered the words "prosecutorial misconduct" in relation to words uttered by the prosecutor.

These standards set forth the basic rules for guidance in constructing and delivering a closing argument. Prosecutors should become intimately familiar with his or her jurisdiction's ethical rules and appellate opinions on proper closings.

# Sentencing

1. Sentencing
2. Probation
3. Community Based Programs

## 1. Sentencing

### 8-1.1 Fair Sentencing

To the extent that the prosecutor becomes involved in the sentencing process, he or she should seek to assure that a fair and fully informed judgment is made and that unfair sentences and unfair sentence disparities are avoided.

### 8-1.2 Sentencing Input

The prosecutor may take advantage of the opportunity to address the sentencing body, whether it is the jury or the court, and may offer a sentencing recommendation where appropriate. The prosecution should also take steps to see that the victim is afforded his or her rights to address the sentencing body.

### 8-1.3 Mitigating Evidence

The prosecutor should disclose to the defense prior to sentencing any known evidence that would mitigate the sentence to be imposed. This obligation to disclose does not carry with it additional obligations to investigate for mitigating evidence beyond what is otherwise required by law.

### 8-1.4 Pre-Sentencing Reports

- a. The prosecutor should take steps to ensure that sentencing is based upon complete and accurate information drawn from the pre-sentence report and any other information the prosecution possesses.
- b. The prosecutor should disclose to the court or probation officer any information in its files relevant to the sentencing process.
- c. Upon noticing any material information within a pre-sentence report which conflicts with information known to the prosecutor, it is the duty of the prosecutor to notify the appropriate parties of such conflicting information.

## Commentary

Participation in the sentencing process provides the prosecutor the opportunity to continue his or her quest for justice. The prosecutor should be the person most familiar with the defendant, the facts surrounding the commission of the crime, and the procedures that brought the defendant to the sentencing stage. It is also the prosecutor who, from prior experience, will be aware of the sentences received by persons in similar situations so as to steer the court away from unfair sentences and unfair sentence disparities.

Sentencing participation also provides the prosecutor with an opportunity to assure that the victims of crimes are allowed to voice their thoughts and opinions regarding the sentence to be imposed. Sentencing also presents the opportunity for the prosecutor to seek a sentence that will adequately protect the community, deter persons from committing crimes and appropriately punish the offender. Sentencing further provides the means for the prosecutor to make sure the defendant is treated fairly by making mitigating evidence in his or her possession available to the defense and to ensure that the information provided to the court in the form of a pre-sentence investigation report is accurate.

## 2. Probation

### 8-2.1 Role in Pre-Sentence Report

- a. The prosecutor should take an active role in the development and submission of the pre-sentence report, including the following:
- b. The office of the prosecutor should be available as a source of information to the probation department concerning a defendant's background when developing pre-sentence reports;
- c. The office of the prosecutor should review pre-sentence reports prior to or upon submission of such reports to the court; and
- d. Upon noticing any material information within a pre-sentence report which conflicts with information known to the prosecutor, it is the duty of the prosecutor to notify the appropriate parties of such conflicting information.

### 8-2.2 Prosecutor as a Resource

The office of the prosecutor should be available as a source of information for the probation department for offenders under supervision.

### 8-2.3 Notice

The office of the prosecutor should seek to be notified of and have the right to appear at probation revocation and termination hearings and be notified of the outcome of such proceedings within the jurisdiction.



### 3. Community-Based Programs

#### 8-3.1 Knowledge of Programs

The prosecutor, to the extent practicable, should be cognizant of and familiar with community-based programs to which defendants may be sentenced or referred to as a condition of probation.

#### Commentary

The prosecutor's relationship with the probation department must continue beyond the preparation of the pre-sentence report. If a defendant is placed under the supervision of the probation department or another community-based program, the prosecutor, as a guardian of the public interest in seeing that the court's directives to the defendant are followed, should share information and, where allowed, assist the probation office and other programs in bringing a non-complying person back before the court.

## Post-Sentencing

### 1. Post-Sentencing

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##### 9-1.1 Prosecution Appeals

The prosecutor should appeal pre-trial and trial rulings when there is a basis in both law and fact for doing so. The basis should not be frivolous and may include good faith arguments for extension, modification or reversal of existing law and when it is in the interests of justice to do so.

##### 9-1.2 Cooperation of Trial and Appellate Counsel

When the appellate prosecutor is not the trial prosecutor, the appellate prosecutor and trial prosecutor should cooperate with each other to ensure an adequate flow of information. When feasible, prior to confession of error, the appellate prosecutor should inform the trial prosecutor and obtain his or her input on any issue in question.

##### 9-1.3 Duty of Prosecutor to Defend Conviction

The prosecutor should defend a legally obtained conviction and a properly assessed punishment unless new evidence is received that credibly calls the conviction or sentence into question. A prosecutor has the duty, consistent with the responsibility as a minister of justice, to require the convicted person to meet the applicable burden of proof to obtain relief on both appeal from or collateral attack of a conviction.

##### 9-1.4 Argument on Appeal

The prosecutor shall not assert or contest an issue on appeal unless there is a basis in both law and fact for doing so. The basis should not be frivolous and may include good faith arguments for extension, modification or reversal of existing law.

##### 9-1.5 Appeal Bonds

The prosecutor should defend against the efforts of convicted defendants to be released on appeal bond unless there is reason to believe that the conviction is no longer supported by the law or evidence or opposition to the bond would create a manifest injustice.

##### 9-1.6 Collateral Review

The prosecutor shall not assert or contest an issue on collateral review unless there is a basis in law and fact for doing so. The basis should not be frivolous and may include good faith arguments for extension, modification or reversal of existing law.

### 9-1.7 Duty to Cooperate in Post-Conviction Discovery Proceedings

A prosecutor shall provide discovery to the defense attorney during post-conviction proceedings where:

- a. Required to do so by law, court order or rule;
- b. The evidence is constitutionally exculpatory; or
- c. He or she reasonably believes that the convicted person's claim of actual innocence is supported by specific factual allegations which, if true, would entitle the convicted person to relief under the legal standard applicable in the jurisdiction, and the evidence relates to that claim.

A prosecutor may require a specific offer of proof to establish a claim of actual innocence before the prosecutor agrees to take any affirmative action in response to a post-conviction request for discovery.

### 9-1.8 Duty of Prosecutor Regarding Claims of Actual Innocence

In the circumstance when a prosecutor learns of material and credible evidence that leads the prosecutor to believe that a defendant may be actually innocent of a crime, the prosecutor should exercise due diligence in taking appropriate action, which may include notifying the defense attorney, the defendant, if not represented, and the appropriate court.

#### Commentary

Assuming that the prosecutor has been diligent in performing his or her duties in the quest for justice throughout the investigation, screening, charging, discovery, trial and sentencing, the continued quest for justice requires his or her continued best efforts in responding to the defendant's appeal or collateral attacks. Those best efforts require cooperation with trial counsel and examination of the record to determine whether any appeal on issues decided unfavorably to the prosecution should be addressed, where permitted.

As in all other dealing with the court, the prosecutor on appeal must base his or her arguments on the facts and the law. Because there is no longer a presumption of innocence, prosecutors should typically oppose an appeal bond unless there is an unusual circumstance that would indicate that a conviction is no longer supported by the law or the evidence.

In those extremely rare instances in which a prosecutor is presented with credible evidence that a convicted person may actually be innocent, these standards set forth his or her responsibilities that are consistent with the role of the prosecutor as a minister of justice. In fulfilling that role, the prosecutor must strike a balance between his or her responsibility to see that valid convictions are upheld and the duty to see that the innocent are protected from harm. Finding that balance will perhaps pose the greatest challenge a prosecutor will have to face, especially in a situation where the evidence, after being reasonably evaluated, indicates that a mistake has been made. In making the reasonable evaluation, the prosecutor must put aside concerns of personal embarrassment and pride, the possible embarrassment to law enforcement, and any other factors that would deter him or her from seeing that justice is accomplished.

Where a prosecutor believes a convicted person is actually innocent, the prosecutor should support the release of the person if the person is incarcerated solely on that charge and support the reversal of any conviction for the crime of which the person was erroneously convicted.

