

# Prosecution Function

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Fourth Edition (2017) of the *CRIMINAL JUSTICE STANDARDS* for the *PROSECUTION FUNCTION*

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## **PART I: GENERAL STANDARDS**

### **Standard 3-1.1 The Scope and Function of These Standards**

(a) As used in these standards, “prosecutor” means any attorney, regardless of agency, title, or full or part-time assignment, who acts as an attorney to investigate or prosecute criminal cases or who provides legal advice regarding a criminal matter to government lawyers, agents, or offices participating in the investigation or prosecution of criminal cases. These Standards are intended to apply in any context in which a lawyer would reasonably understand that a criminal prosecution could result.

(b) These Standards are intended to provide guidance for the professional conduct and performance of prosecutors. They are written and intended to

be entirely consistent with the ABA's Model Rules of Professional Conduct, and are not intended to modify a prosecutor's obligations under applicable rules, statutes, or the constitution. They are aspirational or describe "best practices," and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for accused or convicted persons, to create a standard of care for civil liability, or to serve as a predicate for a motion to suppress evidence or dismiss a charge. For purposes of consistency, these Standards sometimes include language taken from the Model Rules of Professional Conduct; but the Standards often address conduct or provide details beyond that governed by the Model Rules of Professional Conduct. No inconsistency is ever intended; and in any case a lawyer should always read and comply with the rules of professional conduct and other authorities that are binding in the specific jurisdiction or matter, including choice of law principles that may regulate the lawyer's ethical conduct.

(c) Because the Standards for Criminal Justice are aspirational, the words "should" or "should not" are used in these Standards, rather than mandatory phrases such as "shall" or "shall not," to describe the conduct of lawyers that is expected or recommended under these Standards. The Standards are not intended to suggest any lesser standard of conduct than may be required by applicable mandatory rules, statutes, or other binding authorities.

(d) These Standards are intended to address the performance of prosecutors in all stages of their professional work. Other ABA Criminal Justice Standards should also be consulted for more detailed consideration of the performance of prosecutors in specific areas.

## **Standard 3-1.2 Functions and Duties of the Prosecutor**

(a) The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court. The prosecutor's office should exercise sound discretion and independent judgment in the performance of the prosecution function.

(b) The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.

(c) The prosecutor should know and abide by the standards of professional conduct as expressed in applicable law and ethical codes and opinions in the applicable jurisdiction. The prosecutor should avoid an appearance of impropriety in performing the prosecution function. A prosecutor should seek out, and the prosecutor's office should provide, supervisory advice and ethical guidance when the proper course of prosecutorial conduct seems unclear. A prosecutor who disagrees with a governing ethical rule should seek its change if appropriate, and directly challenge it if necessary, but should comply with it unless relieved by court order.

(d) The prosecutor should make use of ethical guidance offered by existing organizations, and should seek to establish and make use of an ethics advisory group akin to that described in Defense Function Standard 4-1.11.

(e) The prosecutor should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction that may be applicable in individual cases or classes of cases. The prosecutor's office should be available to assist community efforts addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.

(f) The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or

procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action. The prosecutor should provide service to the community, including involvement in public service and Bar activities, public education, community service activities, and Bar leadership positions. A prosecutorial office should support such activities, and the office's budget should include funding and paid release time for such activities.

## **Standard 3-1.3 The Client of the Prosecutor**

The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor's clients. The public's interests and views should be determined by the chief prosecutor and designated assistants in the jurisdiction.

## **Standard 3-1.4 The Prosecutor's Heightened Duty of Candor**

(a) In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations. However, the prosecutor should be circumspect in publicly commenting on specific cases or aspects of the business of the office.

(b) The prosecutor should not make a statement of fact or law, or offer evidence, that the prosecutor does not reasonably believe to be true, to a court, lawyer, witness, or third party, except for lawfully authorized investigative purposes. In addition, while seeking to accommodate legitimate confidentiality, safety or security concerns, a prosecutor should correct a prosecutor's representation of material fact or law that the prosecutor reasonably believes is, or later learns was, false, and should disclose a

material fact or facts when necessary to avoid assisting a fraudulent or criminal act or to avoid misleading a judge or factfinder.

(c) The prosecutor should disclose to a court legal authority in the controlling jurisdiction known to the prosecutor to be directly adverse to the prosecution's position and not disclosed by others.

## **Standard 3-1.5 Preserving the Record**

At every stage of representation, the prosecutor should take steps necessary to make a clear and complete record for potential review. Such steps may include: filing motions including motions for reconsideration, and exhibits; making objections and placing explanations on the record; requesting evidentiary hearings; requesting or objecting to jury instructions; and making offers of proof and proffers of excluded evidence.

## **Standard 3-1.6 Improper Bias Prohibited**

(a) The prosecutor should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion. A prosecutor should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor's authority.

(b) A prosecutor's office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work. A prosecutor's office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the prosecutor's jurisdiction, and eliminate those impacts that cannot be properly justified.

## Standard 3-1.7 Conflicts of Interest

(a) The prosecutor should know and abide by the ethical rules regarding conflicts of interest that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues. When a conflict requiring recusal exists and is non-waivable, or informed consent has not been obtained, the prosecutor should recuse from further participation in the matter. The office should not go forward until a non-conflicted prosecutor, or an adequate waiver, is in place.

(b) The prosecutor should not represent a defendant in criminal proceedings in the prosecutor's jurisdiction.

(c) The prosecutor should not participate in a matter in which the prosecutor previously participated, personally and substantially, as a non-prosecutor, unless the appropriate government office, and when necessary a former client, gives informed consent confirmed in writing.

(d) The prosecutor should not be involved in the prosecution of a former client. A prosecutor who has formerly represented a client should not use information obtained from that representation to the disadvantage of the former client.

(e) The prosecutor should not negotiate for private employment with an accused or the target of an investigation, in a matter in which the prosecutor is participating personally and substantially, or with an attorney or agent for such accused or target

(f) The prosecutor should not permit the prosecutor's professional judgment or obligations to be affected by the prosecutor's personal, political, financial, professional, business, property, or other interests or relationships. A prosecutor should not allow interests in personal advancement or aggrandizement to affect judgments regarding what is in the best interests of justice in any case.

(g) The prosecutor should disclose to appropriate supervisory personnel any facts or interests that could reasonably be viewed as raising a potential conflict of interest. If it is determined that the prosecutor should nevertheless continue to act in the matter, the prosecutor and supervisors should consider whether any disclosure to a court or defense counsel should be made, and make such disclosure if appropriate. Close cases should be resolved in favor of disclosure to the court and the defense.

(h) The prosecutor whose current relationship to another lawyer is parent, child, sibling, spouse or sexual partner should not participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer. A prosecutor who has a significant personal, political, financial, professional, business, property, or other relationship with another lawyer should not participate in the prosecution of a person who is represented by the other lawyer, unless the relationship is disclosed to the prosecutor's supervisor and supervisory approval is given, or unless there is no other prosecutor who can be authorized to act in the prosecutor's stead. In the latter rare case, full disclosure should be made to the defense and to the court.

(i) The prosecutor should not recommend the services of particular defense counsel to accused persons or witnesses in cases being handled by the prosecutor's office. If requested to make such a recommendation, the prosecutor should consider instead referring the person to the public defender, or to a panel of available criminal defense attorneys such as a bar association lawyer-referral service, or to the court. In the rare case where a specific recommendation is made by the prosecutor, the recommendation should be to an independent and competent attorney, and the prosecutor should not make a referral that embodies, creates or is likely to create a conflict of interest. A prosecutor should not comment negatively upon the reputation or abilities of a defense counsel to an accused person or witness who is seeking counsel in a case being handled by the prosecutor's office.

(j) The prosecutor should promptly report to a supervisor all but the most obviously frivolous misconduct allegations made, publicly or privately,

against the prosecutor. If a supervisor or judge initially determines that an allegation is serious enough to warrant official investigation, reasonable measures, including possible recusal, should be instituted to ensure that the prosecution function is fairly and effectively carried out. A mere allegation of misconduct is not a sufficient basis for prosecutorial recusal, and should not deter a prosecutor from attending to the prosecutor's duties.

## **Standard 3-1.8 Appropriate Workload**

(a) The prosecutor should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers the interests of justice in fairness, accuracy, or the timely disposition of charges, or has a significant potential to lead to the breach of professional obligations. A prosecutor whose workload prevents competent representation should not accept additional matters until the workload is reduced, and should work to ensure competent representation in existing matters. A prosecutor within a supervisory structure should notify supervisors when counsel's workload is approaching or exceeds professionally appropriate levels.

(b) The prosecutor's office should regularly review the workload of individual prosecutors, as well as the workload of the entire office, and adjust workloads (including intake) when necessary to ensure the effective and ethical conduct of the prosecution function.

(c) The chief prosecutor for a jurisdiction should inform governmental officials of the workload of the prosecutor's office, and request funding and personnel that are adequate to meet the criminal caseload. The prosecutor should consider seeking such funding from all appropriate sources. If workload exceeds the appropriate professional capacity of a prosecutor or prosecutor's office, that office or counsel should also alert the court(s) in its jurisdiction and seek judicial relief.

## **Standard 3-1.9 Diligence, Promptness and Punctuality**

(a) The prosecutor should act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and rights of the defendant, victims, and witnesses. The prosecutor's office should be organized and supported with adequate staff and facilities to enable it to process and resolve criminal charges with fairness and efficiency.

(b) When providing reasons for seeking delay, the prosecutor should not knowingly misrepresent facts or otherwise mislead. The prosecutor should use procedures that will cause delay only when there is a legitimate basis for such use, and not to secure an unfair tactical advantage.

(c) The prosecutor should not unreasonably oppose requests for continuances from defense counsel.

(d) The prosecutor should know and comply with timing requirements applicable to a criminal investigation and prosecution, so as to not prejudice a criminal matter.

(e) The prosecutor should be punctual in attendance in court, in the submission of motions, briefs, and other papers, and in dealings with opposing counsel, witnesses and others. The prosecutor should emphasize to assistants and prosecution witnesses the importance of punctuality in court attendance.

## **Standard 3-1.10 Relationship with the Media**

(a) For purposes of this Standard, a "public statement" is any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication or media, including social media. An extrajudicial statement is any oral, written, or visual presentation not made

either in a courtroom during criminal proceedings or in court filings or correspondence with the court or counsel regarding criminal proceedings.

(b) The prosecutor's public statements about the judiciary, jurors, other lawyers, or the criminal justice system should be respectful even if expressing disagreement.

(c) The prosecutor should not make, cause to be made, or authorize or condone the making of, a public statement that the prosecutor knows or reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding or heightening public condemnation of the accused, but the prosecutor may make statements that inform the public of the nature and extent of the prosecutor's or law enforcement actions and serve a legitimate law enforcement purpose. The prosecutor may make a public statement explaining why criminal charges have been declined or dismissed, but must take care not to imply guilt or otherwise prejudice the interests of victims, witnesses or subjects of an investigation. A prosecutor's public statements should otherwise be consistent with the ABA Standards on Fair Trial and Public Discourse.

(d) A prosecutor should not place statements or evidence into the court record to circumvent this Standard.

(e) The prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement or providing non-public information that the prosecutor would be prohibited from making or providing under this Standard or other applicable rules or law.

(f) The prosecutor may respond to public statements from any source in order to protect the prosecution's legitimate official interests, unless there is a substantial likelihood of materially prejudicing a criminal proceeding, in which case the prosecutor should approach defense counsel or a court for

relief. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(g) The prosecutor has duties of confidentiality and loyalty, and should not secretly or anonymously provide non-public information to the media, on or off the record, without appropriate authorization.

(h) The prosecutor should not allow prosecutorial judgment to be influenced by a personal interest in potential media contacts or attention.

(i) A prosecutor uninvolved in a matter who is commenting as a media source may offer generalized commentary concerning a specific criminal matter that serves to educate the public about the criminal justice system and does not risk prejudicing a specific criminal proceeding. A prosecutor acting as such a media commentator should make reasonable efforts to be well-informed about the facts of the matter and the governing law. The prosecutor should not offer commentary regarding the specific merits of an ongoing criminal prosecution or investigation, except in a rare case to address a manifest injustice and the prosecutor is reasonably well-informed about the relevant facts and law.

(j) During the pendency of a criminal matter, the prosecutor should not re-enact, or assist law enforcement in re-enacting, law enforcement events for the media. Absent a legitimate law enforcement purpose, the prosecutor should not display the accused for the media, nor should the prosecutor invite media presence during investigative actions without careful consideration of the interests of all involved, including suspects, defendants, and the public. However, a prosecutor may reasonably accommodate media requests for access to public information and events.

## **Standard 3-1.11 Literary or Media Rights Agreements Prohibited**

(a) Before the conclusion of all aspects of a matter in which a prosecutor participates, the prosecutor should not enter into any agreement or informal

understanding by which the prosecutor acquires an interest in a literary or media portrayal or account based on or arising out of the prosecutor's involvement in the matter.

(b) The prosecutor should not allow prosecutorial judgment to be influenced by the possibility of future personal literary or other media rights.

(c) In creating or participating in any literary or other media account of a matter in which the prosecutor was involved, the prosecutor's duty of confidentiality must be respected even after government service is concluded. When protected confidences are involved, a prosecutor or former prosecutor should not make disclosure without consent from the prosecutor's office. Such consent should not be unreasonably withheld, and the public's interest in accurate historical accounts of significant events after a lengthy passage of time should be considered.

## **Standard 3-1.12 Duty to Report and Respond to Prosecutorial Misconduct**

(a) The prosecutor's office should adopt policies to address allegations of professional misconduct, including violations of law, by prosecutors. At a minimum such policies should require internal reporting of reasonably suspected misconduct to supervisory staff within the office, and authorize supervisory staff to quickly address the allegations. Investigations of allegations of professional misconduct within the prosecutor's office should be handled in an independent and conflict-free manner.

(b) When a prosecutor reasonably believes that another person associated with the prosecutor's office intends or is about to engage in misconduct, the prosecutor should attempt to dissuade the person. If such attempt fails or is not possible, and the prosecutor reasonably believes that misconduct is ongoing, will occur, or has occurred, the prosecutor should promptly refer the matter to higher authority in the prosecutor's office including, if warranted by the seriousness of the matter, to the chief prosecutor.

(c) If, despite the prosecutor's efforts in accordance with sections (a) and (b) above, the chief prosecutor permits, fails to address, or insists upon an action or omission that is clearly a violation of law, the prosecutor should take further remedial action, including revealing information necessary to address, remedy, or prevent the violation to appropriate judicial, regulatory, or other government officials not in the prosecutor's office.

## **Standard 3-1.13 Training Programs**

(a) The prosecutor's office should develop and maintain programs of training and continuing education for both new and experienced prosecutors and staff. The prosecutor's office, as well as the organized Bar or courts, should require that current and aspiring prosecutors attend a reasonable number of hours of such training and education.

(b) In addition to knowledge of substantive legal doctrine and courtroom procedures, a prosecutor's core training curriculum should address the overall mission of the criminal justice system. A core training curriculum should also seek to address: investigation, negotiation, and litigation skills; compliance with applicable discovery procedures; knowledge of the development, use, and testing of forensic evidence; available conviction and sentencing alternatives, reentry, effective conditions of probation, and collateral consequences; civility, and a commitment to professionalism; relevant office, court, and defense policies and procedures and their proper application; exercises in the use of prosecutorial discretion; civility and professionalism; appreciation of diversity and elimination of improper bias; and available technology and the ability to use it. Some training programs might usefully be open to, and taught by, persons outside the prosecutor's office such as defense counsel, court staff, and members of the judiciary.

(c) A prosecution office's training program should include periodic review of the office's policies and procedures, which should be amended when necessary. Specialized prosecutors should receive training in their specialized areas. Individuals who will supervise attorneys or staff should receive training in how effectively to supervise.

(d) The prosecutor's office should also make available opportunities for training and continuing education programs outside the office, including training for non-attorney staff.

(e) Adequate funding for continuing training and education, within and outside the office, should be requested and provided by funding sources.

## **PART II: ORGANIZATION OF THE PROSECUTION FUNCTION**

### **Standard 3-2.1 Prosecution Authority to be Vested in Full-time, Public-Official Attorneys**

(a) The prosecution function should be performed by a lawyer who is

(i) a public official,

(ii) authorized to practice law in the jurisdiction, and

(iii) subject to rules of attorney professional conduct and discipline.

Prosecutors whose professional obligations are devoted full-time and exclusively to the prosecution function are preferable to part-time prosecutors who have other potentially conflicting professional responsibilities.

(b) A prosecutor's office should have open, effective, and well-publicized methods for communicating with, and receiving communications from, the public in the jurisdiction that it serves.

(c) If a particular matter requires the appointment of a special prosecutor from outside the office, adequate funding for this purpose should be made available. Such special prosecutors should know and are governed by applicable conflict of interest standards for prosecutors. A private attorney

who is paid by, or who has an attorney-client relationship with, an individual or entity that is a victim of the charged crime, or who has a personal or financial interest in the prosecution of particular charges, or who has demonstrated any impermissible bias relevant to the particular matter, should not be permitted to serve as prosecutor in that matter.

(d) Unless impractical or unlawful, the prosecutor's office should implement a system for allowing qualified law students, cross-designated prosecutors from other offices, and private attorneys temporarily assigned to the prosecutor's office, to learn about and assist with the prosecution function.

## **Standard 3-2.2 Assuring Excellence and Diversity in the Hiring, Retention, and Compensation of Prosecutors**

(a) Strong professional qualifications and performance should be the basis for selection and retention for prosecutor positions. Effective measures to retain excellent prosecutors should be encouraged, while recognizing the benefits of some turnover. Supervisory prosecutors should select and promote personnel based on merit and expertise, without regard to partisan, personal or political factors or influence.

(b) In selecting personnel, the prosecutor's office should also consider the diverse interests and makeup of the community it serves, and seek to recruit, hire, promote and retain a diverse group of prosecutors and staff that reflect that community.

(c) The function of public prosecution requires highly developed professional skills and a variety of backgrounds, talents and experience. The prosecutor's office should promote continuing professional development and continuity of service, while providing prosecutors the opportunity to gain experience in all aspects of the prosecution function.

(d) Compensation and benefits for prosecutors and their staffs should be commensurate with the high responsibilities of the office, sufficient to compete with the private sector, and regularly adjusted to attract and retain well-qualified personnel. Compensation for prosecutors should be adequate and also comparable to that of public defense counsel in the jurisdiction.

## **Standard 3-2.3 Investigative Resources and Experts**

The prosecutor should be provided with funds for qualified experts as needed for particular matters. When warranted by the responsibilities of the office, funds should be available to the prosecutor's office to employ professional investigators and other necessary support personnel, as well as to secure access to forensic and other experts.

## **Standard 3-2.4 Office Policies and Procedures**

(a) Each prosecutor's office should seek to develop general policies to guide the exercise of prosecutorial discretion, and standard operating procedures for the office. The objectives of such policies and procedures should be to achieve fair, efficient, and effective enforcement of the criminal law within the prosecutor's jurisdiction.

(b) In the interest of continuity and clarity, the prosecution office's policies and procedures should be memorialized and accessible to relevant staff. The office policies and procedures should be regularly reviewed and revised. The office policies and procedures should be augmented by instruction and training, and are not a substitute for regular training programs.

(c) Prosecution office policies and procedures whose disclosure would not adversely affect the prosecution function should be made available to the public.

(d) The prosecutor's office should have a system in place to regularly review compliance with office policies.

## **Standard 3-2.5 Removal or Suspension and Substitution of Chief Prosecutor**

(a) Fair and objective procedures should be established by appropriate legislation that empowers the governor or other public official or body to suspend or remove, and supersede, a chief prosecutor for a jurisdiction and designate a replacement, upon making a public finding after reasonable notice and hearing that the prosecutor is incapable of fulfilling the duties of office due to physical or mental incapacity or for gross deviation from professional norms.

(b) The governor or other public official or body should be similarly empowered by law to substitute, in a particular matter or category of cases, special counsel in the place of the chief prosecutor, by consent or upon making a finding after fair process that substitution is required due to a serious conflict of interest or a gross deviation from professional norms.

(c) Removal, suspension or substitution of a prosecutor should not be permitted for improper or irrelevant partisan or personal reasons.

## **PART III: PROSECUTORIAL RELATIONSHIPS**

### **Standard 3-3.1 Structure of, and Relationships Among, Prosecution Offices**

(a) When possible, the geographic jurisdiction of a prosecution office should be determined on the basis of population, caseload, and other relevant factors sufficient to warrant at least one full-time prosecutor and necessary support staff.

(b) In all States, there should be coordination of the prosecution policies of local prosecution offices to improve the administration and consistency of justice throughout the State. To the extent needed, a central pool of supporting resources, forensic laboratories, and personnel such as investigators, additional prosecutors, accountants and other experts, should be maintained by the state government and should be available to assist local prosecutors. A coordinated forum for prosecutors to discuss issues of professional responsibility should also be available. In some jurisdictions, it may be appropriate to create a unified statewide system of prosecution, in which the state attorney general is the chief prosecutor and district or county or other local prosecutors are the attorney general's deputies.

(c) Regardless of the statewide structure of prosecution offices, a state-wide association of prosecutors should be established. When questions or issues arise that could create important state-wide precedents, local prosecutors should advise and consult with the attorney general, the state-wide association, and the prosecutors in other local prosecution offices.

(d) Federal, state, and local prosecution offices should develop practices and procedures that encourage useful coordination with prosecutors within the jurisdiction and in other jurisdictions. Prosecutors should work to identify potential issues of conflict, coordinate with other prosecution offices in advance, and resolve inter-office disputes amicably and in the public interest.

## **Standard 3-3.2 Relationships With Law Enforcement**

(a) The prosecutor should maintain respectful yet independent judgment when interacting with law enforcement personnel.

(b) The prosecutor may provide independent legal advice to law enforcement about actions in specific criminal matters and about law enforcement practices in general.

(c) The prosecutor should become familiar with and respect the experience and specialized expertise of law enforcement personnel. The prosecutor should promote compliance by law enforcement personnel with applicable legal rules, including rules against improper bias. The prosecutor's office should keep law enforcement personnel informed of relevant legal and legal ethics issues and developments as they relate to prosecution matters, and advise law enforcement personnel of relevant prosecution policies and procedures. Prosecutors may exercise supervision over law enforcement personnel involved in particular prosecutions when in the best interests of justice and the public.

(d) Representatives of the prosecutor's office should meet and confer regularly with law enforcement agencies regarding prosecution as well as law enforcement policies. The prosecutor's office should assist in developing and administering training programs for law enforcement personnel regarding matters and cases being investigated, matters submitted for charging, and the law related to law enforcement activities.

### **Standard 3-3.3 Relationship With Courts, Defense Counsel and Others**

(a) In all contacts with judges, the prosecutor should maintain a professional and independent relationship. A prosecutor should not engage in unauthorized *ex parte* discussions with, or submission of material to, a judge relating to a particular matter which is, or is likely to be, before the judge. With regard to generalized matters requiring judicial discussion (for example, case-management or administrative matters), the prosecutor should invite a representative defense counsel to join in the discussion to the extent practicable.

(b) When *ex parte* communications or submissions are authorized, the prosecutor should inform the court of material facts known to the prosecutor, including facts that are adverse, sufficient to enable the court to make a fair and informed decision. Except when non-disclosure is

authorized, counsel should notify opposing counsel that an *ex parte* contact has occurred, without disclosing its content unless permitted.

(c) In written filings, the prosecutor should respectfully evaluate and respond as appropriate to opposing counsel's arguments and representations, and avoid unnecessary personalized disparagement.

(d) The prosecutor should develop and maintain courteous and civil working relationships with judges and defense counsel, and should cooperate with them in developing solutions to address ethical, scheduling, or other issues that may arise in particular cases or generally in the criminal justice system. Prosecutors should cooperate with courts and organized bar associations in developing codes of professionalism and civility, and should abide by such codes that apply in their jurisdiction.

## **Standard 3-3.4 Relationship With Victims and Witnesses**

(a) "Witness" in this Standard means any person who has or might have information about a matter, including victims.

(b) The prosecutor should know and follow the law and rules of the jurisdiction regarding victims and witnesses. In communicating with witnesses, the prosecutor should know and abide by law and ethics rules regarding the use of deceit and engaging in communications with represented, unrepresented, and organizational persons.

(c) The prosecutor or the prosecutor's agents should seek to interview all witnesses, and should not act to intimidate or unduly influence any witness.

(d) The prosecutor should not use means that have no substantial purpose other than to embarrass, delay, or burden, and not use methods of obtaining evidence that violate legal rights. The prosecutor and prosecution agents should not misrepresent their status, identity or interests when communicating with a witness.

(e) The prosecutor should be permitted to compensate a witness for reasonable expenses such as costs of attending court, depositions pursuant to statute or court rule, and pretrial interviews, including transportation and loss of income. No other benefits should be provided to witnesses unless authorized by law, regulation, or well-accepted practice. All benefits provided to witnesses should be documented and disclosed to the defense. A prosecutor should not pay or provide a benefit to a witness in order to, or in an amount that is likely to, affect the substance or truthfulness of the witness's testimony.

(f) A prosecutor should avoid the prospect of having to testify personally about the content of a witness interview. The prosecutor's interview of most routine or government witnesses (for example, custodians of records or law enforcement agents) should not require a third-party observer. But when the need for corroboration of an interview is reasonably anticipated, the prosecutor should be accompanied by another trusted and credible person during the interview. The prosecutor should avoid being alone with any witness who the prosecutor reasonably believes has potential or actual criminal liability, or foreseeably hostile witnesses.

(g) The prosecutor should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to independent counsel when the law so requires. Even if the law does not require it, a prosecutor should consider so advising a witness if the prosecutor reasonably believes the witness may provide self-incriminating information and the witness appears not to know his or her rights. However, a prosecutor should not so advise, or discuss or exaggerate the potential criminal liability of, a witness with a purpose, or in a manner likely, to intimidate the witness, to influence the truthfulness or completeness of the witness's testimony, or to change the witness's decision about whether to provide information.

(h) The prosecutor should not discourage or obstruct communication between witnesses and the defense counsel, other than the government's employees or agents if consistent with applicable ethical rules. The prosecutor should not advise any person, or cause any person to be advised,

to decline to provide defense counsel with information which such person has a right to give. The prosecutor may, however, fairly and accurately advise witnesses as to the likely consequences of their providing information, but only if done in a manner that does not discourage communication.

(i) Consistent with any specific laws or rules governing victims, the prosecutor should provide victims of serious crimes, or their representatives, an opportunity to consult with and to provide information to the prosecutor, prior to making significant decisions such as whether or not to prosecute, to pursue a disposition by plea, or to dismiss charges. The prosecutor should seek to ensure that victims of serious crimes, or their representatives, are given timely notice of:

(i) judicial proceedings relating to the victims' case;

(ii) proposed dispositions of the case;

(iii) sentencing proceedings; and

(iv) any decision or action in the case that could result in the defendant's provisional or final release from custody, or change of sentence.

(j) The prosecutor should ensure that victims and witnesses who may need protections against intimidation or retaliation are advised of and afforded protections where feasible.

(k) Subject to ethical rules and the confidentiality that criminal matters sometimes require, and unless prohibited by law or court order, the prosecutor should provide information about the status of matters in which they are involved to victims and witnesses who request it.

(l) The prosecutor should give witnesses reasonable notice of when their testimony at a proceeding is expected, and should not require witnesses to attend judicial proceedings unless their testimony is reasonably expected at that time, or their presence is required by law. When witnesses' attendance is

required, the prosecutor should seek to reduce to a minimum the time witnesses must spend waiting at the proceedings. The prosecutor should ensure that witnesses are given notice as soon as practicable of scheduling changes which will affect their required attendance at judicial proceedings.

(m) The prosecutor should not engage in any inappropriate personal relationship with any victim or other witness.

## **Standard 3-3.5 Relationship with Expert Witnesses**

(a) An expert may be engaged for consultation only, or to prepare an evidentiary report or testimony. The prosecutor should know relevant rules governing expert witnesses, including possibly different disclosure rules governing experts who are engaged for consultation only.

(b) A prosecutor should evaluate all expert advice, opinions, or testimony independently, and not simply accept the opinion of a government or other expert based on employer, affiliation or prominence alone.

(c) Before engaging an expert, the prosecutor should investigate the expert's credentials, relevant professional experience, and reputation in the field. The prosecutor should also examine a testifying expert's background and credentials for potential impeachment issues. Before offering an expert as a witness, the prosecutor should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify.

(d) A prosecutor who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert's opinion on the relevant subject.

(e) Before offering an expert as a witness, the prosecutor should seek to learn enough about the substantive area of the expert's expertise, including ethical rules that may be applicable in the expert's field, to enable effective

preparation of the expert, as well as effective cross-examination of any defense expert on the same topic. The prosecutor should explain to the expert that the expert's role in the proceeding will be as an impartial witness called to aid the fact-finders, explain the manner in which the examination of the expert is likely to be conducted, and suggest likely impeachment questions the expert may be asked.

(f) The prosecutor should not pay or withhold any fee or provide or withhold a benefit for the purpose of influencing the substance of an expert's testimony. The prosecutor should not fix the amount of the fee contingent upon the expert's testimony or the result in the case. Nor should the prosecutor promise or imply the prospect of future work for the expert based on the expert's testimony.

(g) The prosecutor should provide the expert with all information reasonably necessary to support a full and fair opinion. The prosecutor should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. The prosecutor should be aware of expert discovery rules and act to protect confidentiality and the public interest, for example by not sharing with the expert confidences and work product that the prosecutor does not want disclosed.

(h) The prosecutor should timely disclose to the defense all evidence or information learned from an expert that tends to negate the guilt of the accused or mitigate the offense, even if the prosecutor does not intend to call the expert as a witness.

## **Standard 3-3.6 When Physical Evidence With Incriminating Implications is Disclosed by the Defense**

When physical evidence is delivered to the prosecutor consistent with Defense Function Standard 4-4.7, the prosecutor should not offer the fact of

delivery as evidence before a fact-finder for purposes of establishing the culpability of defense counsel's client. The prosecutor may, however, offer evidence of the fact of such delivery in response to a foundational objection to the evidence based on chain-of-custody concerns, or in a subsequent proceeding for the purpose of proving a crime or fraud regarding the evidence.

## **PART IV: INVESTIGATION; DECISIONS TO CHARGE, NOT CHARGE, OR DISMISS; AND GRAND JURY**

### **Standard 3-4.1 Investigative Function of the Prosecutor**

(a) When performing an investigative function, prosecutors should be familiar with and follow the ABA Standards on Prosecutorial Investigations.

(b) A prosecutor should not use illegal or unethical means to obtain evidence or information, or employ, instruct, or encourage others to do so. Prosecutors should research and know the law in this regard before acting, understanding that in some circumstances a prosecutor's ethical obligations may be different from those of other lawyers.

### **Standard 3-4.2 Decisions to Charge Are the Prosecutor's**

(a) While the decision to arrest is often the responsibility of law enforcement personnel, the decision to institute formal criminal proceedings is the responsibility of the prosecutor. Where the law permits a law enforcement officer or other person to initiate proceedings by complaining directly to a judicial officer or the grand jury, the complainant should be required to present the complaint for prior review by the prosecutor, and the

prosecutor's recommendation regarding the complaint should be communicated to the judicial officer or grand jury.

(b) The prosecutor's office should establish standards and procedures for evaluating complaints to determine whether formal criminal proceedings should be instituted.

(c) In determining whether formal criminal charges should be filed, prosecutors should consider whether further investigation should be undertaken. After charges are filed the prosecutor should oversee law enforcement investigative activity related to the case.

(d) If the defendant is not in custody when charged, the prosecutor should consider whether a voluntary appearance rather than a custodial arrest would suffice to protect the public and ensure the defendant's presence at court proceedings.

## **Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges**

(a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.

(b) After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.

(c) If a prosecutor has significant doubt about the guilt of the accused or the quality, truthfulness, or sufficiency of the evidence in any criminal case assigned to the prosecutor, the prosecutor should disclose those doubts to supervisory staff. The prosecutor's office should then determine whether it is appropriate to proceed with the case.

(d) A prosecutor's office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence.

## **Standard 3-4.4 Discretion in Filing, Declining, Maintaining, and Dismissing Criminal Charges**

(a) In order to fully implement the prosecutor's functions and duties, including the obligation to enforce the law while exercising sound discretion, the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support. Among the factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge, even though it meets the requirements of Standard 3-4.3, are:

(i) the strength of the case;

(ii) the prosecutor's doubt that the accused is in fact guilty;

(iii) the extent or absence of harm caused by the offense;

(iv) the impact of prosecution or non-prosecution on the public welfare;

(v) the background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation;

(vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;

(vii) the views and motives of the victim or complainant;

(viii) any improper conduct by law enforcement;

(ix) unwarranted disparate treatment of similarly situated persons;

(x) potential collateral impact on third parties, including witnesses or victims;

(xi) cooperation of the offender in the apprehension or conviction of others;

(xii) the possible influence of any cultural, ethnic, socioeconomic or other improper biases;

(xiii) changes in law or policy;

(xiv) the fair and efficient distribution of limited prosecutorial resources;

(xv) the likelihood of prosecution by another jurisdiction; and

(xvi) whether the public's interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.

(b) In exercising discretion to file and maintain charges, the prosecutor should not consider:

(i) partisan or other improper political or personal considerations;

(ii) hostility or personal animus towards a potential subject, or any other improper motive of the prosecutor; or

(iii) the impermissible criteria described in Standard 1.6 above.

(c) A prosecutor may file and maintain charges even if juries in the jurisdiction have tended to acquit persons accused of the particular kind of criminal act in question.

(d) The prosecutor should not file or maintain charges greater in number or degree than can reasonably be supported with evidence at trial and are necessary to fairly reflect the gravity of the offense or deter similar conduct.

(e) A prosecutor may condition a dismissal of charges, *nolle prosequi*, or similar action on the accused's relinquishment of a right to seek civil redress only if the accused has given informed consent, and such consent is disclosed to the court. A prosecutor should not use a civil waiver to avoid a bona fide claim of improper law enforcement actions, and a decision not to file criminal charges should be made on its merits and not for the purpose of obtaining a civil waiver.

(f) The prosecutor should consider the possibility of a noncriminal disposition, formal or informal, or a deferred prosecution or other diversionary disposition, when deciding whether to initiate or prosecute criminal charges. The prosecutor should be familiar with the services and resources of other agencies, public or private, that might assist in the evaluation of cases for diversion or deferral from the criminal process.

## Standard 3-4.5 Relationship with a Grand Jury

(a) In presenting a matter to a criminal grand jury, and in light of its *ex parte* character, the prosecutor should respect the independence of the grand jury and should not preempt a function of the grand jury, mislead the grand jury, or abuse the processes of the grand jury.

(b) Where the prosecutor is authorized to act as a legal advisor to the grand jury, the prosecutor should appropriately explain the law and may, if permitted by law, express an opinion on the legal significance of the evidence, but should give due deference to the grand jury as an independent legal body.

(c) The prosecutor should not make statements or arguments to a grand jury in an effort to influence grand jury action in a manner that would be impermissible in a trial.

(d) The entirety of the proceedings occurring before a grand jury, including the prosecutor's communications with and presentations and instructions to the grand jury, should be recorded in some manner, and that record should

be preserved. The prosecutor should avoid off-the-record communications with the grand jury and with individual grand jurors.

## **Standard 3-4.6 Quality and Scope of Evidence Before a Grand Jury**

(a) A prosecutor should not seek an indictment unless the prosecutor reasonably believes the charges are supported by probable cause and that there will be admissible evidence sufficient to support the charges beyond reasonable doubt at trial. A prosecutor should advise a grand jury of the prosecutor's opinion that it should not indict if the prosecutor believes the evidence presented does not warrant an indictment.

(b) In addition to determining what criminal charges to file, a grand jury may properly be used to investigate potential criminal conduct, and also to determine the sense of the community regarding potential charges.

(c) A prosecutor should present to a grand jury only evidence which the prosecutor believes is appropriate and authorized by law for presentation to a grand jury. The prosecutor should be familiar with the law of the jurisdiction regarding grand juries, and may present witnesses to summarize relevant evidence to the extent the law permits.

(d) When a new grand jury is empanelled, a prosecutor should ensure that the grand jurors are appropriately instructed, consistent with the law of the jurisdiction, on the grand jury's right and ability to seek evidence, ask questions, and hear directly from any available witnesses, including eyewitnesses.

(e) A prosecutor with personal knowledge of evidence that directly negates the guilt of a subject of the investigation should present or otherwise disclose that evidence to the grand jury. The prosecutor should relay to the grand jury any request by the subject or target of an investigation to testify before the grand jury, or present other non-frivolous evidence claimed to be exculpatory.

(f) If the prosecutor concludes that a witness is a target of a criminal investigation, the prosecutor should not seek to compel the witness's testimony before the grand jury absent immunity. The prosecutor should honor, however, a reasonable request from a target or subject who wishes to testify before the grand jury.

(g) Unless there is a reasonable possibility that it will facilitate flight of the target, endanger other persons, interfere with an ongoing investigation, or obstruct justice, the prosecutor should give notice to a target of a grand jury investigation, and offer the target an opportunity to testify before the grand jury. Prior to taking a target's testimony, the prosecutor should advise the target of the privilege against self-incrimination and obtain a voluntary waiver of that right.

(h) The prosecutor should not seek to compel the appearance of a witness whose activities are the subject of the grand jury's inquiry, if the witness states in advance that if called the witness will claim the constitutional privilege not to testify, and provides a reasonable basis for such claim. If warranted, the prosecutor may judicially challenge such a claim of privilege or seek a grant of immunity according to the law.

(i) The prosecutor should not issue a grand jury subpoena to a criminal defense attorney or defense team member, or other witness whose testimony reasonably might be protected by a recognized privilege, without considering the applicable law and rules of professional responsibility in the jurisdiction.

(j) Except where permitted by law, a prosecutor should not use the grand jury in order to obtain evidence to assist the prosecution's preparation for trial of a defendant who has already been charged. A prosecutor may, however, use the grand jury to investigate additional or new charges against a defendant who has already been charged.

(k) Except where permitted by law, a prosecutor should not use a criminal grand jury solely or primarily for the purpose of aiding or assisting in an

administrative or civil inquiry.

## **PART V: PRETRIAL ACTIVITIES and NEGOTIATED DISPOSITIONS**

### **Standard 3-5.1 Role in First Appearance and Preliminary Hearing**

(a) A prosecutor should be present at any first appearance of the accused before a judicial officer, and at any preliminary hearing.

(b) At or before the first appearance, the prosecutor should consider:

(i) whether the accused has counsel, and if not, whether and when counsel will be made available or waived;

(ii) whether the accused appears to be mentally competent, and if not, whether to seek an evaluation;

(iii) whether the accused should be released or detained pending further proceedings and, if released, whether supervisory conditions should be imposed; and

(iv) what further proceedings should be scheduled to move the matter toward timely resolution.

(c) The prosecutor handling the first appearance should ensure that the charges are consistent with the conduct described in the available law enforcement reports and any other information the prosecutor possesses.

(d) If the accused does not yet have counsel and has not waived counsel, the prosecutor should ask the court not to engage in substantive proceedings, other than a decision to release the accused. The prosecutor should not obtain a waiver of other important pretrial rights, such as the right to a

preliminary hearing, from an unrepresented accused unless that person has been judicially authorized to proceed *pro se*.

(e) The prosecutor should not approach or communicate with an accused unless a voluntary waiver of counsel has been entered or the accused's counsel consents. If the accused does not have counsel, the prosecutor should make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel, and is given reasonable opportunity to obtain counsel.

(f) If the prosecutor believes pretrial release is appropriate, or it is ordered, the prosecutor should cooperate in arrangements for release under the prevailing pretrial release system.

(g) If the prosecutor has reasonable concerns about the accused's mental competence, the prosecutor should bring those concerns to the attention of defense counsel and, if necessary, the judicial officer.

(h) The prosecutor should not seek to delay a prompt judicial determination of probable cause for criminal charges without good cause, particularly if the accused is in custody.

## **Standard 3-5.2 The Decision to Recommend Release or Seek Detention**

(a) The prosecutor should favor pretrial release of a criminally accused, unless detention is necessary to protect individuals or the community or to ensure the return of the defendant for future proceedings.

(b) The prosecutor's decision to recommend pretrial release or seek detention should be based on the facts and circumstances of the defendant and the offense, rather than made categorically. The prosecutor should consider information relevant to these decisions from all sources, including the defendant.

(c) The prosecutor should cooperate with pretrial services or other personnel who review or assemble information to be provided to the court regarding pretrial release determinations.

(d) The prosecutor should be open to reconsideration of pretrial detention or release decisions based on changed circumstances, including an unexpectedly lengthy period of detention.

## **Standard 3-5.3 Preparation for Court Proceedings, and Recording and Transmitting Information**

(a) The prosecutor should prepare in advance for court proceedings unless that is impossible. Adequate preparation depends on the nature of the proceeding and the time available, and will often include: reviewing available documents; considering what issues are likely to arise and the prosecution's position regarding those issues; how best to present the issues and what solutions might be offered; relevant legal research and factual investigation; and contacting other persons who might be of assistance in addressing the anticipated issues. If the prosecutor has not had adequate time to prepare and is unsure of the relevant facts or law, the prosecutor should communicate to the court the limits of the prosecutor's knowledge or preparation.

(b) The prosecutor should make effort to appear at all hearings in cases assigned to the prosecutor. A prosecutor who substitutes at a court proceeding for another prosecutor assigned to the case should make reasonable efforts to be adequately informed about the case and issues likely to come up at the proceeding, and to adequately prepare.

(c) The prosecutor handling any court appearance should document what happens at the proceeding, to aid the prosecutor's later memory and so that necessary information will be available to other prosecutors who may handle the case in the future.

(d) The prosecutor should take steps to ensure that any court order issued to the prosecution is transmitted to the appropriate persons necessary to effectuate the order.

(e) The prosecutor's office should be provided sufficient resources and be organized to permit adequate preparation for court proceedings.

## **Standard 3-5.4 Identification and Disclosure of Information and Evidence**

(a) After charges are filed if not before, the prosecutor should diligently seek to identify all information in the possession of the prosecution or its agents that tends to negate the guilt of the accused, mitigate the offense charged, impeach the government's witnesses or evidence, or reduce the likely punishment of the accused if convicted.

(b) The prosecutor should diligently advise other governmental agencies involved in the case of their continuing duty to identify, preserve, and disclose to the prosecutor information described in (a) above.

(c) Before trial of a criminal case, a prosecutor should make timely disclosure to the defense of information described in (a) above that is known to the prosecutor, regardless of whether the prosecutor believes it is likely to change the result of the proceeding, unless relieved of this responsibility by a court's protective order. (Regarding discovery prior to a guilty plea, see Standard 3-5.6(f) below.) A prosecutor should not intentionally attempt to obscure information disclosed pursuant to this standard by including it without identification within a larger volume of materials.

(d) The obligations to identify and disclose such information continue throughout the prosecution of a criminal case.

(e) A prosecutor should timely respond to legally proper discovery requests, and make a diligent effort to comply with legally proper disclosure obligations, unless otherwise authorized by a court. When the defense

makes requests for specific information, the prosecutor should provide specific responses rather than merely a general acknowledgement of discovery obligations. Requests and responses should be tailored to the case and “boilerplate” requests and responses should be disfavored.

(f) The prosecutor should make prompt efforts to identify and disclose to the defense any physical evidence that has been gathered in the investigation, and provide the defense a reasonable opportunity to examine it.

(g) A prosecutor should not avoid pursuit of information or evidence because the prosecutor believes it will damage the prosecution's case or aid the accused.

(h) A prosecutor should determine whether additional statutes, rules or caselaw may govern or restrict the disclosure of information, and comply with these authorities absent court order.

## **Standard 3-5.5 Preservation of Information and Evidence**

(a) The prosecutor should make reasonable efforts to preserve, and direct the prosecutor's agents to preserve, relevant materials during and after a criminal case, including

(i) evidence relevant to investigations as well as prosecutions, whether or not admitted at trial;

(ii) information identified pursuant to Standard 3-5.4(a); and

(iii) other materials necessary to support significant decisions made and conclusions reached by the prosecution in the course of an investigation and prosecution.

(b) The prosecutor's office should develop policies regarding the method and duration of preservation of such materials. Such policies should be

consistent with applicable rules and laws (such as public records laws) in the jurisdiction. These policies, and individual preservation decisions, should consider the character and seriousness of each case, the character of the particular evidence or information, the likelihood of further challenges to judgments following conviction, and the resources available for preservation. Physical evidence should be preserved so as to reasonably preserve its forensic characteristics and utility.

(c) Materials should be preserved at least until a criminal case is finally resolved or is final on appeal and the time for further appeal has expired. In felony cases, materials should be preserved until post-conviction litigation is concluded or time-limits have expired. In death penalty cases, information should be preserved until the penalty is carried out or is precluded.

(d) The prosecutor should comply with additional statutes, rules or caselaw that may govern the preservation of evidence.

## **Standard 3-5.6 Conduct of Negotiated Disposition Discussions**

(a) The prosecutor should be open, at every stage of a criminal matter, to discussions with defense counsel concerning disposition of charges by guilty plea or other negotiated disposition.

(b) A prosecutor should not engage in disposition discussions directly with a represented defendant, except with defense counsel's approval. Where a defendant has properly waived counsel, the prosecutor may engage in disposition discussions with the defendant, and should make and preserve a record of such discussions.

(c) The prosecutor should not enter into a disposition agreement before having information sufficient to assess the defendant's actual culpability. The prosecutor should consider collateral consequences of a conviction before entering into a disposition agreement. The prosecutor should consider factors listed in Standard 3-4.4(a), and not be influenced in disposition

discussions by inappropriate factors such as those listed in Standards 3-1.6 and 3-4.4(b).

(d) The prosecutor should not set unreasonably short deadlines, or demand conditions for a disposition, that are so coercive that the voluntariness of a plea or the effectiveness of defense counsel is put into question. A prosecutor may, however, set a reasonable deadline before trial or hearing for acceptance of a disposition offer.

(e) A prosecutor should not knowingly make false statements of fact or law in the course of disposition discussions.

(f) Before entering into a disposition agreement, the prosecutor should disclose to the defense a factual basis sufficient to support the charges in the proposed agreement, and information currently known to the prosecutor that tends to negate guilt, mitigates the offense or is likely to reduce punishment.

(g) A prosecutor should not agree to a guilty plea if the prosecutor reasonably believes that sufficient admissible evidence to support conviction beyond reasonable doubt would be lacking if the matter went to trial.

## **Standard 3-5.7 Establishing and Fulfilling Conditions of Negotiated Dispositions**

(a) A prosecutor should not demand terms in a negotiated disposition agreement that are unlawful or in violation of public policy.

(b) The prosecutor may properly promise the defense that the prosecutor will or will not take a particular position concerning sentence and conditions. The prosecutor should not, however, imply a greater power to influence the disposition of a case than is actually possessed.

(c) The prosecutor should memorialize all promises and conditions that are part of the agreement, and ensure that any written disposition agreement

accurately and completely reflects the precise terms of the agreement including the prosecutor's promises and the defendant's obligations. At any court hearing to finalize a negotiated disposition, the prosecutor should ensure that all relevant details of the agreement have been placed on the record. The presumption is that the hearing and record will be public, but in some cases the hearing or record (or a portion) may be sealed for good cause.

(d) Once a disposition agreement is final and accepted by the court, the prosecutor should comply with, and make good faith efforts to have carried out, the government's obligations. The prosecutor should construe agreement conditions, and evaluate the defendant's performance including any cooperation, in a good-faith and reasonable manner.

(e) If the prosecutor believes that a defendant has breached an agreement that has been accepted by the court, the prosecutor should notify the defense regarding the prosecutor's belief and any intended adverse action. If the defense presents a good-faith disagreement and the parties cannot quickly resolve it, the prosecutor should not act before judicial resolution.

(f) If the prosecutor reasonably believes that a court is acting inconsistently with any term of a negotiated disposition, the prosecutor should raise the matter with the court.

## **Standard 3-5.8 Waiver of Rights as Condition of Disposition Agreements**

(a) A prosecutor should not condition a disposition agreement on a waiver of the right to appeal the terms of a sentence which exceeds an agreed-upon or reasonably anticipated sentence. Any waiver of appeal of sentence should be comparably binding on the defendant and the prosecution.

(b) A prosecutor should not suggest or require, as a condition of a disposition agreement, any waiver of post-conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct, or destruction of

evidence, unless such claims are based on past instances of such conduct that are specifically identified in the agreement or in the transcript of proceedings that address the agreement. If a proposed disposition agreement contains such a waiver regarding ineffective assistance of counsel, the prosecutor should ensure that the defendant has been provided the opportunity to consult with independent counsel regarding the waiver before agreeing to the disposition.

(c) A prosecutor may propose or require other sorts of waivers on an individualized basis if the defendant's agreement is knowing and voluntary. No waivers of any kind should be accepted without an exception for manifest injustice based on newly-discovered evidence, or actual innocence.

(d) Although certain claims may have been waived, a prosecutor should not condition a disposition agreement on a complete waiver of the right to file a habeas corpus or other comparable post-conviction petition.

(e) A prosecutor should not request or rely on waivers to hide an injustice or material flaw in the case which is undisclosed to the defense.

## **Standard 3-5.9 Record of Reasons for Dismissal of Charges**

When criminal charges are dismissed on the prosecution's motion, including by plea of *nolle prosequi* or its equivalent, the prosecutor should make and retain an appropriate record of the reasons for the dismissal, and indicate on the record whether the dismissal was with or without prejudice.

## **PART VI: COURT HEARINGS AND TRIAL**

### **Standard 3-6.1 Scheduling Court Hearings**

Final control over the scheduling of court appearances, hearings and trials in criminal matters should rest with the court rather than the parties. When the

prosecutor is aware of facts that would affect scheduling, the prosecutor should advise the court and, if the facts are case-specific, defense counsel.

## **Standard 3-6.2 Civility With Courts, Opposing Counsel, and Others**

(a) As an officer of the court, the prosecutor should support the authority of the court and the dignity of the courtroom by adherence to codes of professionalism and civility, and by manifesting a professional and courteous attitude toward the judge, opposing counsel, witnesses, defendants, jurors, court staff and others. In court as elsewhere, the prosecutor should not display or act out of any improper or unlawful bias.

(b) When court is in session, unless otherwise permitted by the court, the prosecutor should address the court and not address other counsel or the defendant directly on any matter related to the case.

(c) The prosecutor should comply promptly and civilly with a court's orders or seek appropriate relief from such order. If the prosecutor considers an order to be significantly erroneous or prejudicial, the prosecutor should ensure that the record adequately reflects the events. The prosecutor has a right to make respectful objections and reasonable requests for reconsideration, and to seek other relief as the law permits. If a judge prohibits making an adequate objection, proffer, or record, the prosecutor may take other lawful steps to protect the public interest.

## **Standard 3-6.3 Selection of Jurors**

(a) The prosecutor's office should be aware of legal standards that govern the selection of jurors, and train prosecutors to comply. The prosecutor should prepare to effectively discharge the prosecution function in the selection of the jury, including exercising challenges for cause and peremptory challenges. The prosecutor's office should also be aware of the process used

to select and summon the jury pool and bring legal deficiencies to the attention of the court.

(b) The prosecutor should not strike jurors based on any criteria rendered impermissible by the constitution, statutes, applicable rules of the jurisdiction, or these standards, including race, sex, religion, national origin, disability, sexual orientation or gender identity. The prosecutor should consider contesting a defense counsel's peremptory challenges that appear to be based upon such criteria.

(c) In cases in which the prosecutor conducts a pretrial investigation of the background of potential jurors, the investigative methods used should not harass, intimidate, or unduly embarrass or invade the privacy of potential jurors. Absent special circumstances, such investigation should be restricted to review of records and sources of information already in existence and to which access is lawfully allowed. If the prosecutor uses record searches that are unavailable to the defense, such as criminal record databases, the prosecutor should share the results with defense counsel or seek a judicial protective order.

(d) The opportunity to question jurors personally should be used solely to obtain information relevant to the well-informed exercise of challenges. The prosecutor should not seek to commit jurors on factual issues likely to arise in the case, and should not intentionally present arguments, facts or evidence which the prosecutor reasonably should know will not be admissible at trial. Voir dire should not be used to argue the prosecutor's case to the jury, or to unduly ingratiate counsel with the jurors.

(e) During voir dire, the prosecutor should seek to minimize any undue embarrassment or invasion of privacy of potential jurors, for example by seeking to inquire into sensitive matters outside the presence of other potential jurors, while still enabling fair and efficient juror selection.

(f) If the court does not permit voir dire by counsel, the prosecutor should provide the court with suggested questions in advance, and request specific

follow-up questions during the selection process when necessary to ensure fair juror selection.

(g) If the prosecutor has reliable information that conflicts with a potential juror's responses, or that reasonably would support a "for cause" challenge by any party, the prosecutor should inform the court and, unless the court orders otherwise, defense counsel.

## **Standard 3-6.4 Relationship With Jurors**

(a) The prosecutor should not communicate with persons the prosecutor knows to be summoned for jury duty or impaneled as jurors, before or during trial, other than in the lawful conduct of courtroom proceedings. The prosecutor should avoid even the appearance of improper communications with jurors, and minimize any out-of-court proximity to or contact with jurors. Where out-of-court contact cannot be avoided, the prosecutor should not communicate about or refer to the specific case.

(b) The prosecutor should treat jurors with courtesy and respect, while avoiding a show of undue solicitude for their comfort or convenience.

(c) After discharge of a juror, a prosecutor should avoid contacts that may harass or embarrass the juror, that criticize the jury's actions or verdict, or that express views that could otherwise adversely influence the juror's future jury service. The prosecutor should know and comply with applicable rules and law governing the subject.

(d) After a jury is discharged, the prosecutor may, if no statute, rule, or order prohibits such action, communicate with jurors to investigate whether a verdict may be subject to legal challenge, or to evaluate the prosecution's performance for improvement in the future. The prosecutor should consider requesting the court to instruct the jury that, if it is not prohibited by law, it is not improper for jurors to discuss the case with the lawyers, although they are not required to do so. Any post-discharge communication

with a juror should not disparage the criminal justice system and the jury trial process, and should not express criticism of the jury's actions or verdict.

(e) A prosecutor who learns reasonably reliable information that there was a problem with jury deliberations or conduct that could support an attack on a judgment of conviction and that is recognized as potentially valid in the jurisdiction, should promptly report that information to the appropriate judicial officer and, unless the court orders otherwise, defense counsel.

## **Standard 3-6.5 Opening Statement at Trial**

(a) The prosecutor should give an opening statement before the presentation of evidence begins.

(b) The prosecutor's opening statement at trial should be confined to a fair statement of the case from the prosecutor's perspective, and discussion of evidence that the prosecutor reasonably believes will be available, offered and admitted to support the prosecution case. The prosecutor's opening should avoid speculating about what defenses might be raised by the defense unless the prosecutor knows they will be raised.

(c) The prosecutor's opening statement should be made without expressions of personal opinion, vouching for witnesses, inappropriate appeals to emotion or personal attacks on opposing counsel. The prosecutor should scrupulously avoid any comment on a defendant's right to remain silent.

(d) When the prosecutor has reason to believe that a portion of the opening statement may be objectionable, the prosecutor should raise that point with defense counsel and, if necessary, the court, in advance. Similarly, visual aids or exhibits that the prosecutor intends to use during opening statement should be shown to defense counsel in advance.

## **Standard 3-6.6 Presentation of Evidence**

(a) The prosecutor should not offer evidence that the prosecutor does not reasonably believe to be true, whether by documents, tangible evidence, or the testimony of witnesses. When a prosecutor has reason to doubt the truth or accuracy of particular evidence, the prosecutor should take reasonable steps to determine that the evidence is reliable, or not present it.

(b) If the prosecutor reasonably believes there has been misconduct by opposing counsel, a witness, the court or other persons that affects the fair presentation of the evidence, the prosecutor should challenge the perceived misconduct by appealing or objecting to the court or through other appropriate avenues, and not by engaging in retaliatory conduct that the prosecutor knows to be improper.

(c) During the trial, if the prosecutor discovers that false evidence or testimony has been introduced by the prosecution, the prosecutor should take reasonable remedial steps. If the witness is still on the stand, the prosecutor should attempt to correct the error through further examination. If the falsity remains uncorrected or is not discovered until the witness is off the stand, the prosecutor should notify the court and opposing counsel for determination of an appropriate remedy.

(d) The prosecutor should not bring to the attention of the trier of fact matters that the prosecutor knows to be inadmissible, whether by offering or displaying inadmissible evidence, asking legally objectionable questions, or making impermissible comments or arguments. If the prosecutor is uncertain about the admissibility of evidence, the prosecutor should seek and obtain resolution from the court before the hearing or trial if possible, and reasonably in advance of the time for proffering the evidence before a jury.

(e) The prosecutor should exercise strategic judgment regarding whether to object or take exception to evidentiary rulings that are materially adverse to the prosecution, and not make every possible objection. The prosecutor should not make objections without a reasonable basis, or for improper reasons such as to harass or to break the flow of opposing counsel's

presentation. The prosecutor should make an adequate record for appeal, and consider the possibility of an interlocutory appeal regarding significant adverse rulings if available.

(f) The prosecutor should not display tangible evidence (and should object to such display by the defense) until it is admitted into evidence, except insofar as its display is necessarily incidental to its tender, although the prosecutor may seek permission to display admissible evidence during opening statement. The prosecutor should avoid displaying even admitted evidence in a manner that is unduly prejudicial.

## **Standard 3-6.7 Examination of Witnesses in Court**

(a) The prosecutor should conduct the examination of witnesses fairly and with due regard for dignity and legitimate privacy concerns, and without seeking to intimidate or humiliate a witness unnecessarily.

(b) The prosecutor should not use cross-examination to discredit or undermine a witness's testimony, if the prosecutor knows the testimony to be truthful and accurate.

(c) The prosecutor should not call a witness to testify in the presence of the jury, or require the defense to do so, when the prosecutor knows the witness will claim a valid privilege not to testify. If the prosecutor is unsure whether a particular witness will claim a privilege to not testify, the prosecutor should alert the court and defense counsel in advance and outside the presence of the jury.

(d) The prosecutor should not ask a question that implies the existence of a factual predicate for which a good faith belief is lacking.

## **Standard 3-6.8 Closing Arguments to the Trier of Fact**

(a) In closing argument to a jury (or to a judge sitting as trier of fact), the prosecutor should present arguments and a fair summary of the evidence that proves the defendant guilty beyond reasonable doubt. The prosecutor may argue all reasonable inferences from the evidence in the record, unless the prosecutor knows an inference to be false. The prosecutor should, to the extent time permits, review the evidence in the record before presenting closing argument. The prosecutor should not knowingly misstate the evidence in the record, or argue inferences that the prosecutor knows have no good-faith support in the record. The prosecutor should scrupulously avoid any reference to a defendant's decision not to testify.

(b) The prosecutor should not argue in terms of counsel's personal opinion, and should not imply special or secret knowledge of the truth or of witness credibility.

(c) The prosecutor should not make arguments calculated to appeal to improper prejudices of the trier of fact. The prosecutor should make only those arguments that are consistent with the trier's duty to decide the case on the evidence, and should not seek to divert the trier from that duty.

(d) If the prosecutor presents rebuttal argument, the prosecutor may respond fairly to arguments made in the defense closing argument, but should not present or raise new issues. If the prosecutor believes the defense closing argument is or was improper, the prosecutor should timely object and request relief from the court, rather than respond with arguments that the prosecutor knows are improper.

## **Standard 3-6.9 Facts Outside the Record**

When before a jury, the prosecutor should not knowingly refer to, or argue on the basis of, facts outside the record, unless such facts are matters of common public knowledge based on ordinary human experience, or are matters of which a court clearly may take judicial notice, or are facts the prosecutor reasonably believes will be entered into the record at that proceeding. In a nonjury context the prosecutor may refer to extra-record

facts relevant to issues about which the court specifically inquires, but should note that they are outside the record.

## **Standard 3-6.10 Comments by Prosecutor After Verdict or Ruling**

(a) The prosecutor should respectfully accept acquittals. Regarding other adverse rulings (including the rare acquittal by a judge that is appealable), while the prosecutor may publicly express respectful disagreement and an intention to pursue lawful options for review, the prosecutor should refrain from public criticism of any participant. Public comments after a verdict or ruling should be respectful of the legal system and process.

(b) The prosecutor may publicly praise a jury verdict or court ruling, compliment government agents or others who aided in the matter, and note the social value of the ruling or event. The prosecutor should not publicly gloat or seek personal aggrandizement regarding a verdict or ruling.

## **PART VII: POST-TRIAL MOTIONS AND SENTENCING**

### **Standard 3-7.1 Post-trial Motions**

The prosecutor should conduct a fair evaluation of post-trial motions, determine their merit, and respond accordingly and respectfully. The prosecutor should not oppose motions at any stage without a reasonable basis for doing so.

### **Standard 3-7.2 Sentencing**

(a) The severity of sentences imposed should not be used as a measure of a prosecutor's effectiveness.

(b) The prosecutor should be familiar with relevant sentencing laws, rules, consequences and options, including alternative non-imprisonment sentences. Before or soon after charges are filed, and throughout the pendency of the case, the prosecutor should evaluate potential consequences of the prosecution and available sentencing options, such as forfeiture, restitution, and immigration effects, and be prepared to actively advise the court in sentencing.

(c) The prosecutor should seek to assure that a fair and informed sentencing judgment is made, and to avoid unfair sentences and disparities.

(d) In the interests of uniformity, the prosecutor's office should develop consistent policies for evaluating and making sentencing recommendations, and not leave complete discretion for sentencing policy to individual prosecutors.

(e) The prosecutor should know the relevant laws and rules regarding victims' rights, and facilitate victim participation in the sentencing process as the law requires or permits.

## **Standard 3-7.3 Information Relevant to Sentencing**

(a) The prosecutor should assist the court in obtaining complete and accurate information for use in sentencing, and should cooperate fully with the court's and staff's presentence investigations. The prosecutor should provide any information that the prosecution believes is relevant to the sentencing to the court and to defense counsel. A record of such information provided to the court and counsel should be made, so that it may be reviewed later if necessary. If material incompleteness or inaccuracy in a presentence report comes to the prosecutor's attention, the prosecutor should take steps to present the complete and correct information to the court and defense counsel.

(b) The prosecutor should disclose to the defense and to the court, at or before the sentencing proceeding, all information that tends to mitigate the sentence and is known to the prosecutor, unless the prosecutor is relieved of this responsibility by a court order.

(c) Prior to sentencing, the prosecutor should disclose to the defense any evidence or information it provides, whether by document or orally, to the court or presentence investigator in aid of sentencing, unless contrary to law or rule in the jurisdiction or a protective order has been sought.

## **PART VIII: APPEALS AND OTHER CONVICTION CHALLENGES**

### **Standard 3-8.1 Duty To Defend Conviction Not Absolute**

The prosecutor has a duty to defend convictions obtained after fair process. This duty is not absolute, however, and the prosecutor should temper the duty to defend with independent professional judgment and discretion. The prosecutor should not defend a conviction if the prosecutor believes the defendant is innocent or was wrongfully convicted, or that a miscarriage of justice associated with the conviction has occurred.

### **Standard 3-8.2 Appeals -- General Principles**

(a) All prosecutors should be sufficiently knowledgeable about appellate practice to be able to make a record sufficient to preserve issues and arguments for appeal, and should make such a record at the trial court level.

(b) When the prosecutor receives an adverse ruling, the prosecutor should consider whether it may be appealed. If the ruling may be appealed, the prosecutor should consider whether an appeal should be filed, and refer it to an appellate prosecutor if appropriate for decision.

(c) When considering whether an adverse ruling should be appealed, the prosecutor should evaluate not only the legal merits, but also whether it is in the interests of justice to pursue such an appeal, taking into account the benefits to the prosecution, the judicial system, and the public, as well as the costs of the appellate process and of delay to the prosecution, defendant, victims and witnesses.

(d) A prosecutor handling a criminal appeal should know the specific rules, practices and procedures that govern appeals in the jurisdiction.

(e) The prosecutor's office should designate one or more prosecutors in the office to develop expertise regarding appellate law and procedure, and should develop contacts with other offices' prosecutors who have such expertise. The prosecutor's office should develop consistent policies and positions regarding issues that are common or recurring in the appellate process or court. The prosecutor's office should regularly notify its prosecutors and law enforcement agents about new developments in the law or judicial decisions, and should provide regular training to such personnel on such topics.

(f) A prosecutor handling a criminal appeal who was not counsel in the trial court should consult with the trial prosecutor, but should exercise independent judgment in reviewing the record and the defense arguments. The appellate prosecutor should not make or oppose arguments in an appeal without a reasonable legal basis.

## **Standard 3-8.3 Responses to New or Newly-Discovered Evidence or Law**

If a prosecutor learns of credible and material information creating a reasonable likelihood that a defendant was wrongfully convicted or sentenced or is actually innocent, the prosecutor should comply with ABA Model Rules of Professional Conduct 3.8(g) and (h). The prosecutor's office should develop policies and procedures to address such information, and

take actions that are consistent with applicable law, rules, and the duty to pursue justice.

## **Standard 3-8.4 Challenges to the Effectiveness of Defense Counsel**

(a) In any post-conviction challenge to the effectiveness of defense counsel, the prosecutor should be cognizant of the defendant's potential attorney-client privilege with former defense counsel as well as former defense counsel's other ethical or legal obligations, and not seek to abrogate such privileges or obligations without an unambiguous legal basis, or court order.

(b) If a prosecutor observes, at any stage of a criminal proceeding, defense counsel conduct or omission that might reasonably constitute ineffective assistance of counsel, the prosecutor should take reasonable steps to preserve the defendant's right to effective assistance as well as the public's interest in obtaining a valid conviction, while not intruding on a defendant's constitutional right to counsel. During an ongoing defense representation, the prosecutor should not express concerns regarding possible ineffective assistance on the public record without an unambiguous legal basis or court order, and should not communicate any such concerns directly to the defendant.

## **Standard 3-8.5 Collateral Attacks on Conviction**

If required to respond to a collateral attack on a conviction, the prosecutor should consider all lawful responses, including applicable procedural or other defenses. The prosecutor need not, however, invoke every possible defense to a collateral attack, and should consider potential negotiated dispositions or other remedies, if the prosecutor and the prosecutor's office reasonably conclude that the interests of justice are thereby served.

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