Laws and Rules on Confidentiality and Conflicts of Interest for US Prosecutors

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ABA Rules
(DoJ lawyers)

DOJ Supplemental Regulations
(DoJ personnel)

Standards of Ethical Conduct
(executive employees)

Federal Statutes
(applicable to all federal employees)
Federal Statutes
18 U.S.C. §§ 202 to 209

• “Switching Sides” Statutes: prohibit contacting former agency and/or representing adverse party for various lengths of time, depending on degree of involvement.

• Negotiating With Private Sector: cannot take official action on matter affecting financial interests of prospective employer.
Executive Orders and Federal Regulations

- Executive Order 12674 on Principles of Ethical Conduct (as amended by EO 12731)
- Uniform Standards of Ethical Conduct for Employees of the Executive Branch, 5 Code of Federal Regulations, Part 2635
- Department of Justice regulations, 5 CFR Part 3801
ABA Ethical Standards for Prosecutors

- “Black letter” standards approved by American Bar Association’s House of Delegates.
- Published with commentary in *ABA Standards for Criminal Justice: Prosecution Function and Defense Function*.
- Has both confidentiality and conflict of interest provisions.
Non-Public Information

A prosecutor may not:

• engage in a financial transaction
• using nonpublic information
• nor allow the use of such information to further his private interests or those of another.

Nonpublic information is information an employee gains on the job which has not been made available to the general public and is not authorized to be made available upon request.

5 C.F.R. § 2635.703
Confidentiality
Confidentiality in the Investigative Stage

- **Grand jury**: 23 citizens to whom prosecutor presents summary of case, through whom prosecutor subpoenas witnesses/documents, and from whom prosecutor seeks determination that there is probable cause.

- **Origins**: King Henry’s Assize of Clarendon (1166): each county must send forward 12 good men to point out suspected criminals.

- **Confidentiality**: Prosecutor may not disclose proceedings and must ensure that agents who receive evidence from grand jury keep it secret.
Duty of Confidentiality for Other Information?

- Duty of confidentiality not clearly established.
- Recent incident: AUSA in Thunder Dome investigation was at home reviewing tape of FBI undercover sting. Two friends dropped by. One was a lawyer. They and his sister watched the video with him for about ten minutes. AUSA wrote a letter to the court disclosing the incident.
Duty of Confidentiality?

- Geoffrey Hazard: drafter of Model Rules of Professional Conduct and U. Penn law profess—

- "A lawyer has a duty to maintain confidentiality of information relating to the representation of a client. His client here is the United States."
Duty of Confidentiality?

- Bruce A. Green, former federal prosecutor and Fordham University law professor—
  - “It's contrary to everything prosecutors are told about the importance of the confidentiality of ongoing undercover investigations.” "It had the risk of compromising the investigation" and "violated the duty of confidentiality that the prosecutor owed to the government."
ABA Standards: Disclosure Rules

- **Adverse authority:** Unfavorable, controlling case law known to the prosecutor must be disclosed to the Court. 3-2.8(d).

- **Disclosure to victims and witnesses:** they should be given information about status of case if they request it. 3-3.2(e).
ABA Standards
Disclosure Rules (cont.)

- **Exculpatory statements**: Should not fail to disclose to grand jury, before trial or at sentencing, evidence tending to negate guilt or mitigate offense. 3-3.6(b).

- **Extrajudicial statements**: No extrajudicial statements that have reasonable likelihood of prejudicing case. 3-1.4.
Conflict of Interest
Gifts: Prohibited Sources

No gifts can be solicited or accepted from “prohibited sources” because of prosecutor’s official position. These include parties:

• Seeking official action by the employee's agency;
• Doing or seeking to do business with the employee's agency;
• Regulated by the employee's agency; or
• Substantially affected by the performance of the employee's duties.
Acceptable Gifts

An employee may accept:

• Gifts based on a personal relationship when it is clear that the motivation is not his official position.

• Gifts of $20 or less per occasion, not to exceed $50 in a year from one source.

• Discounts and similar benefits offered to a broad class, including a broad class of government employees.
Outside Employment

Regulations for Executive Officials:

- Teaching, Speaking and Writing
  - An employee may not accept a fee for teaching, speaking or writing that relates to his official duties.
  - However, an employee may be paid for teaching courses at a law school or other educational institution.
Standard 3-1.3
Conflicts of Interest

(a) A prosecutor should avoid a conflict of interest with respect to his or her official duties.

(b) A prosecutor should not represent a defendant in criminal proceedings in a jurisdiction where he is she is also employed as a prosecutor.
Standard 3-1.3(c)

Handling Matters Involving Former Clients

A prosecutor should not, except as law may otherwise expressly permit, participate in a matter in which he or she participated personally and substantially while in private practice or non-governmental employment unless under applicable law no one is, or by lawful delegation may be, authorized to act in the prosecutor’s stead in the matter.
Standard 3-1.3(d)

Using Information from Former Clients

A prosecutor who has formerly represented a client in a matter in private practice should not thereafter use information obtained from that representation to the disadvantage of the former client unless the rules of the attorney-client confidentiality do not apply or the information has become generally known.
Standard 3-1.3(e)
Negotiation With Potential Employers

A prosecutor should not, except as the law may otherwise permit, negotiate for private employment with any person who is involved as an accused or as an attorney in a matter in which the prosecutor is participating personally and substantially.
Standard 3-1.3(f)
Personal Interests

A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.
Standard 3-1.3(g)

Connections to Defense Attorney

➢ Do not participate in prosecution where defense lawyer is a close relative, or with whom one has a significant financial or personal relationship without supervisor’s approval.
Standard 3-1.3(h)
Referrals to Defense Attorney

➢ Do not recommend defense counsel to accused or witness unless asked.

➢ Do not comment on counsel’s abilities unless asked.
Conflict of Interest Statutes:
18 U.S.C. § 203: Representation

Prohibits during term of service:
1. Current federal employees from:
2. Demanding, accepting or agreeing to accept compensation
3. For “representational services”
4. In a matter in the United States is a party, or has a direct and substantial interest.
Section 203 (cont.)

- **Purpose:** to ensure undivided loyalty and unclouded judgment of federal employees in their official duties.

- **Penalty:** Knowing violation—up to 1 year
  Willful violation—up to 5 years
  Same penalty applies to 18 U.S.C. §§ 205, 207, 208 & 209
  (to be discussed); see 18 U.S.C. § 216
Conflict of Interest Statutes:
18 U.S.C. § 205: Claims

Prohibits:
1. Current federal employees from:
2. Acting as an agent or attorney
3. In prosecuting any claim either
   • Against the United States, or
   • In a matter in which the United States has a direct and substantial interest.
- No compensation requirement.
Purpose of Section 205

- To prevent government employees from making use of private government information to assist claimant against the United States.
- To prevent government employees from soliciting claimants whom they learn about through their jobs, and offering to represent them.
Example of § 205 Case

- Air Force officer and EPA law clerk attended night classes at Georgetown Law School. They took part in lawyer-supervised workshop offering free legal services to poor people. Judge barred them from making appearance. Court of Appeals affirmed. Purpose is to protect both government and client. United States v. Bailey, 498 F.2d 677 (D.C. Cir. 1974).
18 U.S.C. § 207(a)(1)

“Taking File Across the Aisle”

Permanently prohibits:
1. Former employee from
2. Serving as a representative
3. In a matter in which the former employee participated personally and substantially as a government employee, and
4. In which the United States is a party or has a direct and substantial interest.
18 U.S.C. § 207(a)(2)  
Switching Sides by Supervisor  

Prohibits w/i two years from end of service:  
1. Former employee from  
2. Knowingly serving as a representative  
3. In a matter in which the former employee knows or should know  
4. Was under her responsibility  
5. During the last year of federal service.
18 U.S.C. § 207(c)  
“Lobbying By Former Boss”

Prohibits for one year from end of service:
1. Former senior-level Executive Branch employee from
2. Contacting their former agency
3. To seek action in any matter.
18 U.S.C. § 207(d)

“Lobbying By Former Big Boss”

Prohibits for one year from end of service:
1. Former top-level official from
2. Contacting any government agency
3. To seek official action.
Example of Switching Sides

“Switching Sides—Small Role”: Less than 2 years after retiring, former IRS officer attended meetings between taxpayers who hired him and tax officer to whom files had been reassigned when he retired. Mere presence at meeting was enough to constitute “otherwise representing.” US v. Coleman, 805 F.2d 474 (3d Cir. 1986).
Conflict of Interest Statutes:

18 U.S.C. § 208: Financial Interest

Prohibits government officials from:

1. Participating personally and substantially
2. Through decision, approval, investigation, rendering advice or otherwise
3. In a proceeding, arrest or other matter
4. In which the employee or her immediate relative, partner, or prospective employer has a financial interest.
Example of Section 208
“Financial Interest” Case

Air Force Reserve Officer worked on project to sell surplus cargo airplanes to Mexico. He met with US company bidding to upgrade runways there. During series of meetings, he applied for a job with the company. His actions constituted “negotiations” with prospective employer. US v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991).
Conflict of Interest Statutes:

Prohibits:
1. Government employees from
2. Receiving any salary or contribution
3. As compensation for her official services
4. From any source other than the U.S. government (or a state, county or city government)
Examples of § 209 Cases

- Customs inspectors at Niagara Falls told bridge owner that they would only work on Sundays and holidays if he paid extra salary costs and indemnified US against loss. This violated predecessor statute. *Int’l Railway Co. v. Davidson*, 257 U.S. 506 (1922).

- Assistant Secretary for HUD took trip abroad. Cost was paid by promoters of auto insurance plan unrelated to HUD. Reversed; no connection to government services. *US v. Muntain*, 610 F.2d 964 (1979).
Questions?