Chapter 3

The Prosecution Function

Kenneth J. Hodson, Chairman
Standing Committee on Association Standards for Criminal Justice

Keith Mossman, Chairman
Task Force on Prosecution Function

Norman Lefstein, Reporter

Approved by ABA House of Delegates
February 12, 1979
Task Force on the Prosecution Function

Keith Mossman, Chairman
Attorney, Mossman & Grote, Vinton, Iowa

David A. Horowitz
Senior Trial Attorney, Office of Public Defender, Los Angeles County

Richard H. Kuh
Attorney, Warshaw, Burstein, Cohen, Schlesinger & Kuh, New York City; former District Attorney for New York County

Herbert S. Miller
Co-Director, Institute of Criminal Law & Procedure, Georgetown University Law Center, Washington, D.C.

James J. Richards
Chief Judge, Superior Court of Lake County, Indiana; Past Chairman, ABA National Conference of State Trial Judges; Chairman, ABA Committee to Implement Standards of Judicial Administration

Walter F. Rogosheske
Associate Justice, Supreme Court of Minnesota

Norman Leibstein, Reporter
Professor, University of North Carolina School of Law; former Director, Public Defender Services for Washington, D.C.; former Assistant U.S. Attorney, Washington, D.C.
Chapter 3

The Prosecution Function

Introduction

PART I. GENERAL STANDARDS
3-1.1 The function of the prosecutor
3-1.2 Conflicts of interest
3-1.3 Public statements
3-1.4 Duty to improve the law

PART II. ORGANIZATION OF THE
PROSECUTION FUNCTION
3-2.1 Prosecution authority to be vested in a public official
3-2.2 Interrelationship of prosecution offices within a state
3-2.3 Assuring high standards of professional skill
3-2.4 Special assistants, investigative resources, experts
3-2.5 Prosecutor's handbook; policy guidelines and procedures
3-2.6 Training programs
3-2.7 Relations with police
3-2.8 Relations with the courts and bar
3-2.9 Prompt disposition of criminal charges
3-2.10 Supersession and substitution of prosecutor

PART III. INVESTIGATION FOR
PROSECUTION DECISION
3-3.1 Investigative function of prosecutor
3-3.2 Relations with prospective witnesses
3-3.3 Relations with expert witnesses
3-3.4 Decision to charge
3-3.5 Relations with grand jury
3-3.6 Quality and scope of evidence before grand jury
INTRODUCTION

The first edition of the standards relating to the function of the prosecutor (and the companion standards on the function of the criminal defense lawyer) represented the first national effort to collect in an organized way guidelines that have long been adhered to by the best prosecutors and best defense advocates. Because nearly ten years had elapsed since the first edition of the Prosecution Function standards was approved by the ABA, it was initially believed that it might be necessary to make major changes. However, as each standard was reviewed, debated, and compared with court decisions and recommendations of other groups, it was decided that most of the original black letter stan-
The Prosecution Function

dards have stood the test of time. There are, of course, changes from the first edition, but they are for the most part relatively minor and blend well into the format of the standards as originally issued.

Like the first edition, the subjects discussed in these standards include the organization of the prosecution function (part II) and span all of the activities in which prosecutors engage. Thus, parts III-VI of the standards pertain to the prosecution role in the investigation of cases and the decision to prosecute, plea negotiations, trial, and sentencing. Part I contains general standards that do not neatly fit into any other subdivision.

The black letter standards themselves also follow the format of the original edition of the Prosecution Function standards. Thus, the standards often refer to prosecutorial activity as "unprofessional conduct," meaning that the conduct "is or should be made subject to disciplinary sanctions pursuant to codes of professional responsibility." Where the term "unprofessional conduct" is not used, "the standard is intended as a guide to honorable professional conduct and performance." See standard 3-1.1(e).

To a considerable degree, the changes that have been made in these standards are attributable to: (1) changes in concepts of what constitutes the most acceptable prosecution practice, (2) significant legal developments, or in several instances, (3) errors in phraseology contained in the first edition.

Standard 3-3.2(b) is an example of the first type of change. In the first edition, this standard simply authorized a prosecutor to advise a witness of the privilege against self-incrimination when the prosecutor knew or had reason to believe that the witness was the subject of a criminal prosecution. This has been changed, for reasons explained in the standard's commentary, so that it now provides that a prosecutor "should" advise such a witness of the privilege against self-incrimination.

The second type of change is illustrated by standard 3-4.2(c), which states that "[i]t is unprofessional conduct for a prosecutor to fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present." The original standard sanctioned the breach of plea agreements whenever prosecutors found themselves "unable to fulfill an understanding previously agreed upon in plea discussions." The change in standard 3-4.2(c) was necessitated by the Supreme Court's 1971 decision in Santobello v. New York, which held that a defendant is entitled to relief when a prosecutor breaches an express plea agreement.
The Prosecution Function

Standard 3-5.7(c) is an example of the third type of change—an error in phraseology in the first edition. The original standard stated that a prosecutor should not ask on cross-examination "a question which implies the existence of a factual predicate which the examiner knows he cannot support by evidence." But the presence of evidence to support a factual predicate on cross-examination is not the generally accepted evidentiary test; the test is whether the examiner has a "good faith" belief in the existence of the factual predicate, and the black letter standard has been changed accordingly.

PART I. GENERAL STANDARDS

Standard 3-1.1. The function of the prosecutor

(a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction.

(b) The prosecutor is both an administrator of justice and an advocate. The prosecutor must exercise sound discretion in the performance of his or her functions.

(c) The duty of the prosecutor is to seek justice, not merely to convict.

(d) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined in the codes and canons of the legal profession, and in this chapter. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in standard 4-1.4.

(e) As used in this chapter, the term "unprofessional conduct" denotes conduct which, in either identical or similar language, is or should be made subject to disciplinary sanctions pursuant to codes of professional responsibility in force in each jurisdiction. Where other terms are used, the standard is intended as a guide to honorable professional conduct and performance. These standards are not intended as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.
History of Standard

There are stylistic changes only.

Related Standards

ABA, Code of Professional Responsibility, Preliminary Statement, EC7-13, EC9-6
ABA, Standards for Criminal Justice 4-1.1(b), (e), (f), 4-1.4(a)
NAC, Community Crime Prevention 10.1
NDAA, National Prosecution Standards 25.1

Commentary

The prosecutor plays a critical role in the criminal justice system. All serious criminal cases require the participation of three entities: a judge, counsel for the prosecution, and counsel for the accused, and absent any one (barring valid waiver of counsel), the court is incomplete. In short, a “court” must be viewed as a structure with three legs requiring the support of all three.

Although the prosecutor operates within the adversary system, it is fundamental that the prosecutor’s obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public.1 Thus, the prosecutor has sometimes been described as a “minister of justice” or as occupying a quasi-judicial position. The prosecutor may also be characterized as an administrator of justice, since the prosecutor acts as a decision maker on a broad policy level and presides over a wide range of cases as director of public prosecutions. The prosecutor also has responsibility for deciding whether to bring charges and, if so, what charges to bring against the accused, as well as deciding whether to prosecute or dismiss charges or to take other appropriate actions in the interest of justice. Since the prosecutor bears a large share of the responsibility for determining which cases are taken into the courts, the character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretionary powers.

The legal profession must continue to develop an awareness of the importance of a vigorous, fair, and efficient prosecution system and give

---

high priority to the sponsorship and support of those measures necessary to implement this objective. It is the duty of the prosecutor, meanwhile, to become intimately familiar with and adhere to the legal and ethical standards governing the performance of official duties. Like other lawyers, the prosecutor is subject to disciplinary sanctions for conduct prohibited by applicable codes of professional responsibility. Where the standards in this chapter condemn certain conduct as unprofessional, it is recommended that such standards be incorporated into codes of professional responsibility, unless, as is sometimes the case, the conduct is already prohibited by such codes. In other respects, these standards are intended to advise and assist the prosecutor in the honorable and professional performance of prosecutorial duties. To this end, in situations of doubt as to the proper course of action, the prosecutor should make use of the guidance of the advisory council on professional conduct that these standards recommend be established in each jurisdiction. In addition, the prosecutor should seek the aid of the organized bar in each community to carry out a program of study and action to adapt these standards to local needs and to implement them.

Standard 3-1.2. Conflicts of interest

A prosecutor should avoid the appearance or reality of a conflict of interest with respect to official duties. In some instances, as defined in codes of professional responsibility, failure to do so will constitute unprofessional conduct.

History of Standard

There are stylistic changes only.

Related Standards

ABA, Code of Professional Responsibility DR5-101
ABA, Standards for Criminal Justice 4-3.5

2. See standard 4-1.4.
NAC, Community Crime Prevention 10.1(2)
NDAA, National Prosecution Standards 1.3(A), (B), 3.2, 25.2(A)

Commentary

Standard 3-2.3(b) recommends that the offices of chief prosecutor and staff be full-time occupations. The commentary to that standard points out that a conflict of interest may arise from part-time devotion to the duties of public prosecutor. The instant standard complements this provision.

When the possibility of a conflict of interest arises, the prosecutor should recuse himself or herself and make appropriate arrangements for the handling of the particular matter by other counsel in accordance with the principles contained in this chapter.\(^1\) It is of the utmost importance that the prosecutor avoid participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of the office.

Standard 3-1.3. Public statements

(a) The prosecutor should not exploit the office by means of personal publicity connected with a case before trial, during trial, or thereafter.

(b) The prosecutor should comply with the chapter on Fair Trial and Free Press in these standards. In some instances, as defined in codes of professional responsibility, failure to do so will constitute unprofessional conduct.

(c) In order to assure a fair trial for the accused, the prosecutor and police should cooperate in achieving compliance with the chapter on Fair Trial and Free Press of these standards and codes of professional responsibility.

History of Standard

Paragraph (c) is new. In addition, there are stylistic changes.

Related Standards

ABA, Code of Professional Responsibility DR7-107
ABA, Standards for Criminal Justice 4-1.3, 8-1.1, 18-6.3(g)

\(^1\) See standard 3-2.10.
Commentary

The prosecutor’s responsibility to the administration of justice requires that nothing be done that will impair the right of the accused to fair and impartial treatment in every case. As the representative of the public interest, the prosecutor has the public trust of seeing that justice is done. The prosecutor should not exploit the power and prestige of the office for purposes of personal aggrandizement. Circumspection in this regard is most acutely required in cases that excite public interest. The very nature of the prosecutor’s function as an administrator of justice requires that the prosecutor unselfishly avoid personal publicity in connection with the cases he or she prosecutes.

The problem of publicity as it affects the administration of criminal justice is dealt with in the chapter on Fair Trial and Free Press. That chapter contains detailed standards governing the role of attorneys in public discussion of criminal cases.\(^1\) It is incumbent upon the prosecutor to know and comply with those standards.

Consistent with paragraphs (a) and (b), paragraph (c) recommends that the prosecutor cooperate with police in achieving compliance with the pretrial and trial publicity standards applicable to lawyers. While law enforcement officers are normally not required to follow the admonitions of a prosecutor in such matters, a prosecutor is often in an excellent position to influence police conduct. The recommendation in this standard is in accord with the National Advisory Commission, which urges that “[t]he prosecutor . . . maintain regular liaison with the police department in order to provide legal advice to the police, to identify mutual problems and to develop solutions to those problems.”\(^2\)

Standard 3-1.4. Duty to improve the law

It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When

---

1. See standard 8-1.1.
inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.

**History of Standard**

There are stylistic changes only.

**Related Standards**

ABA, Code of Professional Responsibility EC8-1, EC8-2
NDAA, National Prosecution Standards 1.3(D), 2.3

**Commentary**

As the public official in constant contact with the day-to-day administration of criminal justice, the prosecutor occupies a unique position to influence the improvement of the law. As one national study has noted, the prosecutor "affects the development of legal rules by his arguments in court. He can help bring about needed reform by pressing for changes in bail practices, for example, or in procedures for the appointment of counsel."\(^1\) Although the legal profession does not bear sole responsibility for law reform, it has a clear duty in this respect.\(^2\) In recent years, moreover, increasing numbers of lawyers have recognized their responsibility in the administration of criminal justice. Prosecutors should take advantage of this climate of professional concern by assuming leadership to improve the quality and efficiency of criminal justice. It is in the public interest for the prosecutor to foster good working relationships with the defense bar, including defender agencies, and to participate in such activities as criminal law sections of the organized bar and joint seminars on criminal law and procedure. Reforms and improvements in the criminal law will more readily gain the approval of legislative bodies and the public if they are the joint work product of both prosecutors and defense lawyers.

---

\(^1\) PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 147 (1967).

\(^2\) ABA, CODE OF PROFESSIONAL RESPONSIBILITY EC8-2.
PART II. ORGANIZATION OF THE PROSECUTION FUNCTION

Standard 3-2.1. Prosecution authority to be vested in a public official

The prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline.

History of Standard
There are no changes.

Related Standards
NDAA, National Prosecution Standards 1.1(A), 1.2

Commentary
The concept that the state has a special interest in the prosecution of criminal cases that requires the presence of a professionally trained advocate arose during the formative period of American law. Earlier, in England, it had been assumed that prosecution was a matter for the victim, the victim's family, or friends. The idea that the criminal law, unlike other branches of the law such as contracts and property, is designed to vindicate public rather than private interests is now firmly established. The participation of a responsible public officer in the decision to prosecute and in the prosecution of the charge gives greater assurance that the rights of the accused will be respected. Almost all prosecutions of a serious nature in this country now involve a professional prosecutor. The absence of a trained prosecution official risks abuse or casual and unauthorized administrative practices and dispositions that are not consonant with our traditions of justice.

In a few jurisdictions a private party may institute criminal proceed-

ings without the authorization or approval of the prosecuting attorney.² When a check is not provided by the participation of a public prosecutor, however, there is danger of the vindictive use of the criminal law process. Standard 3-2.1 is designed to discourage the practice of police or private prosecution by the adoption of appropriate legislation to require the participation of a prosecutor in all criminal cases, except regulatory violations of a minor nature.

Private prosecution, as described above, should be distinguished from the process available in some jurisdictions whereby a private citizen may file a complaint if the prosecutor refuses to act. It is often argued that a private citizen should have this right if the prosecutor refuses to proceed. Against this view it is said that efficient prosecution requires the participation of a trained prosecutor at the initial stage of decisions on prosecution. This standard is not intended to discourage the adoption of a system under which a complainant may move for prosecution before a magistrate when a prosecutor has declined to proceed, provided this right is limited to significant criminal conduct and provided that the actual conduct of the case is by a public prosecutor. Under some systems a citizen may take a complaint directly to a grand jury, and such a “safety valve” has much to commend it.

There has been increasing recognition of the desirability of transferring drunkenness offenses, minor traffic offenses, and similar matters out of the traditional criminal processes and into some form of administrative process. Thus, the ALI Model Penal Code recommends the creation of a category of “violations” below that of misdemeanors and not subject to either the consequences or the procedures of the criminal law.³ Even where this has not yet been done, such matters often can be prosecuted without the aid of a professional public prosecutor. Thus relieved of handling these categories of regulatory violations, a properly staffed prosecution office should be better able to ensure that all other prosecutions are initiated only after evaluation by a professionally trained prosecutor and that the prosecution is conducted by such prosecutor.

---


³ ALI, Model Penal Code §1.04(5) and comment (Tent. Draft No. 2, 1954). See also NAC, Courts 8.2 NDAA, National Prosecution Standards 19.1(B).
Standard 3-2.2. Interrelationship of prosecution offices within a state

(a) Local authority and responsibility for prosecution is properly vested in a district, county, or city attorney. Wherever possible, a unit of prosecution should be designed on the basis of population, caseload, and other relevant factors sufficient to warrant at least one full-time prosecutor and the supporting staff necessary to effective prosecution.

(b) In some states, conditions such as geographical area and population may make it appropriate to create a statewide system of prosecution in which the state attorney general is the chief prosecutor and the local prosecutors are deputies.

(c) In all states, there should be coordination of the prosecution policies of local prosecution offices to improve the administration of justice and assure the maximum practicable uniformity in the enforcement of the criminal law throughout the state. A state council of prosecutors should be established in each state.

(d) In cases where questions of law of statewide interest or concern arise which may create important precedents, the prosecutor should consult and advise with the attorney general of the state.

(e) A central pool of supporting resources and manpower, including laboratories, investigators, accountants, special counsel, and other experts to the extent needed, should be maintained by the state government and should be available to all local prosecutors.

History of Standard

There are stylistic changes only.

Related Standards

NAC, Courts 12.1, 12.4
NDAA, National Prosecution Standards 2.1
Commentary

Basic Units of Prosecution

Traditionally, the American prosecutor is a local official whose area of responsibility is limited to a particular district, county, or city. Division of prosecutorial responsibility on this basis serves to emphasize the need for the prosecutor to be responsive to local conditions. Familiarity with the community aids the prosecutor in gathering evidence, in allocating resources to the various activities of the office, and in appraising the disposition appropriate to particular offenses and offenders. In most states, in addition to the unit of prosecution responsible for major prosecutions for violations of state law (chiefly felonies), there are prosecutorial offices of lesser territorial scope charged with the prosecution of violations of local ordinances.

The emphasis on a locally functioning prosecutor and a large, if not unlimited, autonomy for such official developed from early American experience with distant crown officials who were not responsive to local attitudes and traditions. What began as valid opposition to nonrepresentation and nonresponsive officialdom took root and became a parochialism that persists today in spite of vastly changed conditions.

There are two major problems with the present system of prosecutorial offices. The first is the lack of coordination among prosecution offices resulting from their autonomy. This matter is treated in paragraph (c) and is discussed below. The other major source of difficulty is the existence of offices serving small territorial areas. Many territorial units are too small in terms of population to support more than a part-time prosecutor. Unfortunately, these small offices cannot provide the investigative resources, the accumulated skill and experience, and the variety of personnel desirable for the optimum functioning of an efficient prosecution office. Nor can they provide opportunities for developing a range of special skills and internal checks and balances within the office. Organization of the prosecution function on a district basis, extending over more than one county, offers the best hope for improving the prosecution structure in areas

1. "In smaller jurisdictions the majority of prosecutors serve part-time, either for financial reasons, or because of lack of need for a full-time prosecutor in a small district, or simply because the prosecutor in that area has always served only part-time." NDAA, National Prosecution Standards 1.3(A), commentary at 12. The subject of part-time prosecutors is discussed further at standard 3-2.3.
with insufficient population to support a substantial office on a county-wide basis alone.

Statewide System

Several states — for example, Alaska, Delaware, and Rhode Island — have statewide systems of prosecution. In Alaska and Rhode Island the attorneys general are given responsibility for all criminal prosecutions and are empowered to appoint assistant attorneys general to aid them in the discharge of their duties.² In Delaware the attorney general is empowered to appoint deputies with statewide powers of prosecution.³ In addition, some studies of the prosecution structure have recommended the establishment of a statewide system.⁴ Because criminal law is largely the creation of state government, there is considerable appeal to this view. However, each state needs to examine its own geography, transportation, and government structure with a view to the adoption of the most desirable system. An example of effective administration on a nationwide basis is the Department of Justice, which functions through approximately 100 appointed district attorneys in more than fifty states and territories, with central direction in the Attorney General in Washington. The possibility of moving to a system of statewide administration of the prosecution function should not be disregarded.

Statewide Coordination

Increased state coordination may provide the only means of overcoming the problems inherent in local autonomy. From the Wickersham Commission Report of the 1930s to the present, every major study of the prosecution function in the United States has concluded that, at a minimum, there is need for greater statewide coordination. As the result of its studies, the ABA Commission on Organized Crime and Law Enforcement proposed in 1952 a Model Department of Justice Act, which was adopted by the National Conference of Commissioners on Uniform State Laws. This model act includes a provision that the chief state prosecuting official "shall consult with and advise the several

⁴ See U.S. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, WICKERSHAM COMMISSION, REPORT ON PROSECUTION 11-14, 38 (No. 4, 1968) (originally published by G.P.O. in 1931 and hereinafter cited as WICKERSHAM COMMISSION REPORT).
prosecuting attorneys in matters relating to the duties of their office" and another authorizing the official "to make studies and surveys of the organization, procedures and methods of operation and administration of all law enforcement agencies within the State. . . ." The act also provides that "[i]t shall be the duty of the several prosecuting attorneys of this State to cooperate with and aid the Attorney General [Director] in the performance of his duties." The President's Crime Commission, in its 1967 report, reiterated these recommendations. In addition, a commission task force report suggested that the state attorney general provide technical and statistical services, engage in training operations, and develop broad policies for the administration of prosecutorial discretion.

The recommendation for the establishment of a state council of prosecutors flows from the successful experience with similar bodies in the judiciary (judicial councils or conferences) and from the prosecution councils that now operate in several states. Each state should provide by statute for the establishment and adequate funding of a council of its officials engaged in the function of prosecution. Meetings of such a council would provide an opportunity for the valuable exchange of experience and ideas among prosecutors and would enhance the likelihood that statewide prosecution policies will be formulated with an understanding of local needs. The suggestion that there be statewide organizations of prosecutors has been endorsed by the National Advisory Commission and the National District Attorneys Association.

Prosecutors should avoid joint participation with laypersons and organizations such as associations of police officers in group activities concerned with problems of law enforcement. This is essential to maintain the detached professional judgment required of prosecutors in such matters and to avoid identification with legislative or other recommendations on which they may be outvoted and which, from the prosecution point of view, may be ill-advised. On such matters of public concern, prosecutors should avoid affiliations that may inhibit them in voicing their independent views.

5. NCCUSL, Model Department of Justice Act §§7, 12.
6. Id. §11(2).
9. NAC, Courts 12.4; NDAA, National Prosecution Standards 2.2.
Consultation with Attorney General

The Model Department of Justice Act authorizes the attorney general to appear in criminal prosecutions on questions of law. The provision is designed to protect the interests of the state and of local prosecutors where issues in a case might create an important precedent. It is recognized, however, that this provision of the model act would not be compatible with the existing systems in many states. To a large degree, the same objective can be achieved pursuant to standard 3-2.2(d), which urges consultation and cooperation among local prosecutors and the attorney general to reach a consensus on questions of law of statewide concern that may arise in criminal prosecutions.

Prosecution Resources Pool

The need for a resources pool on the state level requires no documentation. Few local prosecution offices can support, either in volume of activity or in financial terms, the full complement of technical and professional experts necessary for effective investigation and prosecution under modern conditions. On the federal level, such services are made available to the various United States attorneys through the facilities of the Department of Justice, including the FBI, the Treasury Department, and other agencies, all of which are staffed by highly trained career professionals.

Counsel with experience in certain types of litigation, for example, tax law violations, food and drug law offenses, and specialized types of criminal prosecutions, can also be provided by a state agency to assist in local prosecutions where the local office does not have sufficient resources to develop specialized personnel in these fields. The federal system presents a valuable model in this respect. Where such facilities are already available at the state level, local prosecutors should be encouraged to make full use of them.

Standard 3-2.3. Assuring high standards of professional skill

(a) The function of public prosecution requires highly developed professional skills. This objective can best be achieved by promot-
ing continuity of service and broad experience in all phases of the prosecution function.

(b) Wherever feasible, the offices of chief prosecutor and staff should be full-time occupations.

(c) Professional competence should be the only basis for selection for prosecutorial office. Prosecutors should select their staffs on the basis of professional competence without regard to partisan political influence.

(d) In order to achieve the objective of professionalism and to encourage competent lawyers to accept such offices, compensation for prosecutors and their staffs should be commensurate with the high responsibilities of the office and comparable to the compensation of their peers in the private sector.

**History of Standard**

There is a stylistic change only.

**Related Standards**

NAC, Courts 12.1, 12.2
NDAA, National Prosecution Standards 1.1, 1.3(A), (C), 1.4

**Commentary**

**Career Service**

In an effort to recruit the most competent law school graduates, prosecution offices have emphasized the many opportunities for trial experience that are available to graduates willing to spend a few years as prosecutors. It is indeed true that a young lawyer can acquire wide trial experience in a relatively short period in a prosecution office, but there is a limit to how much turnover of personnel is tolerable and consistent with effective prosecution. The most efficient prosecution offices are built on career-type service.\(^1\) Some chief prosecutors, moreover, will not appoint recent law school graduates unless they are willing to serve for at least three or four years. This policy has demonstrable advantages. A balanced staff of experienced personnel can be achieved by maintai-

ing a continuing cadre of lawyers supplemented by an infusion of young lawyers, some of whom may continue in the office for several years. Career service need not require that all or even a majority of the staff dedicate their professional lives to this one task. Effective prosecution, however, requires continuity of service by a substantial number of lawyers. Career service may be patterned on the United States Department of Justice central staff, which relies on normal attrition and turnover to maintain the desirable infusion of new personnel.

Developing and maintaining a high degree of professional performance in a prosecution office requires a certain degree of continuity at several levels. In a large office, the most important of these levels is the cadre of experienced prosecutors in charge of the various sections, bureaus, or divisions. When there is a chain of personnel receiving continuous experience, periodic changes in the office of chief prosecutor can be smoothly accommodated. Some turnover at lower levels of the staff is probably desirable in order to maintain a steady infusion of “new blood” and new ideas and to supply a source from which senior prosecutors can be promoted.

Full-Time Occupation

An important step in achieving the goal of professionalism is to make the position of prosecutor a full-time occupation. At present, there are still prosecutors who devote only a portion of their professional effort to the duties of their office, which causes many problems. As one study has noted, “[t]he attorneys he deals with as a public officer are the same ones with whom he is expected to maintain a less formal and more accommodating relationship as counsel to private clients. Similar problems may arise in the prosecutor’s dealings with his private clients whose activities may come to his official attention.”2 Apart from the problem of conflicts of interest, which raises ethical problems, there is a great risk that the part-time prosecutor will not give sufficient energy and attention to official duties. Since the part-time prosecutor’s salary is a fixed amount, and his or her total earnings depend on what can be derived from private practice, there is a continuing temptation to give priority to private clients.

There may be some areas of the country in which geographical con-

considerations make it impractical to establish prosecution offices requiring a full-time attorney, but in most parts of the country the area that the prosecutor serves can be enlarged so as to support and warrant the services of a full-time prosecutor. In larger districts where the prosecutor's office consists of more than one attorney, there is no substantial justification for retaining the practice of hiring assistants on a part-time basis. The experience and performance of the United States Department of Justice suggests that even remote and isolated areas can probably be served from a centrally located prosecutor's office without reliance on part-time assistants. The public interest requires that the practice of employing part-time prosecutors be eliminated wherever feasible.

Selection of the Prosecutor and Staff

Opinion has long been divided on the question of whether the office of prosecutor should be appointive or elective. Some studies of the American prosecutor have concluded that the partisan political basis of electing the prosecutor, coupled with the expenses of campaigning for office, has had deleterious consequences for the evenhanded administration of justice and energetic law enforcement. However, more recent evaluations of the elective system note that it has advantages in that it makes the prosecutor more responsive to community needs and provides the prosecutor with an independent political base. The National District Attorneys Association, moreover, expressly favors local election of the chief prosecutor.

Whether the prosecutor is elected or appointed, the ultimate goal is to remove the office from politics. To do this requires the support and cooperation of the bar and political parties. An effort should be made to reach an understanding that the position of public prosecutor should not be subject to the pressures and demands of partisan politics but that nominations are to be based on merit, after consultation with the bar, as is the case with elective judges in many states.

Regardless of the method by which the chief prosecutor is selected, there is no justification for the selection of assistants on any basis other

3. See standard 3-2.2(b) and commentary.
6. NDAA, National Prosecution Standards 1.1(A).
than their fitness for the duties of office. Those considerations that may make it desirable that the chief prosecutor be politically responsible to the public do not extend to assistants. In some areas, these positions have been brought within the scope of career service or a similar system of merit selection and tenure. However, because of the nature of the professional relationships in a prosecutor's office, a career service method of selection should vest adequate discretion in the chief prosecutor to make the selection of assistants from a group of qualified candidates, including the discretion to refuse to make any appointment if dissatisfied with the applicants.

Compensation

The salaries of the chief and assistant prosecutors should befit the dignity, responsibility, and importance of the positions. Salaries should be comparable to those paid for similar services in the private sector of the economy. Both the National Advisory Commission and the National District Attorneys Association recommend that the salary of the chief prosecutor be at least equivalent to that paid to the presiding judge of the court of general trial jurisdiction.\(^7\)

Under no circumstances should prosecutors be paid in part through fees on a case-by-case basis. It is clear that fee systems of remuneration for prosecuting attorneys raise serious ethical and perhaps constitutional problems, and are totally unacceptable.\(^8\)

Standard 3-2.4. Special assistants, investigative resources, experts

(a) Funds should be provided to enable a prosecutor to appoint special assistants from among the trial bar experienced in criminal cases, as needed for the prosecution of a particular case or to assist generally.

(b) Funds should be provided to the prosecutor for the employment of a regular staff of professional investigative personnel and other necessary supporting personnel, under the prosecutor's direct control, to the extent warranted by the responsibilities and

---

\(^7\) NAC, COURTS 12.1; NDAA, NATIONAL PROSECUTION STANDARDS 1.4(C).

scope of the office. The prosecutor should also be provided with funds for the employment of qualified experts as needed for particular cases.

History of Standard
There are stylistic changes only.

Related Standards
NAC, Courts 12.3, 12.4
NDAA, National Prosecution Standards 3.3, 3.4

Commentary

Special Assistant Prosecutors
The nature of the prosecutor’s responsibilities is such that the flow of work through the office does not remain constant at all times. The incidence of crime is not sufficiently predictable to permit reliable calculation of the staff needs at every moment during the year. It is important that the prosecutor have flexibility in meeting this situation, so that the office is not forced to dispose of cases on a basis not fully compatible with the interests of the public merely because of an unusually heavy workload. The employment of qualified assistants on an ad hoc basis is the best remedy for the periodic ebb and flow of prosecution activity. It is particularly desirable that prosecutors be able occasionally to add a temporary special prosecutor for the purpose of trying a particular case or cases.

Investigative and Other Supporting Personnel and Experts
Traditionally, most prosecutors have relied on the police, sheriff, and other law enforcement officers for investigation of crime. Their investigative work necessarily figures in much of the prosecutor’s activity, since in most cases prosecution is initiated as the result of efforts on their part. However, the prosecutor may need to conduct investigations that the police are unable or unwilling to undertake, such as investigations of public officials, including the police themselves. The prosecutor may also need to carry out lengthy or especially technical investigations.
For all of these purposes, the prosecutor should be provided with independent professional investigative personnel who are subject to his or her supervision. Where the size of the office does not permit this, the prosecutor should have access to investigators through a resources pool.¹

In addition to investigative staff, a prosecution office, like any other law office, needs sufficient supporting personnel to permit it to operate efficiently. There is no saving to the taxpayer if relatively highly paid professionals are forced to perform stenographic and clerical duties because of a lack of secretarial personnel. The prosecutor should be provided with sufficient staff assistance to permit operations to be as efficient as those found in any private law office.

The prosecutor must also be provided with expert scientific assistance to keep pace with the need for effective investigation and prosecution of criminal activities. The value of a modern crime laboratory such as that maintained by the FBI, in the investigation and solution of crime, is universally recognized. Such scientific resources should be available to prosecutors at all levels. In addition, public funds should be provided for the employment of the services of psychiatrists, pathologists, chemists, document analysts, ballistics experts, and other experts as they may be needed for the effective functioning of the prosecutor’s office, just as they should be provided to the defense.²

**Standard 3-2.5. Prosecutor’s handbook; policy guidelines and procedures**

(a) Each prosecutor’s office should develop a statement of:

(i) general policies to guide the exercise of prosecutorial discretion, and

(ii) procedures of the office.

The objectives of these policies as to discretion and procedures should be to achieve a fair, efficient, and effective enforcement of the criminal law.

(b) In the interest of continuity and clarity, such statement of policies and procedures should be maintained in an office handbook. This handbook should be available to the public, except for

---

¹. See standard 3-2.2(e).
subject matters declared "confidential," when it is reasonably believed that public access to their contents would adversely affect the prosecution function.

**History of Standard**

Paragraph (a) has stylistic changes. Original paragraph (b) stated that the prosecutor's "statement of policies and procedures should be maintained in a handbook of internal policies of the office." This has been changed to provide that the prosecutor's "handbook should be available to the public, except for subject matters declared 'confidential,' when it is reasonably believed that public access to their contents would adversely affect the prosecution function."

**Related Standards**

NAC, Courts 3.3, 12.7
NDAA, National Prosecution Standards 6.1

**Commentary**

**Policy Guidelines**

It would be impossible to attempt to develop in these standards a comprehensive statement of the criteria involved in exercising prosecutorial discretion. Some of the aspects of prosecutorial discretion where there is widespread agreement are stated in later portions of this chapter.\(^1\) But the essence of the concept of discretion is the flexibility to cope with myriad and unique circumstances. Nevertheless, the very process of articulating policies in itself contributes to the formulation of sound policies by compelling consideration and evaluation of practices that may have outlived their usefulness. The articulation of policies should be oriented to the ultimate goals of prosecution, that is, the fair, efficient, and effective administration of criminal justice.

**Office Handbook**

The articulation of policies and procedures should be preserved in a handbook or manual that reflects current rules, statutes, and judicial

---

\(^1\) See particularly standard 3-3.9.
decisions. It also should contain detailed descriptions of the criteria governing the principal duties of the office. Highly useful manuals have been established in many prosecutors' offices. They serve to maintain consistent practices and continuity despite changing personnel and tend to assure that policies adopted at the highest levels of the office are observed by the staff. Perhaps of equal importance is the function of such a handbook as a teaching tool by which the accumulated experience of many is preserved and transmitted.

Paragraph (b) recommends that the prosecutor's handbook be treated as a public document, except for matters designated "confidential" due to their unusual sensitivity. Accordingly, directives as to strategic and tactical matters should be accorded the confidential status of internal executive memoranda. Broad standards pertaining to the exercise of discretion, however, normally should be available for public inspection. A suggestion of the National District Attorney's Association is approved:

In keeping with the increased visibility of the prosecution function, it is important that this handbook be made available to the public. If the dissemination of detailed internal policy guidelines would severely hamper the prosecution function, this information need not be released. However, the clear presumption should be in favor of public dissemination.²

**Standard 3-2.6. Training programs**

Training programs should be established within the prosecutor's office for new personnel and for continuing education of the staff. Continuing education programs for prosecutors should be substantially expanded and public funds should be provided to enable prosecutors to attend such programs.

**History of Standard**

There is a stylistic change only.

**Related Standards**

NAC, Courts 12.5
NDAA, National Prosecution Standards 4.2

---

² NDAA, National Prosecution Standards 6.1, commentary at 91
Commentary

Even lawyers with extensive experience in the trial of civil cases must undergo new training and added education in substantive criminal law and procedure before they can function effectively in the trial of a criminal case. In addition, as one study has noted, "[t]he training of a prosecutor is generally limited to his legal education and whatever courtroom experience he has had. While this may meet the need for the courtroom and trial aspects of the job, it does not necessarily prepare the man for his administrative and law enforcement functions." Indoctrination of new personnel in the professionalism expected of them as prosecutors and education in the traditions and policies of the office are obviously essential. Such training can be fostered through the use of office manuals and handbooks, selected writings from professional journals, and office discussions. Training within the prosecutor's office also should emphasize professional responsibility and conduct in the courtroom and in relations with the court and opposing counsel.

The National District Attorneys Association has developed a training institute for prosecutors, as have several other organizations. These programs are essential, and public funds should be provided to defray the expenses of prosecutors attending them.

Standard 3-2.7. Relations with police

(a) The prosecutor should provide legal advice to the police concerning police functions and duties in criminal matters.

(b) The prosecutor should cooperate with police in providing the services of the prosecutor's staff to aid in training police in the performance of their function in accordance with law.

History of Standard

There is a stylistic change only.

---


Related Standards
ABA, Standards for Criminal Justice 1-7.9 to 1-7.11
NAC, Courts 12.9
NDAA, National Prosecution Standards 20.1, 20.3, 20.4

Commentary
Role as Legal Adviser
The necessity to develop methods of guidance to keep the police apprised of the meaning of new provisions of law or court decisions that affect their duties and powers is apparent. To aid in meeting this need, the prosecutor should endeavor to establish and maintain a relationship of mutual confidence and cooperation with the police. In some places, especially where large staffs are involved, a useful device may be to have the prosecutor and the police department each designate staff members through whom interoffice legal matters are conveyed.

Role in Police Training
Many of the problems that have plagued the police — and indeed the public — in recent years can be traced to mistakes of the police, often entirely inadvertent, in carrying out such routine duties as securing warrants, making arrests, executing warrants, interrogating persons in custody, and conducting lineups for identification purposes. It is imperative that every police official, especially the police officer on the beat, be trained carefully as to the limits of police authority. This training cannot be casual or occasional but must be carefully organized and presented. Few lawyers are as well qualified to perform this function as is the prosecutor, who lives with the judicial response to police action on a day-to-day basis. This function of the prosecutor is so important that allowance must be made in the budget for whatever personnel are required to perform effective police training.

Standard 3-2.8. Relations with the courts and bar

(a) It is unprofessional conduct for a prosecutor intentionally to misrepresent matters of fact or law to the court.
(b) A prosecutor's duties necessarily involve frequent and regular official contacts with the judge or judges of the prosecutor's
jurisdiction. In such contacts the prosecutor should carefully strive to preserve the appearance as well as the reality of the correct relationship which professional traditions and canons require between advocates and judges.

(c) It is unprofessional conduct for a prosecutor to engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before the judge.

(d) In the prosecutor’s necessarily frequent contacts with other members of the bar, the prosecutor should strive to avoid the appearance as well as the reality of any relationship which would tend to cast doubt on the independence and integrity of the office.

History of Standard

There are stylistic changes only.

Related Standards

ABA, Code of Professional Responsibility DR1-102(A)(4), (5), DR7-110, DR9-101
ABA, Standards for Criminal Justice 4-1.1(d)
NAC, Courts 12.9
NDAA, National Prosecution Standards 17.1(A), (C)

Commentary

Misrepresentation

It is fundamental that in relations with the court, the prosecutor must be scrupulously candid and truthful in his or her representations in respect of any matter before the court.¹ This is not only a basic ethical requirement, but it is essential if the prosecutor is to be effective as the representative of the public in the administration of criminal justice.

Preserving Correct Relationships

The practice of law requires that there be the appearance as well as the reality of fairness in the administration of justice. Failure to observe correct relationships between advocates and with judges casts a shadow

¹. See ABA, Code of Professional Responsibility DR1-102(A)(4), DR7-102(A)(5).
that lawyers, and especially prosecutors, should avoid. This stricture applies with special force to the prosecutor if for no other reason than that the performance of prosecutorial duties is likely to involve frequent and regular contact with judges concerning particular cases and matters of criminal justice administration. Because of this, it is natural that a cordial relationship of mutual respect often develops. It is only when this cordiality is carried to the point of frequent social contacts that the danger zone is reached. Opposing counsel and the public cannot fail to be disturbed by the existence or the appearance of a close social relationship between one of the contending advocates and the "umpire." Often this kind of relationship develops innocently and gradually without an awareness on the part of the judge or prosecutor and indeed without a scintilla of actual impropriety. The appearance, however, can assume the importance of reality. For these reasons the prosecutor should be scrupulous in avoiding anything except a correct and official relationship with the judges of the jurisdiction, and, even at the risk of giving offense, the prosecutor should exercise great care not to allow any relationship to develop that casts doubt on the administration of justice or the independence of the court and of the prosecutor.

Ex Parte Contacts with the Court

There are, of necessity, occasions when a judge must discuss problems relating to the administration of the court's business with the prosecutor and staff. The need for such appropriate discussions with a judge in chambers or in the courtroom should not be permitted to give rise to ex parte discussion concerning a particular case that is or may come before the court. Nevertheless, if a judge observes conduct by a staff prosecutor that is considered objectionable and the judge's corrective efforts addressed to the assistant are of no avail, the chief prosecutor may appropriately accept an invitation to confer ex parte with the judge in chambers concerning the objectionable behavior of the assistant. However, if the behavior of the assistant affects the fairness of the trial, the prosecutor should insist that the matter be dealt with in court or in chambers with opposing counsel present. This is consistent with the Code of Professional Responsibility, which expressly prohibits ex parte communications with a judge where the purpose is to discuss the merits of a case pending before the court.2

2. Id. DR7-110(B).
Relations with Members of the Bar

As in relations between judges and advocates, the appearance of relations between members of the bar often assumes the importance of reality. Obviously, in cases actually tried, the adversary process supplies an adequate prophylaxis, but since the vast majority of cases are disposed of on pleas of guilty, frequently involving reduction of charges and grants of probation, the appearance of any degree of improper personal or social relationship between prosecutors and defense counsel tends to undermine the integrity and independence of the prosecutor as well as defense counsel. Whenever defense counsel is regularly sought out by accused persons because it is thought the defense counsel has a special relationship with the prosecutor or the judge, the "symptoms of illness" are present and the courts, the bar, and the public may mistake the symptoms for the disease.

The articulation of standards of conduct in this sensitive area is difficult because subjective factors and motivations are crucial. On the one hand, there should be a sense of mutual professional purpose between prosecutors and defense counsel fostered by cordial and continuing relationships. On the other hand, prosecutors should be alert to the possibility that members of the bar may seek to create the appearance of a relationship that will give them a seeming advantage in obtaining clients. Prosecutors, of course, need not avoid friendly contacts with defense lawyers or participation in social and professional activities of bar groups.

Standard 3-2.9. Prompt disposition of criminal charges

(a) A prosecutor should not intentionally use procedural devices for delay for which there is no legitimate basis.

(b) The prosecution function should be so organized and supported with staff and facilities as to enable it to dispose of all criminal charges promptly. The prosecutor should be punctual in attendance in court and in the submission of all motions, briefs, and other papers. The prosecutor should emphasize to all witnesses the importance of punctuality in attendance in court.

(c) It is unprofessional conduct intentionally to misrepresent facts or otherwise mislead the court in order to obtain a continuance.
History of Standard

There are stylistic changes only.

Related Standards

ABA, Code of Professional Responsibility DR1-102(A)(4), (5)
ABA, Standards for Criminal Justice 4-1.2, 12-1.3
NAC, Criminal Justice System 5.4
NDAA, National Prosecution Standards 15.4(C), 15.5(B), 17.1(D)(1), (6)(d)

Commentary

Exploitation of Delay for Unjustified Tactical Advantage

For centuries lawyers have been portrayed satirically as employing dilatory tactics with the indulgence of judges. The problem must be attacked both on the level of improved procedures and on the level of professional ethics. The problem must also be attacked by direct sanctions against both prosecutors and defense counsel who exploit or abuse delay as a tactical weapon. The cost in the time of judges, court personnel, witnesses, and jurors is too great to permit the continuance of practices that allow lawyers to jockey for a particular judge or to exert pressure on their adversary by delay. Judges are best able to detect these abuses, and a heavy responsibility rests on them to separate legitimate use of procedural devices from abusive use calculated to obtain an unjustified delay.

Prompt Disposition

Independent of statutory and constitutional requirements, the interests of the public and defendants are best served by prompt disposition of criminal charges. The prophylactic effect of criminal sanctions is dissipated by delay in bringing them to bear upon offenders. Congestion in the courts is often of such magnitude that, notwithstanding the priority given to criminal cases, the instrumentalities of the administration of criminal justice — the courts, prosecuting agencies, and the bar

1. The chapters on Discovery and Procedure Before Trial and Speedy Trial include proposals to reduce delay in criminal cases. See standards 11-1.1, 11-1.2, 12-1.1 to 12-1.3, 12-3.1, 12-4.1.
2. See ABA, Code of Professional Responsibility DR7-102(A) (1).
— encounter extreme difficulty in disposing of criminal charges with the promptness that an effective system of criminal justice requires. The causes of court congestion and the consequent delays in the processing of criminal cases are familiar ones: increasing population, increasing crime rates, and greater complexity in the processes of enforcing the criminal law, including the trial of criminal cases, as a result of judicial and legislative reinforcements of the protections of the rights of persons accused of crime. At the same time, the agencies of criminal justice are frequently handicapped in their attempts to keep pace with the phenomenon of increased criminal activity by society's reluctance to provide the necessary resources for the prompt processing of criminal charges. Consequently, prosecutors and the courts are sometimes burdened with backlogs of untried criminal cases. In many prosecution offices, trial assistants are charged with caseloads of as many as sixty or seventy cases. This is an intolerable and unmanageable burden. Among other adverse consequences, cases are not adequately prepared and the prosecutor tends to consent to unwarranted continuances, simply because of insufficient time to prepare for trial.

Whether viewed from the standpoint of the accused or the public, it is desirable that the criminal justice system try criminal charges promptly. Some states have implemented the constitutional guarantee of a speedy trial by statute or rule requiring trial within a fixed period unless the accused enters a waiver. To meet these standards, it may be necessary to enlarge some prosecution offices. The intent of paragraph (b) is to advance the efficiency of prosecution offices in all aspects of their work and to ensure that they are provided with sufficient resources to enable them to bear their share of the responsibility for the prompt and effective disposition of criminal charges, whether by trial or otherwise.

Continuances; Misrepresentation

Heavy caseloads in most prosecution offices sometimes have led to abuses in obtaining continuances of proceedings prior to trial and of the trial itself. With adequate staff and resources, it should be unnecessary for the prosecutor to ask for continuances except for good cause arising from unforeseen circumstances. Such cause should be presented to the

court without equivocation. It is never permissible, however, for a prosecutor to make a misrepresentation for the purpose of obtaining a continuance.4

Standard 3-2.10. Supersession and substitution of prosecutor

(a) Procedures should be established by appropriate legislation to the end that the governor or other elected state official is empowered by law to suspend and supersede a local prosecutor upon making a public finding, after reasonable notice and hearing, that the prosecutor is incapable of fulfilling the duties of office.

(b) The governor or other elected official should be empowered by law to substitute special counsel in the place of the local prosecutor in a particular case, or category of cases, upon making a public finding that this is required for the protection of the public interest.

History of Standard

There are stylistic changes only.

Related Standards

NDAA, National Prosecution Standards 1.5

Commentary

Supersession

There are occasions when a prosecutor may have to be superseded, for example, because poor health has rendered the prosecutor incapable of discharging duties effectively or because of corruption or gross dereliction. Some states provide for removal of a local prosecutor from office by impeachment1 or by a similar procedure requiring participation by the legislature, but these are not efficient mechanisms under present-day conditions.2 Since legislatures are in session only infrequently and are occupied with pressing matters of general statewide concern, these

1. E.g., Ark. Const. art. 15, §1; Mich. Const. art. 11, §7.
procedures are largely ineffective as a control on corruption and of no real use in dealing with chronic laxity or inefficiency. Infrequent elections, the long ballot, and the difficulty of communicating to the public the dimensions of the problem often make recourse to the polls a dubious remedy. Some form of summary action for emergencies and some procedures for supersession for particular cases are needed.

In some states the attorney general is held to possess the powers that were attached to that office under the English common law, which included the power to supersede the local prosecutor if the attorney general so desired. But many states hold that the attorney general's powers are restricted to those explicitly granted by the state constitution or statutes. Some states by statute have defined the power of supersession. In others the attorney general may supersede on request of the governor or the legislature, while in others the attorney general has no authority over local prosecutors.

Because the governor is the state's highest elected official and is directly responsible to the electorate, it may be best to vest in the governor's office the power to supersede a local prosecutor, although this will vary according to the traditions of each state government and, especially, with the extent to which the attorney general in a particular state is regularly involved in the administration of prosecution functions. Physical disability to discharge the duties of office, dereliction of duty, and other grounds encompassed in the traditional notion of "cause" should be considered grounds on which the governor or other designated official or public entity may act under appropriate procedures affording due process. The action should not be made subject to court approval initially, since the matter is one within the functions and responsibilities of the executive branch of government. A sufficient


check against the arbitrary use of the power of supersession can be found in a requirement that the grounds for the action be placed on the record by filing them with some appropriate state official, for example, the secretary of state.

Substitution

A substitution may be called for in circumstances where supersession is not necessary. A temporary need may arise when a prosecutor asks to be relieved because of a conflict of interest or, where a prosecutor declines to do so, when substitution appears necessary. Temporary illness or leave of absence, for example, to campaign for other office, are other examples of situations where it may be necessary to substitute prosecutors.

PART III. INVESTIGATION FOR PROSECUTION DECISION

Standard 3-3.1. Investigative function of prosecutor

(a) A prosecutor ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts, but the prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies.

(b) It is unprofessional conduct for a prosecutor knowingly to use illegal means to obtain evidence or to employ or instruct or encourage others to use such means.

(c) A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct for the prosecutor to advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give.

(d) It is unprofessional conduct for a prosecutor to secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless the prosecutor is authorized by law to do so.
(e) It is unprofessional conduct for a prosecutor to promise not to prosecute for prospective criminal activity, except where such activity is part of an officially supervised investigative and enforcement program.

(f) Unless a prosecutor is prepared to forgo impeachment of a witness by the prosecutor's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present the impeaching testimony, a prosecutor should avoid interviewing a prospective witness except in the presence of a third person.

History of Standard

Paragraphs (a) through (e) are basically unchanged from the original standard. Although the substance of paragraph (f) remains unchanged, the language has been modified to correspond with an identical provision in chapter 4.

Related Standards

ABA, Code of Professional Responsibility DR1-102(A)(4) to (6), DR5-102(A), DR7-102(A)(3), (5), (8), DR7-109

ABA, Standards for Criminal Justice 4-4.1, 4-4.2, 4-4.3(c), (d), 11-2.1(a)(i), (b), 11-4.1

NAC, Courts.12.8

NDAA, National Prosecution Standards 7.1, 7.4(A)

Commentary

Affirmative Responsibility to Investigate

The bulk of a prosecutor's work consists of cases in which a complaint has been made by a citizen or by a public agency or cases that develop subsequent to an arrest made by the police. But there are instances where a citizen is reluctant to prosecute, from ignorance, fear, inertia, or other motive, or in which the police have not taken the initiative, for example, because the area of illegal activity in question is not one that attracts their interest, as in the case of certain commercial frauds, or where law enforcement officials are themselves involved.

It is important, therefore, that in some circumstances the prosecutor
take the initiative to investigate suspected criminal acts independent of
citizen complaints or police activity. As one court has stated: "With the
vast extension of the field of criminal law made necessary by complex
social and economic conditions . . . [i]t is not only the right but the duty
of the prosecutor in such cases to himself take the initiative." 1 Most
prosecutors are no doubt willing to accept this responsibility, provided
they have adequate investigative resources. The implementation of this
standard, therefore, is related to fulfillment of standard 3-2.4(b), pro-
viding that professional investigative personnel be available to the pro-
secutor.

Ilegality in Obtaining Evidence

The injunction against the use of illegal means to obtain evidence
hardly needs explanation. "Lawless law enforcement" is universally
condemned as breeding disrespect for law and the agencies charged with
upholding the rule of law. Such conduct by public officers is self-
defeating in another respect, as attested by the expansion of the doctrine
that evidence obtained by methods violative of the rights of the accused
will not be admitted in a court of law. Prosecutors, as representatives
of the people in upholding the law, should take the lead in assuring that
investigations of criminal activities are conducted in accordance with
the safeguards of the Bill of Rights as implemented by legislation and
the decisions of the courts.

Obstructing Communications Between Witnesses and the Defense

Prospective witnesses are not partisans. They should be regarded as
impartial and as relating the facts as they see them. Because witnesses
do not "belong" to either party, it is improper for a prosecutor, defense
counsel, or anyone acting for either to suggest to a witness that the
witness not submit to an interview by opposing counsel. It is not only
proper but it may be the duty of the prosecutor and defense counsel to
interview any person who may be called as a witness in the case (except
that the prosecutor is not entitled to interview a defendant represented
by counsel). In the event a witness asks the prosecutor or defense
counsel, or a member of their staffs, whether it is proper to submit to
an interview by opposing counsel or whether it is obligatory, the wit-

1. State ex rel. McKittrick v. Graves, 346 Mo. 990, 144 S.W.2d 91, 98 (1940).
ness should be informed that, although there is no legal obligation to submit to an interview, it is proper and may be the duty of both counsel to interview all persons who may be witnesses and that it is in the interest of justice that the witness be available for interview by counsel.²

Counsel may properly request an opportunity to be present at opposing counsel's interview of a witness, but counsel may not make his or her presence a condition of the interview. It is proper to call the attention of the witness to the problem of subscribing to a statement prepared by another person. In the event that a written statement is signed or otherwise acknowledged by the witness as a correct representation of facts known to the witness, a copy of the statement should be furnished the witness upon request.

This standard does not impose any obligation upon a prosecutor to disclose the identity of prospective witnesses. The prosecutor's obligation in this respect is governed by the applicable law pertaining to discovery and the furnishing of the names of witnesses who are intended to be called.

Use of Colorable Judicial Process

There is evidence that some prosecution offices have occasionally scheduled persons for interviews by means of documents that in format and language resemble official judicial subpoenas or similar judicial process even though they lack subpoena power in these instances. Such practices are improper and amount to a subversion and usurpation of judicial power. Absent specific statutory subpoena power, a prosecutor's communication requesting a person to appear for an interview should be couched in terms of a request; it should not simulate a process or summons that the prosecutor does not have power to issue.³

² For cases in which prosecutors sought to prevent interviews of government witnesses by defense counsel, see, e.g., United States v. Clemons, 577 F.2d 1247 (5th Cir. 1978); Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966), cert. denied, 396 U.S. 865 (1969).
³ See United States v. Thomas, 320 F. Supp. 527, 530 (D.D.C. 1970) (prosecutor ordered to "cease sending to prospective witnesses . . . before the trial date any form which includes the word 'Summons' or any derivative thereof or which in its format and language resembles an official judicial subpoena or similar judicial process or which conveys the impression that non-appearance is subject to sanction. . . . "). It also has been held to be improper for a prosecutor to arrange for the issuance of a proper subpoena for the sole purpose of interviewing the witness personally. See, e.g., In re Lopreato, 511 F.2d 1150 (1st Cir. 1975); Durbin v. United States, 221 F.2d 520 (D.C. Cir. 1954).
Promise Not to Prosecute

A prosecutor may not grant "dispensation" for criminal conduct because the actor is cooperating with the prosecutor in other areas of law enforcement. However, the need for and propriety of the use of informants in law enforcement is universally recognized and accepted, as long as they are not used to instigate criminal activity. Accordingly, this standard recognizes that it is not improper for a prosecutor to promise not to prosecute an informant for specific criminal activity in which the informant may engage as a part of a supervised effort to obtain evidence of crime committed by other actors. An example is found in the use of "undercover" agents or informants who make purchases of illicit narcotics.

Interviews by the Prosecutor Personally

Two possible problems can arise in relation to the impeachment of witnesses. The first may arise out of a prosecutor's interview with a "friendly" witness. The second relates to the need to interview witnesses likely to be called by the defense so that the prosecutor will be better able to conduct cross-examination or to decide whether to cross-examine at all. The "friendly" witness is likely to be cooperative in giving and signing a statement, and the problem of impeaching the witness will arise only if, unexpectedly, the witness's testimony varies from the pretrial statement and takes counsel by surprise.

The more frequently encountered problem is impeachment of an adverse witness whose testimony varies from what the witness gave the prosecutor before trial. It is here that there may be need to conduct interviews of witnesses with a third person present, since hostile witnesses do not often sign written statements for opposing counsel. Use of a third person is virtually the only effective means of later impeaching such a witness. A prosecutor is in an exceedingly difficult situation in seeking leave to withdraw and to substitute other counsel so that the prosecutor might take the stand to relate what the adverse witness previously said to him or her.

Although a lawyer is sometimes permitted to withdraw in order to testify, this is largely a matter entrusted to the court's discretion, and the court will undoubtedly be influenced by the importance of the testimony, whether another prosecutor is available to try the case or
whether a mistrial must be declared. It is normally not appropriate for a lawyer to offer impeachment testimony and also remain in the case as counsel for the defendant.

After written statements are secured by investigators, it is proper under our system, and indeed wise for the prosecutor, to interview such witnesses personally not only to verify the investigator's report but to become familiar with the personality of the witness in order to anticipate how the witness will react on the stand. Here again, the prosecutor should take the precaution of having an investigator or other third person present.

Standard 3-3.2. Relations with prospective witnesses

(a) It is unprofessional conduct to compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse an ordinary witness for the reasonable expenses of attendance upon court, attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews. Payments to a witness may be for transportation and loss of income, provided there is no attempt to conceal the fact of reimbursement.

(b) Whenever a prosecutor knows or has reason to believe that the conduct of a witness to be interviewed may be the subject of a criminal prosecution, the prosecutor or the prosecutor's investigator should advise the witness concerning possible self-incrimination and the possible need for counsel.

History of Standard

In addition to approving compensation to witnesses for court attendance, there has been added to paragraph (a) authorization to pay witnesses for "attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews." In the first edition, paragraph (b) stated that "it is proper but not mandatory" for a prosecutor to advise a witness of the privilege against self-incrimination and the possible


5. See ABA, Code of Professional Responsibility DR5-101(B), DR5-102(A).
need for counsel when there is reason to believe that the witness may be subjected to criminal prosecution. This has been changed to provide that a prosecutor should give such advisements whenever criminal prosecution of the witness is considered possible.

Related Standards

ABA, Code of Professional Responsibility DR7-109(C)
ABA, Standards for Criminal Justice 4-4.3, 4-4.4

Commentary

Compensation of Witnesses

Because of the risk of encouraging perjury, or appearing to do so, witnesses may not be compensated by the parties for their testimony but may be paid ordinary witness fees. It has long been held that a contract to secure testimony to a given state of facts is against public policy and void.\(^1\) However, it is well accepted that the prohibition against paying for testimony does not forbid reimbursement of witnesses for their actual expenses and reasonable payment for loss of income.\(^2\) These standards are more explicit than the Code of Professional Responsibility, however, in specifically authorizing reimbursement to witnesses for attendance at depositions and at pretrial interviews.\(^3\) Payments should not exceed the out-of-pocket cost of the witnesses, lest it appear that the prosecutor is seeking to purchase the witnesses' favorable testimony. As a matter of sound trial tactics, it may be advisable to disclose whatever payments are made.

Self-Incrimination of Witnesses

Prosecutors and their investigators obviously should warn witnesses of the right to a lawyer and to remain silent if the circumstances of the questioning constitute custodial interrogation.\(^4\) Paragraph (b) deals with

\(^1\) E.g., Neece v. Joseph, 95 Ark. 552, 129 S.W. 797 (1910).
\(^2\) See ABA, Code of Professional Responsibility DR7-109(C).
\(^3\) For a statute that apparently authorizes prosecutors to pay fees for witness interviews, see Mass. Ann. Laws ch. 262, §29 (Michie/Law. Co-op 1968).
situations where custodial interrogation is not present. However, prosecutors and their investigators cannot conceal information concerning law violations that come to their attention. Essentially, they occupy a position like that of police officers, but without custody of witnesses: inadvertent disclosures may be admitted against witnesses, should they later be charged. Given the difficulty of predicting the course of future judicial action, and in fairness to the persons interviewed, it is recommended that prosecutors and their investigators warn potential defendants of the privilege against self-incrimination and the possible need for counsel.5

Standard 3-3.3. Relations with expert witnesses

(a) A prosecutor who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject. To the extent necessary, the prosecutor should explain to the expert his or her role in the trial as an impartial expert called to aid the fact finders and the manner in which the examination of witnesses is conducted.

(b) It is unprofessional conduct for a prosecutor to pay an excessive fee for the purpose of influencing the expert's testimony or to fix the amount of the fee contingent upon the testimony the expert will give or the result in the case.

History of Standard

There are stylistic changes only.

Related Standards

ABA, Code of Professional Responsibility DR7-109(C)
ABA, Standards for Criminal Justice 4-4.4

5. Standard 3-3.6(d) deals specifically with the duty of a prosecutor who summons before a grand jury a person known to be a potential criminal defendant. The standard recommends that the witness be advised "that he or she may be charged and that . . . independent legal advice" should be sought.
Commentary

Advising the Expert Witness

Statements made by physicians, psychiatrists, and other experts about their experiences as witnesses in criminal cases indicate the need for circumspection on the part of prosecutors who engage experts. Nothing should be done by a prosecutor to cast suspicion on the process of justice by suggesting that the expert color an opinion to favor the interests of the prosecutor. Depending on the extent of the expert's experience with courtroom procedure, the prosecutor should explain the workings of the adversary system and the expert witness's role within it as an independent and impartial expert. The prosecutor should also explain that the expert is to testify in accordance with the standards of the expert's discipline without regard to what is best for the prosecution.

Fees to Experts

It is important that the fee paid to an expert not serve to influence the substance of the expert's testimony. To avoid both the existence and the appearance of influence, the fee should not be made contingent on a favorable opinion or result in the case, and the amount of the fee should be reasonable.¹

Standard 3-3.4. Decision to charge

(a) The decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor.

(b) Absent exceptional circumstances, no arrest warrant or search warrant should issue without the approval of the prosecutor.

(c) The prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted.

(d) Where the law permits a citizen to complain directly to a judicial officer or the grand jury, the citizen complainant should be

¹ ABA, Code of Professional Responsibility DR7-109(C)(3) (sanctioning payment of "[a] reasonable fee for the professional services of an expert witness").
required to present the complaint for prior approval to the prosecutor, and the prosecutor's action or recommendation thereon should be communicated to the judicial officer or grand jury.

**History of Standard**

Paragraph (b) is new. Paragraph (a) is unchanged from the original standard. Paragraphs (c) and (d), also unchanged in content, were lettered (b) and (c) in the original edition.

**Related Standards**

NAC, Courts 1.2, 12.8
NDAA, National Prosecution Standards 7.3(A), (B), 9.1, 9.3

**Commentary**

**Initiation by Prosecutor**

Whatever may have been feasible in the past, modern conditions require that the authority to commence criminal proceedings be vested in a professional, trained, responsible public official. The need for law-trained judgment to guide the exercise of the power to charge a citizen with a criminal act is discussed elsewhere in these standards.\(^1\)

**Arrest Warrants and Search Warrants**

Some jurisdictions require by statute the approval of the prosecutor before an arrest warrant can issue.\(^2\) It is established federal practice to secure the approval of the United States attorney before application is made for a warrant. In other jurisdictions prosecutor approval is sometimes sought by the police before they apply to a magistrate for issuance of an arrest warrant. Normally, circumstances that permit an application for an arrest warrant to be made also permit time to consult with the prosecutor and to obtain the prosecutor's approval. The prosecutor and police should cooperate to establish workable procedures to this end. In those instances where it may be difficult or impossible for the prosecutor to be physically present to screen citizen complaints and to advise

---

1. See standard 3-2.1 and commentary.
police on the issuance of arrest warrants, it should be sufficient to communicate with the prosecutor by telephone to obtain approval.

The importance of the prosecutor’s approval of applications for arrest warrants applies with at least the same force to applications for search warrants. Paragraph (b) contemplates dispensing with the prosecutor’s approval for the issuance of arrest and search warrants only in “exceptional circumstances,” such as when a prosecutor is unavailable at a time when it is urgent that a warrant issue immediately. The recommendation of paragraph (b) is consistent with similar suggestions made by the National Advisory Commission and the National District Attorneys Association. The former recommends that “[t]he office of the prosecutor . . . review all applications for search and arrest warrants prior to their submission by law enforcement officers to a judge for approval; no application for a search or arrest warrant should be submitted to a judge unless the prosecutor or assistant prosecutor approves the warrant.”

**Screening Procedures**

The important function of evaluating complaints before initiating criminal proceedings should not be left to ad hoc judgments. Vesting the primary responsibility for the decision to prosecute in the prosecutor’s office requires that orderly procedures be established for the screening of cases initiated by the police. It is highly desirable, as is done in some of the larger prosecution offices, that a complaint unit and an indictment unit serve these functions. Over the years they gather experience and judgment in the exercise of their screening function. This specialization is particularly effective where the prosecution office places these screening functions in the hands of staff lawyers whose familiarity with trial and appellate problems gives them a broad base for evaluating cases.

If the prosecutor’s screening processes are effective, acquittals should not be frequent. In fact, a high acquittal rate is probably a prime indicator of either inadequate exercise of discretion in making a charge or inadequate preparation for or presentation at trial. But it is the duty of the prosecutor to do justice, not merely to “win” convictions. If competent and experienced lawyers, after screening processes involving several layers of independent professional appraisal, conclude that a case should proceed, it is not unreasonable to assume that there is a strong

---

3. NAC, COURTS 12.8; NDAA, NATIONAL PROSECUTION STANDARDS 7.3(A), (B).
4. NAC, COURTS 12.8.
case against the accused. When the rate of acquittals is inordinate, those in authority and the public have a basis for inquiry into the reasons.

Some of the most effective prosecution offices have established a procedure for evaluating the conduct of every case in which a verdict of not guilty is returned or a dismissal or mistrial occurs. This is done in the postmortem sense to determine what took place, and it is both educational and correctional. Such a process may disclose that the charge should not have been made initially, that it should have been dismissed in the postcharge screening, or that it was inadequately prepared or ineptly tried. Sometimes no explanation can be found other than the vagaries of a particular juror or jury. In a rare case the inquiry might suggest the possibility of jury tampering. In any event, a posttrial evaluation serves useful purposes in improving the performance of prosecutors.

Citizen Complaints

Historically, the power to initiate prosecution was not vested exclusively in public officials but was shared with private citizens. The essential screening to determine whether there was substance to a charge was performed by the magistrate at the preliminary hearing or by the grand jury. The emergence of the professional prosecutor, which occurred in the United States, fundamentally altered this situation. The advent of the office of public prosecutor provided a new and professional medium of screening that had not previously been available. Moreover, it provided continuity in office and experience in the evaluation of evidence to determine the need for prosecution.

In some jurisdictions misdemeanor prosecutions may be instituted by the filing of a complaint with a magistrate authorized to issue an arrest warrant.\(^5\) The effectiveness of these systems varies greatly, depending chiefly on the quality of the magistrates who administer them. Where there are still nonlawyer justices of the peace, screening may be at a minimum and the magistrate may not exercise independent and compe-

\(^5\) See Annot., 66 A.L.R.3d 732, 734 (1975): "In practically all jurisdictions statutes or rules provide a method whereby a private citizen may make a criminal accusation against one alleged to have violated the law by making oath, affidavit, complaint, or the like, before a judicial officer who, on finding probable cause to be present, may issue a warrant or process thereon. Under many provisions of this nature it is evident that the approval or authorization of the prosecuting attorney is not contemplated at the time the initial criminal accusation is made."
tent judgment. At the other extreme, as the result of laxity or corruption, prosecutions may be dismissed by a magistrate where charges should have been brought.

There are sound general policy reasons that argue for the joint screening of cases by both the prosecutor and the magistrate. The prosecutor brings trial experience, continuity in office, and the perspective of public responsibility to bear on a decision. Beyond this, the sharing of responsibility in the decision whether to prosecute is an important application of "checks and balances" to the field of prosecution. Where a magistrate has the power to issue a warrant on the complaint of a citizen, it is desirable that a public prosecutor either endorse the magistrate's approval or be afforded the means of recording his or her reasons for declining prosecution.

Standard 3-3.5. Relations with grand jury

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

(b) The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

(c) The prosecutor's communications and presentations to the grand jury should be on the record.

History of Standard

There are stylistic changes only.

Related Standards

NDAA, National Prosecution Standards 14.4

Commentary

In jurisdictions where the grand jury is used as an agency responsible for determining whether charges should be brought against a person,
the prosecutor still plays an important role in the process. The case ordinarily is presented to the grand jury by the prosecutor, who has prepared it to that point. Because of the prosecutor's knowledge of the case and legal training, it is appropriate for the prosecutor to "explain" to the grand jury "the law" and "legal significance of the evidence." This is a proposition that courts have sometimes recognized, although prosecutors must be careful to remember that the ultimate decision to indict belongs to the grand jury.

Thus, a prosecutor must not take advantage of his or her role as the ex parte representative of the state before the grand jury to unduly or unfairly influence it in voting on charges brought before it. In general, the prosecutor should be guided by the standards governing and defining the proper presentation of the state's case in an adversary trial before a petit jury. Since grand jury proceedings are generally secret and ex parte, it is particularly desirable that a record be made of the prosecutor's communications and representations to the jury.

Paragraphs (b) and (c) of this standard are similar to provisions approved by the American Bar Association in 1977 and by the National District Attorneys Association.

Standard 3-3.6. Quality and scope of evidence before grand jury

(a) A prosecutor should present to the grand jury only evidence which the prosecutor believes would be admissible at trial. However, in appropriate cases, the prosecutor may present witnesses to summarize admissible evidence available to the prosecutor which the prosecutor believes he or she will be able to present at trial.

(b) No prosecutor should knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt.

(c) A prosecutor should recommend that the grand jury not indict if it is believed the evidence presented does not warrant an indictment under governing law.

(d) If the prosecutor believes that a witness is a potential defendant, the prosecutor should not seek to compel the witness's testi-

2. ABA, Policy on the Grand Jury §§15, 16 (1977); NDAA, National Prosecution Standards 14.2(F), 14.4(B).
mony before the grand jury without informing the witness that he or she may be charged and that the witness should seek independent legal advice concerning his or her rights.

(e) The prosecutor should not compel the appearance of a witness before the grand jury whose activities are the subject of the inquiry if the witness states in advance that if called he or she will exercise the constitutional privilege not to testify, unless the prosecutor intends to seek a grant of immunity according to the law.

History of Standard

Paragraphs (a), (c), (d), and (e) are unchanged from the original standard, except for stylistic alterations. Original paragraph (b) required the prosecutor to "disclose to the grand jury any evidence which he knows will tend to negate guilt." The standard now reads: "No prosecutor should knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt."

Related Standards

NDAA, National Prosecution Standards 14.2(C), (D)

Commentary

As a general principle, the use of secondary evidence before a grand jury should be avoided unless there are cogent reasons that justify presenting such evidence. On the other hand, some jurisdictions allow an indictment to rest on evidence that would not be admissible at trial.1 The need to use a summary of available evidence may arise in cases involving voluminous records or where an absent witness has given a written statement but is unavailable and circumstances justify prompt grand jury action. Similarly, where the victim of a criminal act is seriously injured and cannot attend, someone to whom the relevant facts have been related should be permitted to testify before the grand jury. A third illustrative situation is where the safety of an important witness reasonably warrants that his or her identity remain secret and recorded statements of the witness be presented to the grand jury.

A prosecutor should present to the grand jury evidence that will tend

The Prosecution Function

3-3.7

substantially to negate the guilt of the accused. For example, when a police officer has seriously injured or killed a person in the line of duty, prosecutors often present all available information and witnesses to the grand jury so that an evaluation of probable cause can be made by an entity independent of the prosecutor. Such a procedure enhances public confidence in the ultimate decision on whether to prosecute. The obligation to present evidence that substantially tends to negate the guilt of the accused flows from the basic duty of the prosecutor to seek justice.2

In the investigation of a crime or in the unfolding of evidence before a grand jury, it may become apparent to the prosecutor that a person who proposes to give highly relevant testimony or other evidence may also be implicated in the crime as a potential defendant. In these circumstances, before seeking to require the person's testimony before a grand jury, the prosecutor should advise the individual that he or she may be implicated and that independent legal advice should be sought.3

Similarly, it would dilute and impinge upon the privilege against self-incrimination to require a potential defendant to appear before a grand jury and there claim the privilege when the prosecutor has been told in advance that the witness would do so. Such a tactic is unfair in that the very exercise of the privilege may prejudice the witness in the eyes of the grand jury.

Paragraphs (a)-(d) are similar to provisions approved by the ABA in 1977.4

Standard 3-3.7. Quality and scope of evidence for information

Where the prosecutor is empowered to charge by information, the prosecutor's decisions should be governed by the principles embodied in standards 3-3.6 and 3-3.9.

2. See standard 3-1.1(c).


History of Standard

Except for a stylistic change and the reference to standard 3-3.9, the standard is unchanged.

Related Standards

None

Commentary

The same considerations that support the provisions of standards 3-3.6 and 3-3.9 apply to the exercise of the power to proceed by information rather than indictment where the power is granted to the prosecutor by law. As provided in standard 3-3.9(a), it is deemed unprofessional conduct to institute a criminal proceeding in the absence of probable cause, and no criminal case should be instituted or permitted to continue "in the absence of sufficient admissible evidence to support a conviction."

Standard 3-3.8. Discretion as to noncriminal disposition

(a) The prosecutor should explore the availability of noncriminal disposition, including programs of rehabilitation, formal or informal, in deciding whether to press criminal charges. Especially in the case of a first offender, the nature of the offense may warrant noncriminal disposition.

(b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

History of Standard

There are stylistic changes only.

Related Standards

NAC, Courts 2.1, 2.2
NDAA, National Prosecution Standards 11.1-11.4
Commentary

The opportunity to dispose of a case by resort to other corrective social processes, before or after formal charge or indictment without pursuing the criminal process, should be given careful consideration in appropriate situations. National studies of the criminal justice system have repeatedly recommended diversion to other community resources of offenders in need of assistance for whom criminal prosecution is unwarranted.\(^1\) Moreover, it has long been the practice among experienced prosecutors to defer prosecution upon the fulfillment of certain conditions, such as a firm arrangement for the offender to seek psychiatric assistance where a disturbed mental condition may have contributed to the aberrant behavior. Another technique of long standing is for prosecutors not to prosecute an offender who has agreed to enter the military service, who has obtained new employment, or has embarked in some other manner on what can broadly be considered a rehabilitative program.

To administer a diversionary program, prosecutors need staffs cognizant of the alternatives available and alert to their uses. Legislative action may sometimes be necessary to entitle prosecutors to the assistance of probation or parole departments to evaluate cases before rather than after conviction. When adequate resources are available, social work personnel can secure job placements, screen applicants for the armed forces, make referrals to clergy, and conduct other rehabilitative programs. Prosecution, meanwhile, should be deferred or dismissed when a case is turned over to a probation or parole department. Hopefully, a combination of jobs and counseling will give the charged person a stable base in the community. Where diversion of the defendant is successful, the dismissal of charges or the suspension of sentence will be appropriate.

Standard 3-3.9. Discretion in the charging decision

(a) It is unprofessional conduct for a prosecutor to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. A prosecutor should not institute, cause

\(^1\) See NAC, COURTS 2.1; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 134 (1967).
to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;
(ii) the extent of the harm caused by the offense;
(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
(iv) possible improper motives of a complainant;
(v) reluctance of the victim to testify;
(vi) cooperation of the accused in the apprehension or conviction of others; and
(vii) availability and likelihood of prosecution by another jurisdiction.

(c) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions.

(d) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(e) The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial.

**History of Standard**

Original paragraph (a) read: "It is unprofessional conduct for a prosecutor to institute . . . criminal charges when he knows that the charges are not supported by probable cause." The first sentence of paragraph (a) retains this principle, and also provides that a prosecutor should not permit the "continued pendency" of a criminal case when probable
cause is lacking. The second sentence of paragraph (a) is new. The remainder of the standard is unchanged except for stylistic alterations and the addition of the word "sufficient" to the second sentence of paragraph (b).

**Related Standards**

ABA, Code of Professional Responsibility DR7-103(A)
NAC, Courts 1.1
NDAA, National Prosecution Standards 9.3, 9.4

**Commentary**

**Basic Criteria**

The charging decision is the heart of the prosecution function. The broad discretion given to a prosecutor in deciding whether to bring charges and in choosing the particular charges to be made requires that the greatest effort be made to see that this power is used fairly and uniformly. By its very nature the exercise of discretion cannot be reduced to a formula. Nevertheless, certain guidelines for the exercise of discretion should be established.1 The instant standard is not intended to be a substitute for developing appropriate prosecution policies on a local level. At most they are illustrative of basic factors that should be included or excluded in the exercise of discretion.

A prosecutor ordinarily should prosecute if, after full investigation, it is found that a crime has been committed, the perpetrator can be identified, and there is sufficient admissible evidence available to support a verdict of guilty. Consistent with the Code of Professional Responsibility, the standard suggests that it is unprofessional conduct to institute criminal proceedings in the absence of probable cause.2 A probable cause standard, which is substantially less than sufficient admissible evidence to sustain a conviction, is sufficiently minimal that a prosecutor should not err in deciding whether the quantum of evidence is adequate to institute criminal proceedings. Paragraph (a) also provides that "[a] prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction." Because of the

1. See standard 3-2.5.
2. ABA, **Code of Professional Responsibility** DR7-103(A).
frequent difficulty of assessing the existence of "sufficient admissible evidence," a violation of this provision is not characterized as unprofessional conduct.

Factors That May Properly Be Considered

The breadth of criminal legislation necessarily means that much conduct that falls within its literal terms should not always lead to criminal prosecution. It is axiomatic that all crimes cannot be prosecuted even if this were desirable. Realistically, there are not enough enforcement agencies to investigate and prosecute every criminal act that occurs. Some violations occur in circumstances in which there is no significant impact on the community or on any of its members. A prosecutor must adopt a "first things first" policy, giving greatest concern to those areas of criminal activity that pose a threat to the security and order of the community.

Nor is it desirable that the prosecutor prosecute all crimes at the highest degree available. Crimes are necessarily defined in broad terms that encompass situations of greatly differing gravity. Differences in the circumstances under which a crime took place, the motives or pressures activating the defendant, mitigating factors of the situation, the defendant's age, prior record, general background, and role in the offense, and a host of other particular factors require that the prosecutor view the whole range of possible charges as a set of tools from which to carefully select the proper instrument to bring the charges warranted by the evidence. In exercising discretion in this way, the prosecutor is not neglecting public duty or discriminating among offenders. The public interest is best served and evenhanded justice best dispensed not by the mechanical application of the "letter of the law," but by a flexible and individualized application of its norms through the exercise of a prosecutor's thoughtful discretion.

Subparagraphs (b)(i)-(vii) provide a series of guidelines for the exercise of the prosecutor's discretion. In addition to the obvious reasonable doubt test, the extent of the harm caused by the offense is an important factor to be considered in deciding whether to charge and what charges to bring. If prosecution is sought by a private party out of malice or to exert coercion on the defendant, as is sometimes the case in matters involving sexual offenses or debt collection, for example, the prosecutor may properly decline to prosecute.

---
Another relevant consideration is the refusal of the victim to testify. A prosecutor may have difficulty establishing a case if an indispensable witness declines to testify. This sometimes occurs when the case involves evidence that, if made public, will cause great pain or harm to the victim. In serious cases, however, the interests of the community require that the prosecutor try to obtain the victim's cooperation, and in some instances, it may be the prosecutor's duty to use the subpoena power to compel attendance of the witness. In contrast, the prosecutor may justifiably decline to prosecute less serious offenses because of lack of witness cooperation. This discretion is commonly exercised in family conflicts where minor violence occurs. Often the injured party who calls the police is later reluctant about prosecution, either because the dispute has been resolved or because of the harmful consequences of prosecution to the family.

Prosecutors frequently and properly choose to pursue a lenient course with one participant in a criminal activity in order to bring other, more serious offenders to justice. The underlying rationale is expressed in statutes, found in many jurisdictions, that permit the grant of immunity from prosecution in exchange for testimony. Consistent with subparagraph (b)(vi), the Plea of Guilty chapter of these standards suggests that charge and sentence concessions are appropriate for a defendant whose "cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct."

The broad span of federal criminal statutes presents many cases of overlapping federal and state jurisdiction. Particularly where federal laws are largely auxiliary to state laws, the federal prosecutor is faced with the problem that his or her power to prosecute may result in a defendant's being punished in two tribunals for the same conduct. Where overlapping federal and state jurisdiction is present, federal action is justified in the presence of one or more of the following circumstances: (1) when the states are unable or unwilling to act; (2) when the jurisdictional feature, for example, use of the mails, is not merely incidental or accidental to the offense but an important ingredient of its

4. See W. LaFave, Arrest 142 n.66 (1965).
8. Standard 14-1.8(a) (iv).
success; (3) when, although the particular jurisdictional feature is incidental, another substantial federal interest is protected by the assertion of federal power; (4) when the criminal operation extends into a number of states, transcending the local interests of any one; (5) when it would be inefficient administration to refer to state authorities a complicated case investigated and developed on the theory of federal prosecution.9

When the possibility of double prosecution arises because the crime is punishable in more than one state, similar considerations should be taken into account in deciding whether to defer to the other jurisdiction's right to prosecute. Where the issues already have been tried in another state, the prosecutor should not seek to relitigate the case by bringing a new prosecution.10

Personal Advantage Not to Be Considered

A prosecutor should avoid measuring his or her record by the "conviction rate" of the office. Accordingly, a prosecutor should never allow the decision to proceed in a particular case to be influenced by a desire to inflate the success record of the office in obtaining convictions. Nor should a prosecutor hesitate to reduce a charge or decline presentation of a case because of such considerations.

Community Indifference to Serious Crime

There are cases where, even if convictions seem quite unlikely, perhaps because of hostile community attitudes toward the victims, a prosecutor should proceed if satisfied that a serious crime has been committed, the offender can be identified, and the necessary evidence is available. Another instance where conviction would be difficult is that where there has been widespread corruption in government. A prosecutor may have the duty in such a situation to take the case to the grand jury and, if successful in obtaining an indictment, to proceed with trial even though conviction would be exceedingly difficult to obtain. These actions represent more than gestures on the part of the prosecutor, for such tactics can successfully alert the community to wrongdoing and raise the community conscience to rectify the offending conditions.


10. See, e.g., ILL. REV. STAT. ch. 38, §3-4(c) (1977); MINN. STAT. ANN. §609.045 (1964).
Discretion in Selecting the Number and Degree of Charges

The structure of the substantive law of crimes is such that a single criminal event will often give rise to potential criminal liability for a number of different crimes. Defense counsel often complain that prosecutors charge a number of different crimes, that is, "overcharge," in order to obtain leverage for plea negotiations. Although it is difficult to give a definition of "overcharging," the heart of the criticism is the belief that prosecutors bring charges not in the good faith belief that they are appropriate under the circumstances and with an intention of prosecuting them to a conclusion, but merely as a harassing and coercive device in the expectation that they will induce the defendant to plead guilty.

From the prosecutor's point of view, the charging decision is one that must be made at a stage when all the evidence is not necessarily in the form it will take at trial. The prosecutor must make a preliminary evaluation in order to proceed, knowing that at later stages dismissal of charges or an election among charges may be necessary. If the facts warrant multiple charges growing out of a single episode, the prosecutor is entitled to charge broadly. A defendant accused of housebreaking, robbery, rape, and murder committed in a single course of conduct involving one victim can hardly complain of "overcharging" if there is evidence of conduct supporting each charge. At some stage, of course, a voluntary dismissal of one or more of the lesser charges may very well be necessary, but a prosecutor cannot fairly be criticized for charging on all counts initially. The line separating so-called overcharging from the sound exercise of prosecutorial discretion is necessarily indefinite and subjective and does not lend itself to any more definitive treatment than is stated in paragraph (c).

Standard 3-3.10. Role in first appearance and preliminary hearing

(a) A prosecutor who is present at the first appearance (however denominated) of the accused before a judicial officer should not communicate with the accused unless a waiver of counsel has been entered, except for the purpose of aiding in obtaining counsel or in arranging for the pretrial release of the accused.
(b) The prosecutor should cooperate in good faith in arrangements for release under the prevailing system for pretrial release.

(c) The prosecutor should not encourage an uncounseled accused to waive preliminary hearing.

(d) The prosecutor should not seek a continuance solely for the purpose of mooting the preliminary hearing by securing an indictment.

(e) Except for good cause, the prosecutor should not seek delay in the preliminary hearing after an arrest has been made if the accused is in custody.

(f) The prosecutor should ordinarily be present at a preliminary hearing where such hearing is required by law.

**History of Standard**

Paragraph (a) has been changed to provide that a prosecutor should not communicate with a defendant who has not waived counsel, except for the purposes of arranging for defense counsel and for the pretrial release of the accused. Original paragraph (a) simply stated that the prosecutor should cooperate in arranging for counsel and the accused's pretrial release. The second sentence of original paragraph (a) is now paragraph (b) and the subsequent paragraphs have been relettered.

**Related Standards**

NDAA, National Prosecution Standards 12.1(C), 12.2(D), (E)

**Commentary**

The prosecutor should ordinarily be present at the first appearance of the accused before a judicial officer. If in attendance, the prosecutor should cooperate in implementing relevant standards in the chapter on Providing Defense Services¹ and in making arrangements for release of the accused unless unusual circumstances impose a duty to object to release.² In most cases there will be no basis for opposing release on appropriate bond or other conditions. The prosecutor should not ask

---

¹. See standard 5-5.1.
². See standard 10-4.2(f).
excessive bail to prevent release. Since eventually (if not immediately) counsel will usually represent the accused, the prosecutor should not communicate with the defendant until arrangements for legal representation have been made or counsel is waived, unless the prosecutor's reasons for doing so relate to obtaining counsel for the accused or assisting in arrangements for pretrial release. This is consistent with the spirit of the Code of Professional Responsibility, which prohibits counsel from communicating with a party known to be represented by another lawyer.³

In some jurisdictions a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Moreover, prosecutors sometimes seek postponement of the preliminary hearing in order to bring the case before the grand jury to obtain an indictment that renders the preliminary hearing moot. Although an adversary preliminary hearing is not a constitutional necessity,⁴ these practices may deprive the defendant of valuable information without serving any important public interest. However, some situations may arise in which considerations of valid public policy exist for a continuance at the prosecutor's request; for example, there may be a genuine need to protect an undercover agent or the life or safety of a material witness.

Since the function of the preliminary examination is to determine whether there is probable cause to hold the accused for charge by indictment or otherwise, the prosecutor should avoid delay that would cause a person to be kept in custody pending a determination that there is probable cause to hold such person. Postponement of such hearing should be sought only for good cause and never for the sole purpose of mooting the preliminary hearing by securing an indictment.

Standard 3-3.11. Disclosure of evidence by the prosecutor

(a) It is unprofessional conduct for a prosecutor intentionally to fail to make disclosure to the defense, at the earliest feasible opportunity, of the existence of evidence which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused.

³ See ABA, Code of Professional Responsibility DR7-110(B).
(b) The prosecutor should comply in good faith with discovery procedures under the applicable law.
(c) It is unprofessional conduct for a prosecutor intentionally to avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

**History of Standard**

In paragraph (a), modifications have been made for reasons of style and the word "intentionally" has been added. In addition, there is a stylistic change in paragraph (c).

**Related Standards**

ABA, Code of Professional Responsibility DR7-103(B)
ABA, Standards for Criminal Justice 4-4.5, 11-2.1, 11-2.2, 18-6.3(d)(i), (ii)
NAC, Courts 3.6, 4.9

**Commentary**

**Withholding Evidence of Innocence**

The standard adopts the definition of exculpatory material contained in the Supreme Court's decision in *Brady v. Maryland*,¹ that is, material that tends to negate guilt or reduce punishment. Although the test necessarily presents some questions of relevance, prosecutors are urged to disclose all material that is even possibly exculpatory as a prophylactic against reversible error and possible professional misconduct. The Supreme Court has voiced a similar suggestion with its comment that because the standard for disclosure is "inevitably imprecise . . . the prudent prosecutor will resolve doubtful questions in favor of disclosure."²

Paragraph (a) is virtually identical to a provision in the chapter on Discovery and Procedure Before Trial,³ except that (1) the instant standard refers to the prosecutor's failure to reveal as "unprofessional con-

¹. 373 U.S. 83 (1963).
³. See standard 11-2.1(c).
duct, and (2) the duty of the prosecutor to make disclosures to the defense is not conditioned upon a request by the defense. In addition, paragraph (a) is similar to the Code of Professional Responsibility, which requires a prosecutor to “make timely disclosure . . . of evidence . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.”

Compliance with Discovery

The prosecutor should seek in good faith to make discovery procedures in criminal cases function fairly and effectively. To this end, the prosecutor should not compel the defense to resort to a court order for discovery in order to harass the defense, increase the costs of defense, or obstruct the flow of information when it is known that the information is discoverable.

Independent of any rules or statutes making prosecution evidence available to discovery processes, many experienced prosecutors have habitually disclosed most if not all of their evidence to defense counsel. This practice, it is believed, often leads to guilty pleas in cases that would otherwise be tried. A defense preview of a strong prosecution case, for example, frequently strengthens the posture of a defense lawyer who is trying to persuade the defendant that a guilty plea is in the defendant’s best interest. Voluntary disclosure also serves to open areas in which the parties can stipulate to undisputed or other facts for which a courtroom contest is a waste of time.

Intentional Ignorance of Facts

Just as it is unprofessional conduct for defense counsel to adopt the tactic of remaining intentionally ignorant of relevant facts known to the accused in order to provide a “free hand” in the client’s defense, it is similarly unprofessional for the prosecutor to engage in a comparable tactic. A prosecutor may not properly refrain from investigation in order to avoid coming into possession of evidence that may weaken the prosecution’s case, independent of whether disclosure to the defense may be required. The duty of the prosecutor is to acquire all the relevant evidence without regard to its impact on the success of the prosecution.

4. For additional commentary pertaining to the substance of paragraph (a), see the commentary to standard 11-2.1(c).
5. ABA, Code of Professional Responsibility DR7-103(B).
PART IV. PLEA DISCUSSIONS

Standard 3-4.1. Availability for plea discussions

(a) The prosecutor should make known a general policy of willingness to consult with defense counsel concerning disposition of charges by plea.

(b) It is unprofessional conduct for a prosecutor to engage in plea discussions directly with an accused who is represented by counsel, except with counsel's approval. Where the defendant has properly waived counsel, the prosecuting attorney may engage in plea discussions with the defendant, although ordinarily a verbatim record of such discussions should be made and preserved.

(c) It is unprofessional conduct for a prosecutor knowingly to make false statements or representations in the course of plea discussions with defense counsel or the accused.

History of Standard

The second sentence of original paragraph (b) stated that a prosecutor could discuss pleas with an accused who refused to be represented by counsel but that the prosecutor would be well advised to have another lawyer designated to attend such discussions. Paragraph (b) now provides that all plea discussions conducted directly with an unrepresented defendant should ordinarily be recorded verbatim. Paragraphs (a) and (c), along with the first sentence of paragraph (b), are unchanged.

Related Standards

ABA, Code of Professional Responsibility DR1-102(A)(4), (5), DR7-102(A)(5), DR7-104(A)(1)
ABA, Standards for Criminal Justice 4-6.1, 4-6.2, 11-1.1, 11-5.2(b), 14-3.1(a), (c)
NAC, Courts 3.5, 3.6
NDAA, National Prosecution Standards 16.1(A), (C), 16.2, 16.4

Commentary

Availability of Prosecutor

Prosecutors should make themselves and their staffs available to defense counsel for the purpose of discussing the prospects of disposition without trial, and a willingness to discuss pleas should be affirmatively
declared. Meaningful discussions must be timely; hence, they should occur after both sides have the facts but well in advance of trial. Effective discussion is best conducted in a calm, unhurried, and private atmosphere, rather than at the last moment in a courtroom or courthouse corridor, although there should be no barrier to disposition by plea at any stage. Of course, willingness to discuss a possible disposition by plea imposes no obligation to make concessions.

Discussion Through Counsel

The Code of Professional Responsibility provides that “a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.”\(^1\) The obvious policy of this rule is to protect a litigant against overreaching by adversary counsel and it is applicable to criminal cases as well as civil litigation. Indeed, it has been held to be a denial of the right to counsel for the prosecutor to negotiate directly with the defendant in the absence of the defense attorney.\(^2\)

There may be situations where the defendant has properly waived counsel pursuant to these standards.\(^3\) Where this occurs, the prosecutor “may engage in plea discussions with the defendant, although ordinarily a verbatim record of such discussions should be made and preserved.” Given the unequal bargaining positions between prosecutor and defendant, the requirement of a verbatim record is necessary to protect the prosecutor from charges of exerting undue influence. This recommendation corresponds to an identical suggestion contained in the chapter on Pleas of Guilty.\(^4\)

Misrepresentation by Prosecutor to Defense Counsel

Disciplinary sanction may be imposed against a lawyer who intentionally deceives opposing counsel.\(^5\) Although the prosecutor is under

---

1. ABA, Code of Professional Responsibility DR7-104(A)(1).
3. See standards 5-7.2, 5-7.3.
4. See standard 14-3.1(a).
no obligation to reveal any evidence to defense counsel in the course of plea discussions, truth is required in the presentation of facts relating to the case or any mitigating facts. The prosecutor during plea discussions must also avoid the use of deception in dealing with the evidence and must refrain from misrepresenting the law or sentencing practices of the court. Not only does misrepresentation reflect on the integrity of the prosecutor and jeopardize the achievement of justice, but it also frustrates dispositions by plea, since lawyers are understandably reluctant to negotiate with a prosecutor who cannot be trusted.

Standard 3-4.2. Fulfillment of plea discussions

(a) It is unprofessional conduct for a prosecutor to make any promise or commitment concerning the sentence which will be imposed or concerning a suspension of sentence. A prosecutor may properly advise the defense what position will be taken concerning disposition.

(b) It is unprofessional conduct for a prosecutor to imply a greater power to influence the disposition of a case than is actually possessed.

(c) It is unprofessional conduct for a prosecutor to fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present.

History of Standard

This is original standard 4.3. Original standard 4.2 stated that “[a] prosecutor may not properly participate in a disposition by plea of guilty if he is aware that the accused persists in denying guilt or the factual basis for the plea, without disclosure to the court.” That standard has been deleted from the revision.

In North Carolina v. Alford,¹ the Supreme Court held that guilty pleas can be accepted by courts, even if accompanied by a defendant’s denial of guilt, as long as the plea is voluntarily and intelligently entered. If a factual basis for the plea is absent, the prosecutor should have dismissed the case before the guilty plea stage was reached. A factual basis is commonly understood to refer to the presence of evidence that a judge

might fairly conclude would be sufficient to convict a defendant if the defendant elected to stand trial.

In addition to stylistic changes, two substantive changes have been made. First, paragraph (b) now states that it is "unprofessional conduct for a prosecutor to imply a greater power to influence the disposition of a case than is actually possessed." Second, paragraph (c) provides that "[i]t is unprofessional conduct for a prosecutor to fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present." Original paragraph (c) sanctioned the breach of plea agreements by prosecutors in the event they found themselves "unable to fulfill an understanding previously agreed upon in plea discussions...." As discussed in the commentary below, the original standard is contrary to the Supreme Court's subsequent decision in Santobello v. New York.²

Related Standards

ABA, Code of Professional Responsibility DR1-102(A)(4), DR7-102(A)(5)
ABA, Standards for Criminal Justice 4-6.2(b), 14-2.1(b)(ii)(D)
NDAA, National Prosecution Standards 16.4(A), (B)

Commentary

Misrepresentation of Intention or Power

It is essential that pleas be entered intelligently and voluntarily. In the standards relating to Pleas of Guilty, it is recommended that all plea discussions between prosecution and defense and any plea agreements be explored on the record by the judge before whom the plea is entered.³ Accordingly, if a prosecutor has made promises or commitments that he or she cannot fulfill, this fact should emerge when the court inquires of the parties concerning their plea discussions and whether an agreement was reached. But if a plea is entered as the result of a prosecutor's promising concessions beyond his or her power to fulfill, the plea is involuntary and the defendant is entitled to withdraw it.⁴ Sometimes it may not be a matter of intentional deception by the prosecutor, but

³ See standards 14-1.5 and 14-1.7.
rather a failure to make clear that the prosecutor is without power to
effect a particular disposition by the court. It is therefore important that
the prosecutor make clear that he or she is not able to assure the judicial
consequence of a guilty plea. For example, a court has labeled fraudulent
the practice of promising to recommend a lenient sentence "if asked"
for a recommendation when the prosecutor is aware that it is not the
practice of the court to ask the prosecutor for a recommendation. According to paragraphs (a) and (b), intentional deception of the de-
fense by the prosecutor respecting the sentence to be imposed should
be regarded as unprofessional conduct. These paragraphs are consistent
with the Code of Professional Responsibility, which prohibits a lawyer
from knowingly making a false statement of fact.7

Honoring Plea Agreements

The refusal to honor an agreement concerning a recommendation to
the court after a guilty plea is made undermines the voluntariness of the
plea and results in fundamental unfairness to the defendant. In Santobello
v. New York,8 the Supreme Court held that a defendant was entitled
either to withdraw the plea or to be resentenced when the prosecutor
breached an agreement to make no recommendation respecting sen-
tence. The standards on Pleas of Guilty provide that a plea may be
withdrawn when a defendant "did not receive the charge or sentence
concessions contemplated by the plea agreement and the prosecuting
attorney failed to seek or not to oppose these concessions as promised
in the plea agreement."9 Consistent with Santobello and with this pro-
vision, paragraph (c) provides that it is normally "unprofessional conduct
for a prosecutor to fail to comply with a plea agreement. . . ." An
exception to this obligation is recognized in the event the defendant
fails to comply with his or her part of the agreement (e.g., does not make
restitution as promised) or there are other extenuating circumstances
(e.g., facts concerning the defendant's past previously unknown by the
prosecutor are discovered).10

5. See State v. Hovis, 353 Mo. 602, 183 S.W.2d 147 (1944).
6. See Dillon v. United States, 307 F.2d 445 (9th Cir. 1962); McKeag v. People, 7 Ill. 2d
586, 131 N.E.2d 517 (1956).
7. ABA, CODE OF PROFESSIONAL RESPONSIBILITY DR7-102(A)(S).
10. See generally Westen & Westin, A Constitutional Law of Remedies for Broken Plea Bargains,
66 CAL. L. REV. 471 (1978). For a case holding that the government is bound by its plea
Standard 3-4.3. Record of reasons for nolle prosequi disposition

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

History of Standard

This is original standard 4.4. There are no changes.

Related Standards

None

Commentary

Some jurisdictions require the consent of the court for dismissal of criminal charges, but this is not a universal requirement. But whether or not judicial consent is required, a public record should be made of the reasons for the prosecutor’s action. This requirement would perhaps be unduly onerous in relation to misdemeanors, and the standard therefore is limited to felony criminal charges. An alternative short of placing control in the court is the practice in a number of states of requiring that the prosecutor make an on-the-record statement of the grounds for dismissal.¹

PART V. THE TRIAL

Standard 3-5.1. Calendar control

Control over the trial calendar should be vested in the court. The prosecuting attorney should be required to file with the court as a public record periodic reports setting forth the reasons for delay as

The Prosecution Function

to each case for which the prosecuting attorney has not requested trial within a prescribed time following charging. The prosecuting attorney should also advise the court of facts relevant in determining the order of cases on the calendar.

History of Standard

There is a stylistic change only.

Related Standards

ABA, Standards for Criminal Justice 12-1.2
NAC, Courts 9.4
NDAA, National Prosecution Standards 15.1(A), 15.2, 15.3(G)

Commentary

The vesting of calendar control in the court avoids even the appearance of a lack of fair and evenhanded administration of the docket. Ultimate responsibility for determining which cases are to be tried and when should be recognized as a judicial function, although the court obviously should receive relevant information from both the prosecution and the defense in establishing its priorities. The instant standard is based on a similar recommendation contained in the chapter on Speedy Trial, which should be consulted for additional commentary on this provision.¹

Standard 3-5.2. Courtroom decorum

(a) The prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom.

(b) When court is in session the prosecutor should address the court, not opposing counsel, on all matters relating to the case.

(c) It is unprofessional conduct for a prosecutor to engage in

¹. See standard 12-1.2.
behavior or tactics purposefully calculated to irritate or annoy the court or opposing counsel.

(d) A prosecutor should comply promptly with all orders and directives of the court, but the prosecutor has a duty to have the record reflect adverse rulings or judicial conduct which the prosecutor considers prejudicial. The prosecutor has a right to make respectful requests for reconsideration of adverse rulings.

(e) A prosecutor should be punctual in all court appearances and in the submission of all motions, briefs, and other papers.

(f) Prosecutors should cooperate with courts and the organized bar in developing codes of decorum and professional etiquette for each jurisdiction.

**History of Standard**

In addition to requiring that the prosecutor be punctual in all court appearances, paragraph (e) also stipulates that the prosecutor be timely "in the submission of all motions, briefs, and other papers." This change was made in order to conform paragraph (e) with a counterpart provision contained in the Defense Function standards.

Original paragraph (f) provided that "[p]rosecutors should take leadership in developing, with the cooperation of the courts and the bar, a code of decorum and professional etiquette for courtroom conduct." As revised, this provision urges that prosecutors "cooperate with courts and the organized bar in developing codes of decorum and professional etiquette. . . ." The change in emphasis corresponds with identical language applicable to defense lawyers in the Defense Function standards.

In addition, there are stylistic changes.

**Related Standards**

ABA, Code of Professional Responsibility DR7-101(A)(1), DR7-106(A), (C)(6)  
ABA, Standards for Criminal Justice 4-1.2(a), 4-7.1  
NDAA, National Prosecution Standards 17.1(B), (C)(1), (2), (D)(1), (3), (6)
Commentary

Rules or standards of conduct are needed to ensure that contending advocates work in harmony for what is their common cause, the administration of justice. They must not allow themselves to be diverted by irrelevant, extraneous, or disrupting factors. Basic to an efficient and fair functioning of our adversary system of justice is an atmosphere of mutual respect by all participants. This can be achieved only by strict adherence to firm standards of what may be called, for want of a better term, professional etiquette and deportment. There is no place and no occasion for rudeness or overbearing, oppressive conduct. The control of courtroom decorum lies in the advocates' acceptance of standards of elementary courtesy and politeness in human relations, but ultimately the presiding judge has the responsibility to govern the conduct of all persons in the courtroom, and especially the conduct of the advocates, who, as officers of the court, are subject to the court's control.

The objective of such standards is to keep the understandably contentious spirit of the opposing advocates within appropriate bounds and constructive channels, in order that issues may be resolved on the merits and proceedings not be diverted by the intrusion of factors such as personality, acrimonious exchanges between advocates or between advocates and witnesses, and histrionics in an effort to sway jurors by other than legitimate evidence. "Baiting" of witnesses for the other side, or of the trial judge, blurs and confuses the very issues that the trial is intended to sharpen and clarify. Lawyers must expect that every intrusion of bad manners or other rudeness into a trial will be dealt with swiftly and sternly by the presiding judge. Necessarily, the "ground rules" of professional conduct must be known by prosecutors and violations of rules made the subject of disciplinary action by courts and bar grievance committees.

The same considerations that call for certain standards of conduct for advocates require that the judge maintain a scrupulously neutral and fair attitude. Deviations from standards of appropriate judicial conduct should be made part of the record so as to be brought to the attention of reviewing courts.

Exchanges Between Lawyers

A breach of courtroom decorum occurs when lawyers address each other directly rather than through the court. Such exchanges may begin
with innocent purpose relating to the trial and escalate because of the natural tensions of the courtroom. Sometimes a lawyer will deliberately "bait" a less-experienced opponent to shake the opponent's composure or to impress the jury. In the courtroom, as in legislative bodies and where other formal proceedings occur, the surest protection against the degeneration of the controversy into personal acrimony is the requirement that the participants address the presiding officer and do so in certain prescribed forms. A challenge to a statement of opposing counsel should be made in the form of an objection or a request to the judge rather than to the opposing counsel directly. Both the formality of the request and the intermediary role it imposes on the judge serve to temper the exchange and provide an insulation that reduces the risk of friction. The need to curb direct exchanges between counsel is greatest when a jury is present, since there is substantial risk that the jury will be distracted from its task by the spectacle created by the lawyers.

Respect for the Judge, Opposing Counsel, and Witnesses

The obligation of the prosecutor to maintain a respectful attitude toward the court is necessary to give due recognition to the position held by the judge in the administration of the law. The prosecutor's attitude communicates to the layperson in the courtroom the professional relationship that exists between judge and prosecutor. The appropriate way to challenge the judge's decisions is through appropriate procedural devices, including objections and appeals designed for that purpose, not by a show of belligerency that exceeds the need to make a record of what is believed to be error in the case. A restrained, respectful attitude on the part of each advocate toward the other helps reinforce the concept that the adversary system, although based on contention, depends on evidence and the rule of law, not vituperation or personality conflicts.¹

A reasonable balance must be reached on matters of conduct so that judicial proceedings are not permitted to degenerate to the level of donnybrooks, but it is also important that no artificial standards of courtroom conduct impede lawyers from rendering vigorous advocacy of their viewpoints. It is for this reason that the law grants lawyers an absolute privilege against defamation actions for anything said or writ-

¹ See, e.g., In re Schofield, 362 Pa. 201, 66 A.2d 675 (1949); H. Drinker, Legal Ethics 69-70 (1953).
ten in the course of judicial proceedings pertinent to that proceeding, under a broad standard of pertinence.²

Public respect for law derives in large measure from the image that the administration of justice presents. It is not enough that justice be done; there must also be the appearance of justice. The law is a great teacher not only in its substantive principles but also in the example it sets of dispassionate and rational methods for the resolution of conflicts. An important aspect of the image of justice is the relations that are seen to exist in the courtroom among the lawyer-participants: defense counsel, prosecutor, and judge.³

Of necessity, the prosecutor must often be forceful and vigorous in questioning witnesses and in arguing to the jury. This does not mean, however, that the prosecutor may make a farce of the trial or undermine the dignity of the legal process by excessive histrionics. The line between legitimate cross-examination and “witness baiting” is difficult to draw. Ultimately an experienced and vigilant trial judge will draw such a line if the advocates fail to stay within reasonable bounds.⁴

These standards seek to suggest certain limited forms of courtroom misconduct deserving imposition of disciplinary sanctions. To avoid undue limitation on appropriate advocacy, extreme sanctions are limited to conduct purposefully calculated to annoy or irritate. Repetition of misconduct after a warning from the bench should be considered sufficient to establish a prima facie showing of purposeful misconduct.

Compliance with Court Orders

The relationship between the court and the prosecutor is most severely put to the test on those occasions when the judge issues a direct command to counsel, for example, instructing counsel to cease interrogation of a witness or to desist from a particular line of argument.

Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court’s considered ruling. . . . But if the ruling is adverse, it is not counsel’s right to resist

---

⁴ See ABA, Code of Professional Responsibility DR7-106(C)(2), (6).
it or to insult the judge — his right is only respectfully to preserve his point for appeal.  

Corresponding to the prosecutor's obligation to accede to the court's command in good grace is the duty of the court to permit an adequate record to be made of the court's order and the circumstances under which it was made, as seen by counsel.

**Prompt Disposition; Punctuality**

Lack of punctuality in attendance at court disturbs the orderly processes of the court and inconveniences others waiting to be heard. It is costly in terms of the wasted time of lawyers, witnesses, jurors, and the judge and staff. It is also a disservice to the client because of the risk that it may irritate the court or the jury. Failure to be punctual in court appearances may be grounds for punishment for contempt.  

Punctuality in the filing of briefs and motions is also important. As a corollary to counsel’s own responsibility to be punctual, it is incumbent on counsel to do all within his or her power to see to it that the client and witnesses are punctual in their attendance at court. Where additional time is needed to properly prepare a case, the correct course is to seek a continuance.

**Code of Decorum**

The particular formalities observed in American courts differ from place to place. A lawyer is entitled to know what standards of decorum are expected in a particular court, especially with regard to the use of conventional forms of address, when the lawyer is required to stand, where he or she is allowed to be in the courtroom during trial, and other such matters. To avoid misunderstanding between court and lawyer concerning such formalities, achieve greater uniformity within jurisdictions, and generally improve the dignity of courtroom proceedings,

---

6. See, e.g., United States v. Lespier, 558 F.2d 624 (1st Cir. 1977); In re Allis, 531 F.2d 1391 (9th Cir. 1976).
7. See AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT §21(d) (1972).
8. For a standard dealing with continuances, see standard 12-1.3.
lawyers, including prosecutors, should take the lead in developing rules governing these matters.

Standard 3-5.3. Selection of jurors

(a) The prosecutor should prepare himself or herself prior to trial to discharge effectively the prosecution function in the selection of the jury and the exercise of challenges for cause and peremptory challenges.

(b) In those cases where it appears necessary to conduct a pretrial investigation of the background of jurors, investigatory methods of the prosecutor should neither harass nor unduly embarrass potential jurors or invade their privacy and, whenever possible, should be restricted to an investigation of records and sources of information already in existence.

(c) The opportunity to question jurors personally should be used solely to obtain information for the intelligent exercise of challenges. A prosecutor should not intentionally use the voir dire to present factual matter which the prosecutor knows will not be admissible at trial or to argue the prosecution’s case to the jury.

History of Standard

Original paragraph (c) referred to those “jurisdictions where lawyers are permitted to personally question jurors on voir dire. . . .” This language has been deleted because of concern that it may have been construed to imply tacit approval of jurisdictions where lawyers are not permitted to question jurors personally. Standard 15-2.4, in the chapter on Trial by Jury, recommends that “counsel for each side should have the opportunity, subject to reasonable time limits, to question jurors directly, both individually and as a panel.”

In addition, there are stylistic changes.

Related Standards

ABA, Code of Professional Responsibility DR7-106(C)(1), DR7-108(E)
ABA, Standards for Criminal Justice 4-7.2, 15-2.4

3 · 76
Commentary

Preparation for Jury Selection

The selection of a jury is an important phase of the trial, although the process is sometimes beyond the comprehension of laypersons and prospective jurors. The procedure requires the alert attention of the lawyer. As elsewhere in the trial, in the selection of the jury the advocate’s decisions must be made under time pressure. They can be made wisely only if the prosecutor has prepared adequately before trial. Thus, the prosecutor needs to prepare carefully for the exercise of challenges for cause and peremptory challenges.

Pretrial Investigation of Jurors

Pretrial investigation of jurors may permit a more informed exercise of challenges than reliance solely on voir dire affords. The practice of conducting out-of-court investigations of jurors presents serious problems, however. It may have a tendency to make jury service, already unpopular with many persons, even more onerous because of the fear of invasion of privacy. It may also have the appearance, even if unintended, of an effort to intimidate jurors. To minimize these risks, the prosecutor should be careful to conduct investigations of jurors in a manner that avoids invasions of privacy. Except in unusual circumstances of necessity, the prosecutor should limit the inquiry to records already in existence rather than, for example, questioning a potential juror’s neighbors contemporaneously.¹

Use of Voir Dire

The process of voir dire examination of prospective jurors by lawyers is often needlessly time consuming and is frequently used to influence the jury in its view of the case. These standards elsewhere recommend that jurors be questioned “initially and primarily by the judge, but counsel for each side should have the opportunity . . . to question jurors directly. . . .”² In those jurisdictions that retain the practice of permitting the lawyer to conduct all of the questioning of jurors, the responsibility

---

¹ See ABA, Code of Professional Responsibility DR7-108(E), EC7-29 to EC7-31.
² Standard 15-2.4.
must rest with the lawyer, supervised by the court, to limit questions to those that are designed to lay a basis for the lawyer's challenges. The observation that the voir dire may be used to influence the jury in its view of the case is rejected as an improper use of the right of reasonable inquiry to ensure a fair and impartial jury.

The use of the voir dire to inject inadmissible evidence into the case is a substantial abuse of the process. Treatment of legal points in the course of voir dire examination should be strictly confined to those inquiries bearing on possible bias in relation to the issues of the case.

Standard 3-5.4. Relations with jury

(a) It is unprofessional conduct for a prosecutor to communicate privately with persons summoned for jury duty or impaneled as jurors concerning a case prior to or during trial. The prosecutor should avoid the reality or appearance of any such improper communications.

(b) The prosecutor should treat jurors with deference and respect, avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.

(c) After discharge of the jury from further consideration of a case, it is unprofessional conduct for the prosecutor to intentionally make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which will tend to influence judgment in future jury service.

History of Standard

Paragraph (c) now provides that it is "unprofessional conduct" for a prosecutor to engage intentionally in the conduct proscribed by this standard. Also, the original standard applied "after verdict." This has been modified and the standard is now applicable "after discharge of the jury from further consideration of a case." Paragraphs (a) and (b) are unchanged.

Related Standards

ABA, Code of Professional Responsibility DR7-108(A), (B), (D), (E), EC7-36
ABA, Standards for Criminal Justice 4-7.3
NDAA, National Prosecution Standards 17.1(D)(5)

Commentary

Communication with Jurors Before or During Trial

Discussing the case privately with a juror before verdict is obviously a gross breach of professional standards of conduct.1 Courts have sometimes considered the broader question of the propriety of any conversation, however innocent in purpose or trivial in content, between counsel and juror during trial, since the mere fact that counsel is seen conversing with a juror may raise the question of whether the juror reached the verdict solely on the evidence.2 The prosecutor's legitimate communication must be with the jury as an entity — not with jurors individually. For obvious reasons, these strictures apply as well to communications with persons summoned for jury duty who may or may not be impaneled as jurors in a particular case.

Attitude Toward Jury

The prosecutor "should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration."3 Referring to individual jurors by name during trial has been ruled unethical,4 and courts also have condemned the practice.5 Just as respect for the position of the judge requires that the judge be addressed formally as "your honor," the jury's symbolic position as representing the community in the court requires that a degree of formality be observed in addressing the jury. The

1. ABA, Code of Professional Responsibility DR7-108(B).
3. ABA, Code of Professional Responsibility EC7-36.
typical form of address is, of course, "ladies and gentlemen of the jury" or "members of the jury."

Posttrial Interrogation

Since it is vital to the functioning of the jury system that jurors not be influenced in their deliberations by fears that they subsequently will be harassed by lawyers or others who wish to learn what transpired in the jury room, neither defense counsel nor the prosecutor should discuss a case with jurors after trial in a way that is critical of the verdict. However, it is recognized that "it is not unethical, in states where it is not illegal, for the purpose of self-education, to communicate in an informal manner with jurors who are willing to talk."

Standard 3-5.5. Opening statement

The prosecutor’s opening statement should be confined to a brief statement of the issues in the case and to remarks on evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.

History of Standard

There are stylistic changes only.

Related Standards

ABA, Code of Professional Responsibility DR7-106(C)(1)
ABA, Standards for Criminal Justice 4-7.4
NAC, Courts 4.15
NDAA, National Prosecution Standards 17.5(B)

---


7. ABA Committee on Ethics and Professional Responsibility, Formal Opinion 319 (1967).
Commentary

The purpose of the opening statement is narrow and limits the prosecutor to a brief statement of the issues and an outline of what the prosecutor believes can be supported with competent and admissible evidence. In that statement the prosecutor should be scrupulous to avoid any utterance that cannot be supported later with such evidence. If, through honest inadvertence, the prosecutor's proof falls significantly short of the opening statement, the court should be asked to give a clarifying instruction to avoid either advantage or penalty. In other respects, the opening statement is governed by standards applicable to the closing argument.

Standard 3-5.6. Presentation of evidence

(a) It is unprofessional conduct for a prosecutor knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

(b) It is unprofessional conduct for a prosecutor knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

(c) It is unprofessional conduct for a prosecutor to permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration by the judge or jury until such time as a good faith tender of such evidence is made.

(d) It is unprofessional conduct to tender tangible evidence in the view of the judge or jury if it would tend to prejudice fair consideration by the judge or jury unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained.

3. See standard 3-5.8.
History of Standard

Except for the addition of the word "substantial" to the second sentence of paragraph (d), there are no changes.

Related Standards

ABA, Code of Professional Responsibility DR7-102(A)(4), DR7-106(C)(1)
ABA, Standards for Criminal Justice 4-7.5
NAC, Courts 4.15(2)
NDAA, National Prosecution Standards 17.1(A)(2), (C), (D)(6), 17.9

Commentary

False Evidence or Known Perjury

It is axiomatic that a prosecutor, in common with all other advocates, is barred from introducing evidence that is known to be false. ¹ This obligation applies to evidence that bears on the credibility of a witness as well as to evidence on issues going directly to guilt. ² Even if false testimony is volunteered by the witness and takes the prosecutor by surprise, if the prosecutor knows it is false, it is the prosecutor’s obligation to see that it is corrected. ³ Although some courts have granted new trials to defendants even where the prosecutor was unaware of the falsity of the evidence, ⁴ disciplinary action against prosecutors should be limited to those cases where the falsity of the evidence was known to, or reasonably should have been discovered by, the prosecutor.

Presenting Inadmissible Evidence

The mere offer of known inadmissible evidence or asking a known improper question may be sufficient to communicate to the trier of fact the very material the rules of evidence are designed to keep from the fact finder. Moreover, the damage may only be emphasized by an objection to the evidence, so that the offer of inadmissible matter may leave opposing counsel with no effective remedy. This practice and the similar tactic of arguing to the bench or making comments on or off the record

¹. See ABA, Code of Professional Responsibility DR7-102(A)(4).
³. See United States v. Poole, 379 F.2d 645 (7th Cir. 1967).
⁴. See Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964).
in a manner calculated to influence the jury clearly are improper.\textsuperscript{5} Many cases have held that such conduct is ground for declaring a mistrial or granting a new trial.\textsuperscript{6}

A prosecutor should exercise great care in deciding what evidence to use. A strong case should not be jeopardized by introducing evidence that is essentially cumulative but that may bring about a reversal. It is obviously not easy to forgo using reliable and probative evidence when it is at hand, but the prosecutor must do so in many instances. A high level of experienced litigation judgment is often required, and a prosecution office should have its senior litigation lawyers available for consultation on these difficult decisions.

Display and Tender of Tangible Evidence

The rationale underlying paragraph (b), as explained above, applies as well to paragraphs (c) and (d). Tangible evidence requires special treatment because such evidence is immediately subject to scrutiny once it is brought into the courtroom. As in paragraph (b), dealing with testimonial evidence, the purpose of paragraphs (c) and (d) is to prevent tangible evidence from coming to the attention of the trier of fact unless and until it is offered. The premature display of a tangible article in the courtroom may be unduly inflammatory even though it is later admitted. Hence, such an article should not be exposed to view until it is formally offered for admission in evidence. Moreover, the offer must be made in good faith. If there is any doubt as to the admissibility of the article, the display and tender should be made outside the presence of the jury.

Standard 3-5.7. Examination of witnesses

(a) The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily. Proper cross-examination can be conducted without violating rules of decorum.

(b) The prosecutor’s belief that the witness is telling the truth does not preclude cross-examination, but may affect the method

\textsuperscript{5} See ABA, Code of Professional Responsibility DR7-106(C).
\textsuperscript{6} See Annot., 109 A.L.R. 1089 (1937).
and scope of cross-examination. A prosecutor should not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully.

(c) A prosecutor should not call a witness who the prosecutor knows will claim a valid privilege not to testify for the purpose of impressing upon the jury the fact of the claim of privilege. In some instances, as defined in codes of professional responsibility, doing so will constitute unprofessional conduct.

(d) It is unprofessional conduct for a prosecutor to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

**History of Standard**

Modifications have been made in paragraph (b) for purposes of clarity and style.

Original paragraph (d) stated that "[i]t is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner knows he cannot support by evidence." The accepted test, however, for determining the propriety of questions on cross-examination is whether the examiner has a good faith belief in the questions asked, not whether evidence is available to introduce in support of the question. Accordingly, paragraph (d) has been changed and now contains a "good faith" test as the basis for asking cross-examination questions.

There are stylistic changes only in paragraphs (a) and (c).

**Related Standards**

ABA, Code of Professional Responsibility DR1-102(A)(5), DR7-106(C)(1), (2)

ABA, Standards for Criminal Justice 4-7.6, 6-2.2(a), 6-2.3

NDAA, National Prosecution Standards 17.1(D)(4), 17.6(A), (B), (F), (G)

**Commentary**

Character and Scope of Direct Examination and Cross-Examination

The ethic of our legal tradition has long recognized that there are limitations on the manner in which witnesses should be examined be-
yond those contained in rules of evidence. The Code of Professional
Responsibility forbids a lawyer to "[a]sk any question that he has no
reasonable basis to believe is relevant to the case and that is intended
to degrade a witness or other person."1 Another source states that "[a]
lawyer should never be unfair or abusive or inconsiderate to adverse
witnesses or opposing litigants, or ask any question intended not legiti-
mately to impeach but only to insult or degrade the witness."2 Some
states have by statute guaranteed "the right of a witness to be protected
from irrelevant, improper or insulting questions, and from harsh or
insulting demeanor. . . ."3 An eminent British barrister has spoken on
the subject in these terms:

The right of cross examination is important: it is one of the things
which distinguishes the procedures of trial in the common law countries
from those derived from Roman law and I think distinguishes it to the
advantage of our system. But it is a right easily abused. One has always
to remember that its object is not to examine crossly, as Mr. Baron Alder-
son put it; not to blackguard the witness; not to bring out unhappy or
discreditable things there may have been in the witness's past unless they
have a clear and direct bearing on the witness's credibility in the instant
case.4

Ultimately, a lawyer must always exercise discretion in determining
the extent to which damage done to the reputation of a witness is
justified by the contribution that a particular line of questioning may
make to the truth-finding function of the trial.

Undermining a Truthful Witness

A question of long standing is whether a prosecutor, in cross-examin-
ing a witness, should be restrained by the belief that the witness has
tested truthfully. Generally, a lawyer is not required to substitute
personal opinion for the available fact-finding processes of the trial and
may, therefore, properly invoke the usual cross-examination techniques
to test the witness's capacity and opportunity for observation and the
witness's ability to recall. However, it is sometimes argued that the
manner and tenor of cross-examination ought to be restricted where

1. ABA, Code of Professional Responsibility DR7-106(C)(2). See also EC7-25.
4. Shawcross, The Functions and Responsibilities of an Advocate, 13 Rec. Assn. B. City N.Y. 483,
examining counsel believes in the truthfulness of the testimony given by the witness.

Where the prosecutor knows that the testimony of the witness is accurate, paragraph (b) adopts the view that the power of cross-examination may not be invoked to destroy or undermine the truth. In this regard, it is believed that the duty of the prosecutor differs from that of the defense lawyer, who on occasion may be required to challenge known truthful witnesses of the prosecution in order to put the state to its proof.5

**Forcing a Claim of Privilege Before the Jury**

Most courts preclude a jury from drawing evidentiary inferences from the fact that a witness has claimed a privilege.6 The theory underlying these cases is "the impossibility of effective cross-examination and the possibility that the jury may give inferences from the claim of privilege more weight than they deserve."7 If these effects are to be minimized, it is desirable that issues relating to a claim of privilege be heard out of the presence of the jury whenever possible. If the prosecutor is informed in advance that the witness will claim a privilege and wishes to contest the claim, the matter should be treated without the presence of the jury and a ruling obtained.8

Concern has been expressed that failure of the jury to be aware that the nonappearance of a witness having possibly relevant information is due to a claim of privilege will leave an opening for argument based on the failure of the adversary to call the witness.9 This reasoning has been offered as a ground for permitting the prosecutor to compel a claim of privilege in the jury’s presence.10 Since the prosecutor is precluded from calling a person who will claim a privilege, the defense counsel is under a correlative obligation not to argue any inference from the absence of the person as a witness.

---

5. See standard 4-7.6(b).
Paragraph (c) is similar to standard 3-3.6(e), which recommends that the prosecutor not call a witness before the grand jury when it is known that the witness plans to invoke the constitutional privilege not to testify.

**Unfounded Questions**

It is an improper tactic for the prosecutor to attempt to communicate impressions by innuendo through questions that would be to the defendant's advantage to answer in the negative, for example, "Have you ever been convicted of the crime of robbery?" or "Weren't you a member of the Communist party?" or "Did you tell Mr. X that . . . ?" when the questioner has no evidence to support the innuendo. Generally, questions may be asked on cross-examination if, as recommended in paragraph (d), a "good faith belief" in the factual predicate implied in the question is present.

**Standard 3-5.8. Argument to the jury**

(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by

---

11. See ABA, Code of Professional Responsibility DR7-106(C)(1); 6 Wigmore, Evidence §1808(2) (1940).

12. See, e.g., United States v. Pugh, 436 F.2d 222 (D.C. Cir. 1970); People v. Lewis, 180 Colo. 423, 506 P.2d 125 (1973); Hazel v. United States, 319 A.2d 136 (D.C. 1974). However, in some situations in some jurisdictions, it may be necessary to have more than a good faith basis to ask a question on cross-examination. It has been held, e.g., that a witness may not be cross-examined as to prior convictions if the examiner does not have a certified record of the conviction available to rebut a denial of the conviction. See, e.g., State v. Williams, 297 Minn. 76, 210 N.W.2d 21 (1973); People v. Di Paolo, 366 Mich. 394, 113 N.W.2d 78 (1962). Contra, People v. Lewis, supra.
injecting issues broader than the guilt or innocence of the accused
under the controlling law, or by making predictions of the conse-
quencies of the jury's verdict.

(e) It is the responsibility of the court to ensure that final argu-
ment to the jury is kept within proper, accepted bounds.

History of Standard

Paragraph (e) has been added. The substance of this addition ap-
peared as standard 5.10 of the original Function of the Trial Judge
standards. In addition, there is a stylistic change.

Related Standards

ABA, Code of Professional Responsibility DR7-102(A)(5), DR7-
106(C)(3), (4)
ABA, Standards for Criminal Justice 4-7.7
NAC, Courts 4.15(3)
NDAA, National Prosecution Standards 17.17(A)

Commentary

The prosecutor's argument is likely to have significant persuasive
force with the jury. Accordingly, the scope of argument must be consist-
ent with the evidence and marked by the fairness that should characte-
rize all of the prosecutor's conduct. Prosecutorial conduct in argument is
a matter of special concern because of the possibility that the jury will
give special weight to the prosecutor's arguments, not only because of
the prestige associated with the prosecutor's office but also because of
the fact-finding facilities presumably available to the office.¹ Unfortu-
nately, some prosecutors have permitted an excess of zeal for conviction
or a fancy for exaggerated rhetoric to carry them beyond the permissible
limits of argument.² Of course, a prosecutor must be free to present
arguments with logical force and vigor. As the Supreme Court has
remarked, however, "while he may strike hard blows, he is not at liberty

¹ See Di Carlo v. United States, 6 F.2d 364 (2d Cir. 1925); Note, The Nature and Consequences
to strike foul ones." To attempt to spell out in detail what can and cannot be said in argument is impossible, since it will depend largely on the facts of each case. Nevertheless, certain broad guidelines based on the function of argument and the experience of courts in typical situations can be established.

Inferences Warranted by the Evidence; Misrepresentation

The most elementary rule governing the limits of argument is that it must be confined to the record evidence and the inferences that can reasonably and fairly be drawn therefrom. Assertions of fact not proven amount to unsworn testimony of the advocate and are not subject to cross-examination. In a few cases prosecutors were condemned for the clearly improper use before the jury of evidence that had not been or could not have been introduced in evidence at the trial. Standard 3-5.6 treats this subject more fully.

The intentional misstatement of evidence is particularly reprehensible. It has long been established that a lawyer may not knowingly misquote testimony of a witness or in argument assert as a fact that which has not been proved.

Personal Belief

Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor’s office and undermine the objective detachment that should separate a lawyer from the cause being argued. Such argument is expressly forbidden by the Code of Professional Responsibility, and many courts have recognized the impropriety of such statements. This kind of argument is easily avoided by insisting that lawyers restrict themselves to statements such as “The evidence shows . . .” or something similar.

The line between permissible and impermissible argument is a thin one. Neither advocate may express personal opinion as to the justice of his or her cause or the veracity of witnesses. Credibility is to be determined solely by the triers, but an advocate may point to the fact that circumstances or independent witnesses give support to one witness or cast doubt on another. The prohibition pertains to the advocate's personally endorsing, vouching for, or giving an opinion. The cause should turn on the evidence, not on the standing of the advocate, and the testimony of witnesses must stand on its own.

Appeals to Passion or Prejudice

Arguments that rely on racial, religious, ethnic, political, economic, or other prejudices of the jurors introduce into the trial elements of irrelevance and irrationality that cannot be tolerated. Of course, the mere mention of the status of the accused as shown by the record may not be improper if it has a legitimate bearing on some issue in the case, such as identification by race. But where the jury's predisposition against some particular segment of society is exploited to stigmatize the accused or the accused's witnesses, such argument clearly trespasses the bounds of reasonable inference or fair comment on the evidence. Accordingly, many courts have denounced such appeals to prejudice as inconsistent with the requirement that the defendant be judged solely on the evidence.  

Injection of Extraneous Issues

References to the likelihood that other authorities, such as the governor or the appellate courts, will correct an erroneous conviction are impermissible efforts to lead the jury to shirk responsibility for its decision. Predictions as to the effect of an acquittal on lawlessness in the community also go beyond the scope of the issues in the trial and are to be avoided. Some courts have reversed convictions where such arguments were made. Of course, the restriction must be reciprocal;

a prosecutor may be justified in making a reply to an argument of
defense counsel that may not have been proper if made without provo-
cation. The better solution to this problem, however, lies in adequate-
ly instructing advocates on the limits of proper argument and on
the willingness of trial judges to enforce fair rules pertaining to such
limits.

Standard 3-5.9. Facts outside the record

It is unprofessional conduct for the prosecutor intentionally to
refer to or argue on the basis of facts outside the record whether
at trial or on appeal, unless such facts are matters of common
public knowledge based on ordinary human experience or matters
of which the court may take judicial notice.

History of Standard
There are no changes.

Related Standards
ABA, Code of Professional Responsibility DR7-106(C)(1)
ABA, Standards for Criminal Justice 4-7.9, 4-8.4(c)

Commentary
The problem of digression from the record can arise at both the trial
and the appellate levels. It is indisputable that at the trial level it is
highly improper for a lawyer to refer in colloquy, argument, or other
context to factual matter beyond the scope of the evidence or the range
of judicial notice. This is true whether the case is being tried to a court
or a jury, but it is particularly offensive in a jury trial. It can involve the
risk of serious prejudice with a mistrial as a possible remedy. Ordinarily
a trial court should summarily exclude any reference to factual matter
beyond the scope of the evidence in any significant way. The broad
discretion a trial court has in such matters enables it to deal with them
as they arise by allowing a party to reopen the case or to take other
appropriate steps to enlarge the record so as to provide an evidentiary
basis for the matter the party wishes to argue but has for some reason
failed to establish. At the appellate level it is also a grave violation of ethical standards to argue factual matters outside the record.

Standard 3-5.10. Comments by prosecutor after verdict

The prosecutor should not make public comments critical of a verdict, whether rendered by judge or jury.

History of Standard

There are no changes.

Related Standards

NDAA, National Prosecution Standards 27.2(A)

Commentary

The chapter on Trial by Jury recommends that the trial judge refrain from praising or criticizing jurors for their verdict, noting that such remarks may improperly influence the jurors in other cases to which they may be assigned. For like reasons and also because of the prosecutor’s influence as the representative of the people, the prosecutor should refrain from making public statements critical of a jury’s verdict. The prosecutor should similarly avoid the fact or appearance of trying to intimidate a judge when the case is tried without a jury.

PART VI. SENTENCING

Standard 3-6.1. Role in sentencing

(a) The prosecutor should not make the severity of sentences the index of his or her effectiveness. To the extent that the prosecutor becomes involved in the sentencing process, he or she should seek

---

1. See standard 15-4.6 and commentary.
to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.

(b) Where sentence is fixed by the court without jury participation, the prosecutor should be afforded the opportunity to address the court at sentencing and to offer a sentencing recommendation. When requested by the court to furnish a sentencing recommendation, the prosecutor should have the obligation to do so.

(c) Where sentence is fixed by the jury, the prosecutor should present evidence on the issue within the limits permitted in the jurisdiction, but the prosecutor should avoid introducing evidence bearing on sentence which will prejudice the jury's determination of the issue of guilt.

History of Standard

Original paragraph (b) urged that the prosecutor ordinarily not make sentencing recommendations unless the prosecutor agreed to do so as part of a plea agreement or the prosecutor's recommendation is requested by the court. As revised, paragraph (b) urges that the prosecutor be afforded the opportunity to make sentencing recommendations and be required to do so when the prosecutor's views are requested by the court.

There are stylistic changes only in paragraphs (a) and (c).

Related Standards

ABA, Standards for Criminal Justice 18-6.3(b) to (d)
NDAA, National Prosecution Standards 18.1(A), (D), (E)

Commentary

Severity of Sentence

The prosecutor's position in the administration of criminal justice makes it totally inappropriate to measure prosecutorial effectiveness by the severity of the sentences imposed in prosecuted cases. There are times, of course, when the prosecutor may need to urge the courts to take a stronger stand in sentencing where the prosecutor believes their policies have been erroneous. But the prosecutor's overriding obligation is to see that justice is fairly done and can most effectively be achieved
by seeking to make the sentencing process operate in a fair, equitable manner with the best available information. Public pressure on prosecutors to seek severe sentences is often present. However, once guilt is determined it is important that prosecutors, like judges, maintain an attitude of fairness and objectivity. In the long run, this can be achieved more easily if prosecutors avoid implying to the public, either in campaigns for office or in other public statements, that their success is properly to be measured by the severity of the sentences they have obtained. This position is in accord with a similar standard contained in the chapter on Sentencing Alternatives and Procedures.¹

**Recommendations in Sentencing by the Court**

Paragraph (b) is also fully consistent with recommendations in the chapter on Sentencing Alternatives and Procedures.² The sentencing process is, in the final analysis, an adversary proceeding. Accordingly, the prosecutor must be permitted in all cases, at his or her discretion, access to information pertaining to the appropriate sentence and to make a sentencing recommendation. Particularly where the court requests a sentence recommendation, the prosecutor has an obligation to respond. In addition, plea discussions may result in an agreement that the prosecutor will make a sentencing recommendation. In such circumstances, the prosecutor should, of course, honor the agreement by making the recommendation.³

**Sentencing by the Jury**

In the chapter on Sentencing Alternatives and Procedures, it is pointed out that in the minority of states in which juries make sentence determinations in noncapital cases the power to overrule the sentence is retained by the sentencing judge.⁴ When a jury does determine the sentence, there is the risk that evidence bearing on the sentence will prejudice the determination of guilt. For this reason, even where the evidence rules permit some evidence at trial to be introduced as bearing on the sentence issue, the prosecutor should avoid unnecessarily pre-

---

¹ See standard 18-6.3(b).
² See standard 18-6.3(c).
³ For a standard dealing with the duty of the prosecutor to honor plea agreements, see standard 3-4.2. The prosecutor’s role in plea discussions is dealt with in standard 14-3.1.
⁴ See commentary to standard 18-1.1.
senting evidence of an inflammatory nature that may prejudice the jury’s decision on the issue of guilt.

**Standard 3-6.2. Information relevant to sentencing**

(a) The prosecutor should assist the court in basing its sentence on complete and accurate information for use in the presentence report. The prosecutor should disclose to the court any information in the prosecutor’s files relevant to the sentence. If incompleteness or inaccuracy in the presentence report comes to the prosecutor’s attention, the prosecutor should take steps to present the complete and correct information to the court and to defense counsel.

(b) The prosecutor should disclose to the defense and to the court at or prior to the sentencing proceeding all information in the prosecutor’s files which is relevant to the sentencing issue.

**History of Standard**

There are stylistic changes only.

**Related Standards**

ABA, Standards for Criminal Justice 4-8.1(b), 18-6.3(d)(i)(A), (B), (ii)
NDAA, National Prosecution Standards 18.1(E)

**Commentary**

One of the most important contributions the prosecutor can make in the sentencing process is to see that the information that the prosecutor has gathered for use at trial is brought to bear on the issue of sentence to the extent relevant, whether that information is favorable or unfavorable to the convicted defendant. Unless the sentencing judge directs otherwise, the prosecutor should forward relevant information to the officer responsible for preparation of the presentence report. It is also desirable that the prosecutor have access to the report, or a summary, after it is prepared in order to check on its completeness and accuracy in light of the prosecutor’s information.¹

¹ For further exposition of the responsibilities of the prosecutor in connection with the use and presentation of factual data at the sentencing stage, see standard 18-6.3(d).