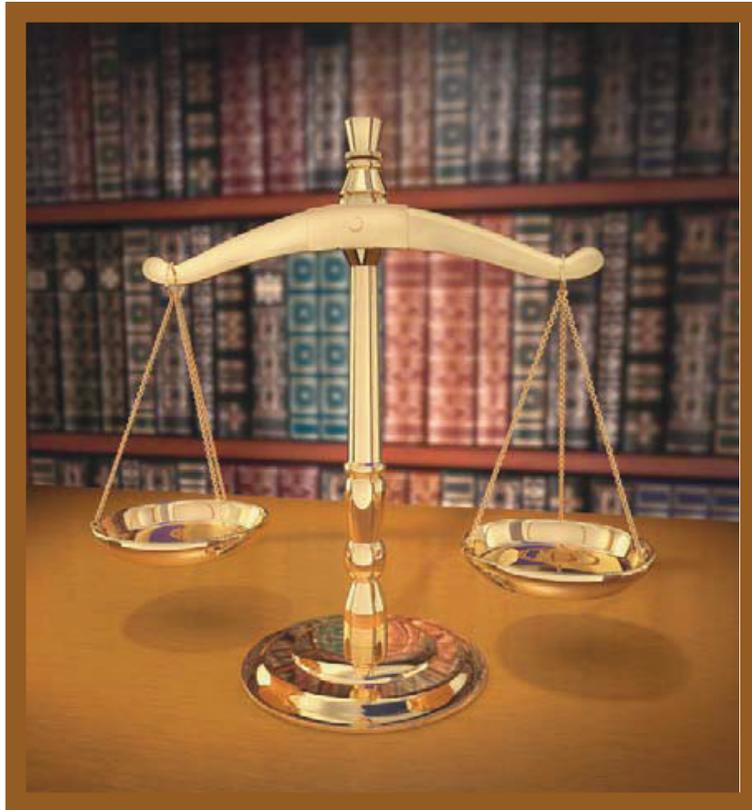


“The Right Thing”

Ethical Guidelines for Prosecutors



2012

Produced by the Ethics and Best Practices Sub-Committees of the
DAASNY Committee on the Fair and Ethical Administration of Justice

DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK



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August 2012

Dear Colleagues:

I am pleased to distribute this second edition of the District Attorneys Association's Ethics Handbook. The Handbook collects in one place the most significant cases and rules that govern ethical behavior by prosecutors in this state, and reflects our long-standing commitment to ethical prosecution and to the protection of the rights of victims, defendants and the public. The ethical principles that govern prosecutors are described in a practical and meaningful way that will help us all in our daily work.

The Ethics Handbook was developed by the Ethics and Best Practices sub-committees of our Committee on the Fair and Ethical Administration of Justice, chaired by District Attorney William Fitzpatrick of Onondaga County. D.A. Fitzpatrick's leadership sparked the idea and spurred forward the effort that led to the creation of this booklet. While president of the District Attorneys Association in 2011, D.A. Derek Champagne of Franklin County had the Handbook printed and distributed to every District Attorney and Assistant District Attorney in the state. I know that it will continue to be extremely useful in all of our offices, whether rural, suburban or urban.

The Handbook is meant as a supplement to existing ethics training that is conducted by both the New York Prosecutors Training Institute (NYPTI) and individual District Attorneys. District Attorneys may use the Handbook as a foundation upon which additional protocols and procedures may be added, or to supplement their own training programs and ethics policies.

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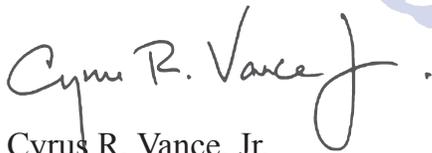
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Please note that this edition contains recent amendments to Rule 3.8 of the New York Rules of Professional Conduct, as adopted by the Appellate Divisions, effective July 1, 2012. The amendments, which were supported by the Association, are described more fully in the Handbook.

The primary author of the Handbook is Philip Mueller, Chief Assistant District Attorney in the Schenectady County District Attorney's office. His vision for the Handbook is displayed on every page and his strong knowledge of the subject matter provides support for his powerful words. Tammy Smiley of Nassau County, Wendy Lehman, formerly of Monroe County, and Lois Raff of Queens County helped edit the handbook. Kristine Hamann of New York County and the Office of Special Narcotics, who serves as Chair of the Best Practices committee, nudged the Handbook forward to completion and coordinated the enclosed amendments. David Cohn of New York County, Mike Coluzza of Oneida County, Michael Flaherty of Erie County, Chana Krauss of Putnam County, Robert Masters of Queens County, Rick Trunfio of Onondaga County and Joshua Vinciguerra of NYPTI also all contributed to various parts of the Handbook. We thank them all for their efforts.

I hope that the Ethics Handbook will continue to serve as a practical, easy-to-understand outline of the ethical obligations that we must uphold as prosecutors in New York State.

Best Regards,



Cyrus R. Vance, Jr.
President
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This handbook is intended to provide general guidance to prosecutors by expressing in writing the long-standing commitment of New York’s District Attorneys and their assistants to ethical prosecution and the protection of the rights of victims, defendants and the public. This handbook summarizes aspirational principles, as well as ethical obligations created by statute, case precedent, and duly authorized rules of professional conduct. It is not intended to, and does not, create any rights, substantive or procedural, in favor of any person, organization, or party; it may not be relied upon in any matter or proceeding, civil or criminal. Nor does it create or impose any limitations on the lawful prerogatives of New York State’s District Attorneys and their staffs.

“The Right Thing”

The prosecutor *“is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”* Berger v. United States, 295 U.S. 78, 88 (1935).

We prosecutors have the best job in the criminal justice system because we have more freedom than any other actor to do “the right thing.” Defense counsel protect their clients’ interests and legal rights. Judges protect the parties’ rights and the public’s interest in the proper resolution of pending cases. But it’s not their job to find the truth, decide who should be charged, or hold the perpetrator accountable. Only prosecutors are given the freedom – and with it the ethical duty – to promote all of these vital components of “the right thing.”

What does this mean?

It means we -- you -- have great power to alter the lives of many people: people accused of crimes, people victimized by crimes, their families and friends, and the community at large. A criminal charge may be life-changing to an accused or a victim; it must never be taken for granted. Handle it like a loaded gun; never forget its power to protect or harm.

It means we keep an open mind. Not every person who is suspected should be arrested, not every suspect who is arrested should be prosecuted, not every case should be tried, and not every trial should be won. We have the freedom, and with it, the ethical duty not to bring a case to trial unless we have diligently sought the truth and are convinced of the defendant’s guilt. Even then, none of us – not the police, the witness, the prosecutor, the judge, nor the juror – is omniscient or infallible. Like all lawyers, we have an ethical duty to zealously advocate for our client. But unlike other lawyers, the client we represent is the public, whose interests are not necessarily served by winning every case. A guilty verdict serves our client’s interest only if the defendant is in fact guilty and has received due process.

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It means we seek the truth, tell the truth, and let the chips fall where they may. We serve our client's interest when we respect the rights of the accused, when we leave no stone unturned in our search for the truth, and when the jury's verdict reflects the available evidence. When we win, we can sleep at night because the outcome – with its awesome consequences – is the product of our best effort and the fairest system humans have devised. When we lose, we can sleep at night for the same reason.

It means we succeed when the innocent are exonerated, as well as when the guilty are convicted.

It means each of us has a duty to know the ethical rules that govern our conduct, and to remain alert to the myriad and often subtle ethical challenges that arise in our work.

It means that district attorneys and their senior staff must set the tone, emphasize the primacy of ethical conduct, instruct junior prosecutors in these principles, and monitor their compliance.

These core principles, which at once define what it means to be a prosecutor and make it the best of jobs, are also reflected in mandatory rules of professional conduct. Violations can ruin the lives and reputations of innocent suspects, cheat victims of their chance at justice, and endanger the public. Such dire consequences to others justify dire consequences to prosecutors who act unethically. Ethical violations expose prosecutors to formal discipline including: censure, suspension and disbarment; case-specific sanctions, such as reversal of convictions, preclusion of evidence, and dismissal of charges; and employment sanctions, including damaged reputation, loss of effectiveness, demotion, and termination. Fortunately, compliance with ethical rules requires only that we know the rules, recognize that they define rather than restrain our mission, and anticipate challenges. This handbook was created by New York's prosecutors to help you meet these challenges.

Unethical Conduct: Consequences For Others

The Defendant

“The prosecutor . . . enters a courtroom to speak for the People and not just some of the People. The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of ‘the People’ includes the defendant and his family and those who care about him.” Lindsey v. State, 725 P.2d 649 (WY 1986) (quoting *Commentary On Prosecutorial Ethics*, 13 Hastings Const. L.Q. 537-539 [1986]).

A prosecutor’s worst nightmare is not losing a major case or watching a dangerous criminal go free, it’s convicting an innocent person. Nothing is more repugnant to our core principles of truth and justice. Unethical behavior by a prosecutor increases the risk that an innocent person will be convicted. The consequences for the defendant are obvious: incarceration, destruction of reputation, separation from family and friends, and extended damage to employability.

But the damage done by unethical behavior is not limited to innocent defendants or to defendants who are convicted. All defendants, innocent and guilty alike, are entitled to the presumption of innocence, the benefit of reasonable doubt, and due process. Unethical behavior by a prosecutor can render these fundamental rights illusory. And defendants who are ultimately acquitted can nevertheless suffer irreparable harm from unethical prosecution: loss of freedom, employment, reputation, sense of security, and trust in government.

The Defendant’s Family

Convicted defendants facing sentencing often bolster their pleas for leniency by citing the damage their incarceration will do to their families. This collateral damage from crime and punishment is real and can be devastating -- the heartbreaking separation from a defendant who is also a parent, a spouse or a child; financial destitution of a family; and public shame. Coming from a guilty person fairly convicted, this argument is hollow because the defendant has victimized his or her own family. But if the conviction was procured by

your unethical behavior as a prosecutor, the destruction of the defendant's family will be on your head.

The Victim and the Victim's Family

Unethical behavior by a prosecutor can re-victimize crime victims, the very people we strive to protect. Convicting an innocent person means that the guilty person is left unpunished and any sense of "closure" is a sham. Convicting a guilty person by unethical means, subjects the victim and his or her family to the agony of seeing the conviction overturned, being dragged through a second, painful trial, or even watching the perpetrator go free.

Crime forces people from outside the court system into a strange and frightening world in the role of "victims." Some have already suffered horrific losses. The ordeal of appearing in court, facing the perpetrator, risking retaliation, describing the crime to strangers, being cross-examined, having his or her credibility attacked, and waiting in suspense through jury deliberations may be the second-most harrowing experience of a victim's life. It leaves most victims and their families thinking: "I never want to go through that again." Now imagine having to call the victim or the victim's family to tell them that, because of your own unethical behavior or that of another prosecutor in your office, they must go through it all again, their ordeal was wasted, the wrong person was convicted, or the right person was convicted but will now get a second chance to evade responsibility. Worse yet, imagine having to explain that, because of the gravity of the prosecutorial misconduct, there will be no retrial, only a dismissal with prejudice, and that the perpetrator will go free.

Your Community

"The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community." Hurd v. People, 25 Mich. 405, 416 (1872).

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Conviction of an innocent person leaves the community exposed to future crimes by the guilty person. Also, the conviction will usually be seen by the police as “closing the book” on the crime, making it much less likely that the guilty person will ever be found.

Conviction of a guilty person, if tainted by unethical prosecutorial behavior, exposes the community to the tremendous expense, waste, and risk of a reversal and retrial.

But the damage potentially caused to the community by a prosecutor’s unethical behavior goes beyond the particular case. The public’s trust in the integrity of the justice system is impaired when there is a perception that law enforcement does not follow basic rules of fairness. Witnesses may refuse to come forward or may feel justified in withholding evidence or giving false testimony, if they feel that prosecutors are corrupt. Jurors may be reluctant to serve or may bring with them into the deliberation room a crippling mistrust of the law enforcement community.

Unethical Conduct: Consequences For You

We prosecutors hold people accountable for their actions. We are, in turn, accountable for ours. In the criminal justice system, with its multitude of actors, motivated adversaries, high stakes, and sentences lasting years, any unethical behavior by a prosecutor is likely to be discovered. Violations of your ethical obligations will expose you, your cases, your office, and your District Attorney to dire consequences. Unethical behavior by one prosecutor, if unpunished, can poison the atmosphere in an entire office. Moreover, your unethical conduct can cause the District Attorney public embarrassment and possible electoral defeat. Just as there are many levels of culpability for professional misconduct, there are many consequences for unethical actions.

- **You may be censured, suspended, or disbarred.** Violations of ethical rules governing the conduct of attorneys, including prosecutors, are overseen by the supreme courts of the state. Under the rules set out by each appellate division, those courts have empowered permanent committees on professional standards to investigate allegations of misconduct and “censure, suspend from practice or remove from office any attorney . . . guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice.” Judiciary Law § 90(2).
- **You may lose your job.** You are not expected to win every case, but you are expected to conduct yourself ethically in every case. Your unethical conduct can lead to your dismissal or demotion.
- **A written reprimand may be placed in your permanent file.**
- **You may be fired or demoted by the next District Attorney.** If your unethical behavior embarrassed the prior D.A., you will probably be fired by his or her successor. Even if your misconduct never became public, a new D.A. finding indications of unethical conduct in your personnel file or in oral reports from senior staff or other sources may consider you a liability.

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- **Your case may suffer a variety of sanctions.** These include damaging delays, preclusion of evidence, negative inference instructions to the jury, dismissal with prejudice, and reversal of a conviction.
- **You may be criminally prosecuted.** You could be prosecuted under state law, for example, for suborning perjury, obstructing justice, or official misconduct, or under federal law for deprivation of rights under color of law. See 18 USC § 242; *Dennis v. Sparks*, 449 U.S. 24 (1980); *United States v. Otherson*, 637 F.2d 1276 (9th Cir. 1980), cert. denied, 454 U.S. 840 (1981).
- **You may be sued civilly for damages.** To ensure their independent judgment and zealous advocacy, our law confers absolute immunity from civil liability upon individual prosecutors acting in their role as advocates for the state. You may have only qualified immunity, however, when acting outside your role as an advocate, for example, when performing investigative functions. More importantly, personal immunity from civil prosecution does not diminish your ethical duties or shield you, in extreme cases, from criminal liability.
- **You will lose your reputation and effectiveness.** You will spend years building your reputation for integrity in the community of judges, defense attorneys, police, potential jurors, and fellow prosecutors. You can lose it all by a single act of unethical behavior. With diminished reputation comes diminished effectiveness. Judges have a hundred ways to punish a prosecutor whom they suspect of unethical conduct; they don't need to prove it or even accuse you, and most times there will be no appeal. Your credibility with members of the defense bar will affect your ability to negotiate plea and cooperation agreements, as well as the civility of your practice and your enjoyment of your job. No case is worth your reputation.
- **You'll know.** You didn't become a prosecutor to get rich or take the easy path. You did it because you know right from wrong and it's important to you to be on the side of right. Remember this when you're tempted to cut an ethical corner; even in the unlikely event that it stays hidden for your entire career, you'll still know, and it will rob you of the self-esteem that is your work's most valuable reward.

Rules Of Fairness And Ethical Conduct

Our ethical duties as prosecutors derive from and are defined by many sources. These include, of course, the Rules of Professional Conduct codified at Title 22, Part 1200 of the New York Code of Rules and Regulations (“NYCRR”). These mandatory rules are also construed by advisory ethics opinions issued by bar associations. But we are wise not to view our ethical duties as limited by the Rules of Professional Conduct. They are also shaped by procedural statutes and case law, including, for example, the *Brady* and *Giglio* doctrines enforcing a defendant’s constitutional right to a fair trial, discovery rules under Criminal Procedure Law Article 240 and the *Rosario* rule. To be sure, not every mistake made by a prosecutor in applying these doctrines, and not every error in judgment, can fairly be deemed a breach of ethical obligations. But deliberate violations of these rules of fairness, or willful ignorance of them, are ethical failures.

a. *Rules of Professional Conduct*, 22 NYCRR Part 1200

Effective April 1, 2009, the Chief Judge of the Court of Appeals and the Presiding Justices of the Appellate Division adopted new *Rules of Professional Conduct* to replace New York’s *Code of Professional Responsibility* and bring our state’s ethical rules more in line with the American Bar Association’s *Model Rules of Professional Responsibility*. Although all of the *Rules of Professional Conduct* apply to prosecutors, some have little relevance to criminal prosecution because they regulate the private practice of law, fees, and relationships with individual clients. Most of the new *Rules* have similar counterparts in the old *Code*, causing the chairman of the committee that drafted the new *Rules* to opine that “the new rules represent a fine tuning of the existing code of professional responsibilities in New York so that the obligations remain exactly the same...” (Steven Krane, Esq., chairman of the New York State Bar Association’s Committee on Standards of Attorney Conduct, quoted in the *New York Law Journal*, 12/17/09).

The complete *Rules of Professional Conduct* can be accessed through the websites of the New York Prosecutors Training Institute (“NYPTI”) and the New York State Bar Association. If you confront specific issues involving any of these mandatory ethical rules, you should review the text of

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the rule itself and relevant advisory opinions issued by the state or local bar associations.

For your day-to-day practice, however, most ethical principles underlying the *Rules* can be distilled to a few common sense principles of fairness and professionalism:

- **Be Prepared.** You must acquire “the legal knowledge, skill, thoroughness and preparation necessary for the representation.” (Rule 1.1).
- **Be On Time.** You must “act with reasonable diligence and promptness” (Rule 1.3). You must not “neglect a legal matter entrusted to” you (Rule 1.3), or “use means that have no substantial purpose other than to delay or prolong a proceeding . . .”(Rule 3.2).
- **Tell The Truth.** You must be candid about the facts and the law with judges, opposing counsel and others. In representing the People, you must not “knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law [you] previously made to the tribunal”; “fail to disclose to the tribunal controlling legal authority” not already cited by opposing counsel; “offer or use evidence that [you] know is false” (Rule 3.3); or “knowingly make a false statement of fact or law to a third person” (Rule 4.1). When communicating with unrepresented persons, you must not misrepresent your role in the matter (Rule 4.3). You must not make a false statement in an application for membership to the bar (Rule 8.1) or “concerning the qualifications, conduct or integrity of a judge” or judicial candidate (Rule 8.2). If you learn of false testimony or other fraud upon the court, you must “take reasonable remedial measures, including, if necessary, disclosure to the tribunal” (Rule 3.3[b]). In an *ex parte* proceeding, you must disclose to the court all material facts, including adverse facts, that will enable the court to make an informed decision (Rule 3.3[d]).
- **Don’t Reveal Secrets.** With certain exceptions, you must not “knowingly reveal confidential information to the disadvantage of a client” (Rule 1.6). This rule is drafted with the private practitioner and client in mind, but maintaining confidentiality is even more important for prosecutors than for private attorneys. Careless or unauthorized disclosure of the sensitive information we routinely acquire can cost lives, compromise investigations,

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and ruin reputations. Some unauthorized disclosures -- notably, of grand jury proceedings -- are punishable as felonies (Penal Law § 215.70).

- **Don't Prosecute Without Probable Cause.** As a prosecutor, you are specifically forbidden to “institute, cause to be instituted or maintain a criminal charge when [you] know or it is obvious that the charge is not supported by probable cause” (Rule 3.8[a]). If you come to know that a pending charge is not supported by probable cause, you must act appropriately to dismiss or reduce the charge, or advise a supervisor with the authority to do so, regardless of who caused the charge to be instituted (Rule 5.2). The breadth of the term “maintain” and the objective component of Rule 3.8[a] (“or should have known”) highlight the importance of the initial screening process for charges or indictments in place in each District Attorney’s office, as well as the ongoing review of charges by prosecutors familiar with and exercising substantial control over each case. Moreover, even *with* probable cause, you must not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter (Rule 3.4[e]).

- **Don't Make Frivolous Arguments.** You must not “bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.” A claim is “frivolous” if it is knowingly based on false factual statements, if it is made for no purpose other than delay, or if it is “unwarranted under existing law.” Attorneys may, however, argue in good faith for an extension, modification, or reversal of existing law (Rule 3.1).

- **Comply With Procedural And Evidentiary Rules.** When appearing before a tribunal, you must not “intentionally or habitually violate any established rule of procedure or of evidence” (Rule 3.3[f][3]). When questioning a witness in court, you must not “ask any question that [you have] no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person . . .” (Rule 3.4[d][4]).

- **Be Fair.** For example, you must not: advise a witness to hide or leave the jurisdiction to avoid testifying; knowingly use false testimony or evidence; pay or offer to pay compensation to a witness contingent on the content of the witness’s testimony or the outcome of the case; or, act as an unsworn witness in a proceeding and assert personal knowledge of material facts (Rule 3.4).

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You must not communicate directly or indirectly with a person represented by another lawyer, about the subject matter of that representation, unless you have the lawyer's consent or are otherwise legally authorized to do so (Rule 4.2).

- **Be Courteous And Respectful.** When appearing before a tribunal, you must not “engage in undignified or discourteous conduct ... [or] conduct intended to disrupt the tribunal”; or “fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply.” (Rule 3.3).

- **Protect The Integrity Of Courts And Juries.** In an adversarial proceeding, you must not engage in unauthorized *ex parte* communications with the judge or his or her staff regarding the merits. During a litigation, whether or not you are a participant, you must not engage in or cause another to engage in prohibited communications with a sitting juror or prospective juror or a juror's family members. After the litigation ends, you must not communicate with a juror if this has been prohibited by the court or if the juror has expressed a desire not to communicate, and you must not communicate with a juror in a misleading, coercive or harassing manner, or in an attempt to influence the juror's action in future jury service. You must promptly reveal to the court any improper conduct by a juror or by another toward a juror, venire person, or members of their families (Rule 3.5).

- **Try Your Case In The Courtroom, Not The Media.** Rule 3.6 (“Trial Publicity”) is long and complex, and is perhaps the ethical rule most likely to trip up the unwary prosecutor. The public's intense interest in crimes committed in their communities, which is reflected in media attention, combined with the propensity of some defense attorneys to try their cases in the press, may tempt you to provide the media with more information than you should. The general rule is that a lawyer participating in a criminal or civil proceeding “shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” (Rule 3.6[a]). Rule 3.6[a] includes a list of categories of statements to the media deemed likely to materially prejudice a criminal proceeding, and a list of statements that can properly be made; read it before speaking with the media. Any statement announcing that

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a particular person has been charged with a crime must be accompanied by a statement that the charge is merely an accusation and that the defendant is presumed innocent unless and until proven guilty (Rule 3.6).

- **Comply With Disclosure Rules.** All lawyers are ethically bound to disclose any evidence which they have “a legal obligation to reveal or produce.” (Rule 3.4[a][1],[3]). As a prosecutor, you must also make timely disclosure to the defense of all evidence or information known to your office that “tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence,” unless relieved of this obligation by a protective order (Rule 3.8[b]; see CPL § 240.50).

- **Trust Jurors, Trust Your Advocacy, Trust The Truth.** Lawyers who do not trust jurors to act reasonably, intelligently and justly, or don’t trust their own ability to help jurors make sense of conflicting evidence, tend to make ethical errors. The villain in the courtroom drama *A Few Good Men*, played by Jack Nicholson, famously declared: “You can’t handle the truth!” He was wrong. The truth, when presented in a calm, coherent and engaging manner, has a compelling power of its own. Jurors take their duty seriously and want to find the truth. Many of the ethical principles cited above (“tell the truth,” “be fair,” “comply with procedural and evidentiary rules,” “comply with disclosure rules,” etc.), are aimed at restraining attorneys from substituting their own judgments about guilt or innocence, credibility, or what evidence should be considered, for the judgments of courts and jurors. Prosecutors should focus their advocacy, not on suppressing discordant evidence, but on helping jurors put it in its proper perspective.

- **Keep Doing Justice After A Conviction.** Our ethical duties don’t end when a defendant is convicted. Prosecutors must act appropriately upon learning of new evidence indicating that an innocent person was convicted, keeping in mind that no person or system is infallible and that exonerating the innocent is as important as convicting the guilty. In July of 2011, the District Attorneys Association of New York State adopted the following Statement of Principle:

“The fundamental core of a prosecutor’s responsibility is to ‘do justice’. It is an obligation that does not end with a conviction, regardless of whether the conviction is by verdict or plea. Whenever a credible claim of innocence is put forward we remain committed to pursuing the path that justice demands. Every case must be determined

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on its facts and its own merits. Where the facts and the merits demonstrate that DNA testing could conclusively establish innocence, or is otherwise the appropriate course of action, we will pursue it.”

In addition, a year later, in July of 2012, New York’s *Rules of Professional Conduct* were amended to describe the special responsibilities of a prosecutor who “knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted”. See the Appendix for the complete text of the NY *Rules of Professional Conduct*, Rule 3.8. See also, *District Attorney’s Office for the Third Judicial District v. Osborne*, 129 S. Ct. 2308, 2319-2322 (2009); *McKithen v. Brown*, 626 F.3d 143 (2d Cir. 2010); *Warney v. Monroe County*, 587 F.3d 113 (2d Cir. 2009); and *Connick v. Thompson*, 131 S.Ct. 1350 (2011).

- **Obey The Law.** Attorneys are ethically bound to avoid deceit and misconduct in their personal as well as their professional activities. You must not engage in: “illegal conduct that adversely reflects on [your] honesty, trustworthiness or fitness as a lawyer; . . . conduct involving dishonesty, fraud, deceit or misrepresentation; . . . conduct that is prejudicial to the administration of justice; . . . [or] any other conduct that adversely reflects on [your] fitness as a lawyer.” (Rule 8.4[b,c,d,h]).

- **When In Doubt, Reach Out.** The ethical principles summarized here, although straightforward in theory, will often prove difficult to apply in the complex factual circumstances you will confront. You must stay watchful for ethical issues that may arise in subtle ways. When in doubt, seek guidance from supervisors, colleagues, bar association advisory opinions or other resources. Senior lawyers have probably confronted and resolved the same ethical issues that seem new and vexing to you. Rule 5.2 (“Responsibilities of a Subordinate Lawyer”) highlights the value of seeking advice, while making clear that, in the end, you are responsible for your own ethical conduct, regardless of what anyone else may tell you. A lawyer is bound by the *Rules of Professional Conduct* even when acting at the direction of another person (Rule 5.2[a]), but a subordinate lawyer does not violate the *Rules* if he or she “acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” (Rule 5.2[b]).

- **Provide Guidance:** Any law firm, including a District Attorney’s Office (Rule 1.0[h]), must make “reasonable efforts” to ensure that all lawyers in

the office conform to the *Rules of Professional Conduct*, and must “adequately supervise” the work of all employees. Senior and supervisory prosecutors have an ethical duty to “make reasonable efforts” to ensure that subordinates act ethically. See Rules 5.1 (“Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers”) and 5.3 (“Lawyer’s Responsibility for Conduct of Nonlawyers”).

b. *Brady* and *Giglio*: The Constitutional Right to a Fair Trial

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that the prosecution in a criminal trial must disclose to the defense, upon request, material, exculpatory information. Failure to disclose such information may violate due process if the evidence is material to either guilt or punishment, “irrespective of the good faith or bad faith of the prosecution.” See also *People v. Cwikla*, 46 N.Y.2d 434, 441 (1979). In *Giglio v. United States*, 405 U.S. 150, 174 (1972), the Court made clear that *Brady* information includes not only information directly related to the crime, but also, under some circumstances, information that would negatively affect the credibility of a prosecution witness.

In *United States v. Agurs*, 427 U.S. 97 (1976), the Court held that the prosecution must disclose *Brady* information even if the defense has not specifically requested it. In *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), the Court held that prosecutors have an affirmative duty to learn of, as well as to disclose, favorable evidence known to “others acting on the government’s behalf in the case, including the police.” This duty to disclose pertains to all exculpatory and impeachment “information,” including oral information, and not merely to written materials or documents. It applies, moreover, not only at the trial stage, but also to pretrial suppression hearings. See *People v. Williams*, 7 N.Y.3d 15 (2006).

This obligation to disclose exculpatory and impeachment evidence is a product exclusively of the defendant’s “fair trial” guarantees inherent in the fifth, sixth, and fourteenth amendments to the Constitution. *United States v. Ruiz*, 536 U.S. 622, 628 (2002). Thus, *Brady* “does not direct disclosure at any particular point of the proceedings.” *People v. Bolling*, 157 A.D.2d 733 (2d Dept. 1990). Accord *People v. Fernandez*, 135 A.D.2d 867 (3rd Dept. 1987); *People v. Coppa*, 267 F.3d 132, 135, 139-144, 146 (2d Cir. 2001). Rather, the People’s

obligation to disclose *Brady* material is satisfied when the defendant has been given “a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People’s witnesses or as evidence during his case.” *People v. Cortijo*, 70 N.Y.2d 868, 870 (1987). Thus, it follows, “the concerns of *Brady* are not implicated during grand jury proceedings.” *People v. Reese*, 23 A.D.3d 1034, 1036 (4th Dept. 2005).

Because the right to *Brady* material is a product of a defendant’s fair trial guarantees, the Supreme Court has also held that, at least in regard to impeachment material, a defendant who pleads guilty has no right to disclosure. *United States v. Ruiz*, 536 U.S. at 625. Our Court of Appeals has not addressed this issue, and the appellate divisions are not in harmony. Given this uncertainty, and the absence of any higher authoritative state decision, a prosecutor may determine, in accord with the law in his or her department, whether to disclose certain materials prior to accepting a guilty plea. Disclosure, of course, will never be error.

The failure to disclose impeachment or exculpatory information, when constitutionally required, can result in the reversal or vacatur of a conviction, or other sanctions, even if that failure was inadvertent. A knowing or willful failure to disclose such information is an ethical violation. *Rules of Professional Conduct* 3.4[a][1] (“a lawyer shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce”); 3.4[a][3] (“a lawyer shall not conceal or knowingly fail to disclose that which the lawyer is required by law to reveal”); 3.8[b] (“a prosecutor . . . shall make timely disclosure to counsel for the defendant . . . of the existence of evidence or information known to the prosecutor.. that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence”).

Innumerable judicial decisions and scholarly articles have sought to define what information is “material” within the meaning of the *Brady* doctrine, what is exculpatory, at what juncture in the case disclosure must be made, how rigorously the prosecutor must seek out exculpatory information, how damaging the impeachment information or important the prosecution witness must be to invoke *Giglio’s* disclosure requirement, and what sanctions will be imposed for various failures to disclose. Obviously, particularized research and factual analysis are required to address the specifics of each prosecution.

c. CPL Article 240: Statutory Discovery Obligations

Criminal Procedure Law Article 240 describes the materials you must disclose to defense counsel, regardless of whether they inculcate or exculpate the defendant. CPL § 240.20 describes materials you must disclose early, generally within 15 days after the defense makes a written demand for them. CPL § 240.44 requires you to disclose, at pretrial hearings, the relevant prior statements and the criminal convictions of and pending charges against any witnesses you call at the hearings. CPL § 240.45 codifies the *Rosario* rule (discussed below) and requires disclosure at trial, before opening statements, of similar information concerning any witnesses you wish to call at the trial. CPL § 240.50 allows you to seek a protective order denying, limiting, conditioning, delaying or regulating discovery for good cause, including the protection of witnesses. Your failure to provide discovery required under CPL Article 240, even if inadvertent, may cause the court to impose whatever sanction it deems necessary to cure any prejudice that the non-disclosure or late disclosure caused to the defendant. A deliberate failure to meet your discovery obligations under CPL Article 240 can constitute an ethical violation. *Rules of Professional Conduct* 3.4[a][1], [3]

d. *Rosario* and CPL §§ 240.44 & 240.45: Discovery Concerning Prosecution Witnesses

Under *People v. Rosario*, 9 N.Y.2d 286 (1961) and CPL §§ 240.44 and 240.45, you must give the defense any prior written or recorded statement of a witness whom you intend to call at trial or a pretrial hearing, which statement is in your possession or control, and which concerns the subject matter of the witness's testimony. At pretrial hearings, you must turn this material over upon request after the witness's direct examination and before the start of cross-examination. CPL § 240.44. In a jury trial you must turn it over -- even without a request -- after the jury has been sworn and before opening statements. CPL § 240.45(1); *People v. Smith*, 63 A.D.3d 508 (1st Dept. 2009). In a bench trial, you must do it before submitting any evidence. CPL § 240.45(1). Once again, these deadlines do not mean that you should wait for the last minute to meet your obligations.

Rosario violations, even if inadvertent, can lead to a new trial or new pretrial hearing if the defendant shows a reasonable possibility that

the nondisclosure materially contributed to the conviction or the denial of suppression following a pretrial hearing. CPL § 240.75. A knowing or willful *Rosario* violation is an ethical breach. *Rules of Professional Conduct* 3.4[a][1],[3].

e. Political Activity by Prosecutors

The District Attorneys Association of the State of New York (“DAASNY”) has adopted a *Code of Conduct for Political Activity*. This *Code* recognizes the civil rights of a prosecutor, as an individual citizen, to vote, join a political party, contribute money to political organizations, attend political events, sign political petitions, and participate in community and civic organizations that have no partisan purpose. However, to avoid compromising the integrity of their office and the appearance of conflicts with their professional responsibilities, district attorneys and their assistants are forbidden to be members or officers of any organization or group having a political purpose. Prosecutors generally may not speak at political functions, publicize their attendance at such functions, or act in a manner that could be interpreted as lending the prestige and weight of their office to a political party or function. Of course, a prosecutor who is running for election or re-election is permitted to campaign on his or her own behalf. District Attorneys and their assistants may not endorse political candidates, except that in some counties assistants may be permitted to engage in political activity in support of the re-election of the District Attorney by whom they are employed.

Prosecutors may not coerce or improperly influence anyone to give money or time to a political party, committee or candidate; they may not engage in political activity during normal business hours or use office resources; and they may not misuse their public positions to obstruct or further the political activities of any political party or candidate. Furthermore, in some localities, all government employees, including prosecutors, may also be subject to local laws concerning political activity, such as the New York City Conflict of Interest Rules. For additional details, consult the *Code of Conduct for Political Activity*, which is reproduced in the appendix to this handbook.

Conclusion

Ethical principles are the essence of criminal prosecution, not a burden upon it. Compliance with ethical rules requires that we know the rules, remain vigilant, remember the diverse public interests we have sworn to serve, and remind one another that we became prosecutors to do “the right thing.”

Resources

The new *Rules of Professional Conduct*, NYCRR Part 1200, can be accessed through the websites of the New York Prosecutors Training Institute (“NYPTI”), www.nypti.org, and the New York State Bar Association, www.nysba.org. Additional local rules of the Appellate Divisions may cover specific areas of lawyer conduct not covered in the statewide rules. These include, for the First Department, 22 NYCRR Parts 603 - 605; for the Second Department, 22 NYCRR Parts 691 and 701; for the Third Department, 22 NYCRR Part 806; and for the Fourth Department, 22 NYCRR Part 1022. These too can be accessed through the NYSBA website.

The District Attorneys Association of the State of New York (“DAASNY”) maintains a Committee For The Fair And Ethical Administration Of Justice, whose Ethics Subcommittee is staffed with experienced prosecutors from District Attorney offices across the state. DAASNY’s Ethics Subcommittee is authorized to consult with and render advisory opinions to local prosecutors who refer questions of ethics to the Subcommittee on a prospective or retrospective basis. The Ethics Subcommittee can be reached through DAASNY’s website, www.daasny.org.

Bar Associations also have ethics committees which issue nonbinding, advisory opinions to guide attorneys and courts on issues of professional conduct. Hundreds of advisory opinions by the Committee on Professional Ethics of the New York State Bar Association are indexed and accessible through the NYSBA website. You can also check the New York City Bar Association (www.nycbar.org), the New York County Lawyer’s Association (www.nycla.org), the Nassau County Bar Association (www.nassaubar.org), and the American Bar Association’s Ethics Committee (www.abanet.org).

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The New York Prosecutors Training Institute (“NYPTI”) is an invaluable resource that provides on-line and regional training sessions on prosecutors’ ethical obligations, Brady, Rosario, statutory discovery and prosecutorial misconduct. NYPTI’s online Prosecutor’s Encyclopedia, at <https://pe.nypti.org>, gives easy access to these and a host of other resources, including summaries of, and links to, New York State Bar Association ethics opinions relevant to prosecutors. The National District Attorneys Association (“NDAA”), www.ndaa.org, has provided ethical guidance to prosecutors in its publications: *National Prosecution Standards and Commentaries* (3d ed.); and *Doing Justice: A Prosecutor’s Guide to Ethics and Civil Liability* (2nd ed.).

Helpful treatises include Simon’s *New York Code of Professional Responsibility Annotated* (Thompson-West 2007); the *ABA/BNA Lawyers’ Manual on Professional Conduct* (multivolume loose-leaf service also available in the Westlaw database “ABA-BNA-MOPCNL”, and on LEXIS under “Secondary Legal” and the “BNA” database); and the *Restatement (Third) of the Law Governing Lawyers*, by the American Law Institute. Cornell Law School provides online access to its *American Legal Ethics Library* (www.law.cornell.edu/ethics).

Appendix

Rule 3.8 Special Responsibilities of Prosecutors and Other Government Lawyers (Amendment Effective July 1, 2012)

(c) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) disclose that evidence to an appropriate court or prosecutor's office;
or

(2) if the conviction was obtained by that prosecutor's office,

(A) notify the appropriate court and the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;

(B) disclose that evidence to the defendant unless the disclosure would interfere with an ongoing investigation or endanger the safety of a witness or other person, and a court authorizes delay for good cause shown; and

(C) undertake or make reasonable efforts to cause to be undertaken such further inquiry or investigation as may be necessary to provide a reasonable belief that the conviction should or should not be set aside.

(d) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted, in a prosecution by the prosecutor's office, of an offense that the defendant did not commit, the prosecutor shall seek a remedy consistent with justice, applicable law, and the circumstances of the case.

(e) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (c) and (d), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

District Attorneys' Code of Conduct for Political Activity

The office of District Attorney, under the Constitution and laws of New York State, is an elected position. District Attorneys must regularly submit their record of performance to the electorate. The District Attorney is therefore involved directly in the political process. Thus, it is reasonable and proper for District Attorneys and members of their staffs to engage in activities that do not compromise their office's efficiency or integrity or interfere with the professional responsibilities and duties of their offices.

District Attorneys may engage in the following conduct:

1. Register to vote themselves, and vote.
2. Have membership in a political party.
3. Contribute money to political parties, organizations and committees.
4. Attend political/social events.
5. Participate in community and civic organizations that have no partisan purposes.
6. Sign political petitions as an individual.
7. In order to demonstrate public support for the nonpartisan nature of the District Attorney's office, a District Attorney should consider accepting the endorsement of more than one political party when running for office.
8. District Attorneys are entitled to criticize those policies that undermine public safety and support those policies that advance it, by freely and vigorously speaking out and writing on criminal justice issues and the individuals involved in those issues.

District Attorneys and Assistants shall not:

1. Be a member or serve as an official of any political committee, club, organization or group having a political purpose.

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2. Endorse candidates, except that Assistant District Attorneys shall be permitted to engage in political activity in support of the re-election of the District Attorney by whom they are employed.
3. While attending a political/social function, District Attorneys or Assistant District Attorneys shall not speak at such functions; they shall not publicize their attendance at such functions; nor shall they act in a manner which could be interpreted as lending the prestige and weight of their office to the political party or function. However, this shall not prohibit normal political activity during the course of a campaign year.
4. Coerce or improperly influence any individual to make a financial contribution to a political party or campaign committee or to engage in political activities.
5. Except as otherwise provided, engage in any political activity during normal business hours or during the course of the performance of their official duties or use office supplies, equipment, facilities or resources for political purposes.
6. Misuse their public positions for the purpose of obstructing or furthering the political activities of any political party or candidate.

The above activities are reasonable and ethical, and are consistent with the impartiality of the District Attorney's office. The above activities should also help District Attorneys maintain a sense of public confidence in the non-partisan nature of the District Attorney's office. Such conduct also guarantees the constitutional rights of prosecutors and their assistants in the exercise of their elective franchise. Candidates for the office of District Attorney shall abide by these rules.

