

# ABA Standards for the Prosecution Function

- ▶ Aspirational or describe “best practices”
- ▶ 3-1.2(a) - administrator of justice, a zealous advocate, and an officer of the court.
- ▶ The prosecutor’s office should exercise sound discretion and independent judgment in the performance of the prosecution function.

## 3-1.2(b)

- ▶ The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.
- ▶ The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both
  - ▶ by pursuing appropriate criminal charges of appropriate severity, and
  - ▶ by exercising discretion to not pursue criminal charges in appropriate circumstances.

## 3-1.2(c)

- ▶ 3-1.2(c) - The prosecutor should know and abide by the standards of professional conduct as expressed in applicable law and ethical codes and opinions in the applicable jurisdiction.
- ▶ The prosecutor should avoid an appearance of impropriety in performing the prosecution function.

## 3-1.2(c)

- ▶ A prosecutor should seek out, and the prosecutor's office should provide, supervisory advice and ethical guidance when the proper course of prosecutorial conduct seems unclear.
- ▶ A prosecutor who disagrees with a governing ethical rule should seek its change if appropriate, and directly challenge it if necessary but should comply with it unless relieved by court order.

## 3-1.2(e)

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

## 3-1.2(f)

- ▶ The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system.
- ▶ The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action.

## 3-1.2(f)

- ▶ The prosecutor should provide service to the community, including involvement in public service and Bar activities, public education, community service activities, and Bar leadership positions.
- ▶ A prosecutorial office should support such activities, and the office's budget should include funding and paid release time for such activities.

## Standard 3-1.3

### The Client of the Prosecutor

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



## Standard 3-1.6 Improper Bias Prohibited

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

## Standard 3-1.9

### Diligence, Promptness, and Punctuality

- ▶ (a) The prosecutor should act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and rights of the defendant, victims, and witnesses.

## Standard 3-1.9

### Diligence, Promptness, and Punctuality

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

## Standard 3-1.9

### Diligence, Promptness, and Punctuality

- ▶ c) The prosecutor should not unreasonably oppose requests for continuances from defense counsel.
- ▶ (d) The prosecutor should know and comply with timing requirements applicable to a criminal investigation and prosecution, so as to not prejudice a criminal matter.
- ▶ (e) The prosecutor should be punctual in attendance in court, in the submission of motions, briefs, and other papers, and in dealings with opposing counsel, witnesses and others. The prosecutor should emphasize to assistants and prosecution witnesses the importance of punctuality in court attendance.

## Standard 3-3.2

### Relationships With Law Enforcement

- ▶ (a) The prosecutor should maintain respectful yet independent judgment when interacting with law enforcement personnel.
- ▶ (b) The prosecutor may provide independent legal advice to law enforcement about actions in specific criminal matters and about law enforcement practices in general.

## Standard 3-3.2

### Relationships With Law Enforcement

- ▶ (c) The prosecutor should become familiar with and respect the experience and specialized expertise of law enforcement personnel.
- ▶ The prosecutor should promote compliance by law enforcement personnel with applicable legal rules, including rules against improper bias.

## Standard 3-3.2

### Relationships With Law Enforcement

- ▶ The prosecutor's office should keep law enforcement personnel informed of relevant legal and legal ethics issues and developments as they relate to prosecution matters, and advise law enforcement personnel of relevant prosecution policies and procedures.
- ▶ Prosecutors may exercise supervision over law enforcement personnel involved in particular prosecutions when in the best interests of justice and the public.

## Standard 3-3.2

### Relationships With Law Enforcement

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



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## Standard 3-4.1

### Investigative Function of the Prosecutor

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

## Standard 3-4.2

### Decisions to Charge Are the Prosecutor's

- ▶ (a) While the decision to arrest is often the responsibility of law enforcement personnel, the decision to institute formal criminal proceedings is the responsibility of the prosecutor.
- ▶ (b) The prosecutor's office should establish standards and procedures for evaluating complaints to determine whether formal criminal proceedings should be instituted.

## Standard 3-4.2

### Decisions to Charge Are the Prosecutor's

- ▶ (c) In determining whether formal criminal charges should be filed, prosecutors should consider whether further investigation should be undertaken. After charges are filed the prosecutor should oversee law enforcement investigative activity related to the case.
- ▶ (d) If the defendant is not in custody when charged, the prosecutor should consider whether a voluntary appearance rather than a custodial arrest would suffice to protect the public and ensure the defendant's presence at court proceedings.

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

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

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

- ▶ (c) If a prosecutor has significant doubt about the guilt of the accused or the quality, truthfulness, or sufficiency of the evidence in any criminal case assigned to the prosecutor, the prosecutor should disclose those doubts to supervisory staff. The prosecutor's office should then determine whether it is appropriate to proceed with the case.
- ▶ (d) A prosecutor's office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence.

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

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



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

- ▶ Among the factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge, even though it meets the requirements of Standard 3-4.3, are:
  - ▶ (i) the strength of the case;
  - ▶ (ii) the prosecutor's doubt that the accused is in fact guilty;
  - ▶ (iii) the extent or absence of harm caused by the offense;
  - ▶ (iv) the impact of prosecution or non-prosecution on the public welfare;

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- ▶ (v) the background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation;
- ▶ (vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;
- ▶ (vii) the views and motives of the victim or complainant;
- ▶ (viii) any improper conduct by law enforcement;
- ▶ (ix) unwarranted disparate treatment of similarly situated persons;

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

- ▶ (x) potential collateral impact on third parties, including witnesses or victims;
- ▶ (xi) cooperation of the offender in the apprehension or conviction of others;
- ▶ (xii) the possible influence of any cultural, ethnic, socioeconomic or other improper biases;
- ▶ (xiii) changes in law or policy;
- ▶ (xiv) the fair and efficient distribution of limited prosecutorial resources;

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

- ▶ (xv) the likelihood of prosecution by another jurisdiction; and
- ▶ (xvi) whether the public's interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.

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

- ▶ (b) In exercising discretion to file and maintain charges, the prosecutor should not consider:
  - ▶ (i) partisan or other improper political or personal considerations;
  - ▶ (ii) hostility or personal animus towards a potential subject, or any other improper motive of the prosecutor; or
  - ▶ (iii) the impermissible criteria described in Standard 1.6 above.

(Implicit Biases)

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

- ▶ (c) A prosecutor may file and maintain charges even if juries in the jurisdiction have tended to acquit persons accused of the particular kind of criminal act in question.
- ▶ (d) The prosecutor should not file or maintain charges greater in number or degree than can reasonably be supported with evidence at trial and are necessary to fairly reflect the gravity of the offense or deter similar conduct.

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

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

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

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



# The Model Rules of Professional Conduct

## Rule 3.8: Special Responsibilities of a Prosecutor

- ▶ The prosecutor in a criminal case shall:
- ▶ (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- ▶ (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- ▶ (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

# The Model Rules of Professional Conduct

## Rule 3.8: Special Responsibilities of a Prosecutor

- ▶ (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

# The Model Rules of Professional Conduct

## Rule 3.8: Special Responsibilities of a Prosecutor

- ▶ (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
  - ▶ (1) the information sought is not protected from disclosure by any applicable privilege;
  - ▶ (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  - ▶ (3) there is no other feasible alternative to obtain the information;

# The Model Rules of Professional Conduct

## Rule 3.8: Special Responsibilities of a Prosecutor

- ▶ (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

# The Model Rules of Professional Conduct

## Rule 3.8: Special Responsibilities of a Prosecutor

- ▶ (g) 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:
- ▶ (1) promptly disclose that evidence to an appropriate court or authority, and

# The Model Rules of Professional Conduct

## Rule 3.8: Special Responsibilities of a Prosecutor

- ▶ (2) if the conviction was obtained in the prosecutor's jurisdiction,
  - ▶ (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
  - ▶ (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

# The Model Rules of Professional Conduct

## Rule 3.8: Special Responsibilities of a Prosecutor

- ▶ (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

## Florida Rule 4-3.8: Special Responsibilities of a Prosecutor

- ▶ The prosecutor in a criminal case shall:
  - ▶ a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; [Model Rules a)]
  - ▶ (b) not seek to obtain from an unrepresented accused a waiver of important pre-trial rights such as a right to a preliminary hearing; [Model Rules c)]



## Florida Rule 4-3.8: Special Responsibilities of a Prosecutor

► (c) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. [Model Rule d)]

## Standard 3-1.4

### The Prosecutor's Heightened Duty of Candor

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

## 3-1.4 Heightened Duty of Candor

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

## 3-1.4 Heightened Duty of Candor

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

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

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

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

- ▶ (b) When *ex parte* communications or submissions are authorized, the prosecutor should inform the court of material facts known to the prosecutor, including facts that are adverse, sufficient to enable the court to make a fair and informed decision.
- ▶ Except when non-disclosure is authorized, counsel should notify opposing counsel that an *ex parte* contact has occurred, without disclosing its content unless permitted.

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

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

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

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