

Responding to Ethical Considerations in Domestic Violence Cases



1

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2

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3

Objectives

- 1 Identify and comply with ethical obligations.
- 2 Navigate challenges related to prosecutorial discretion, recantation, and disclosure of evidence.
- 3 Approach prosecution decisions from an ethical framework.

4

“The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done...”

5

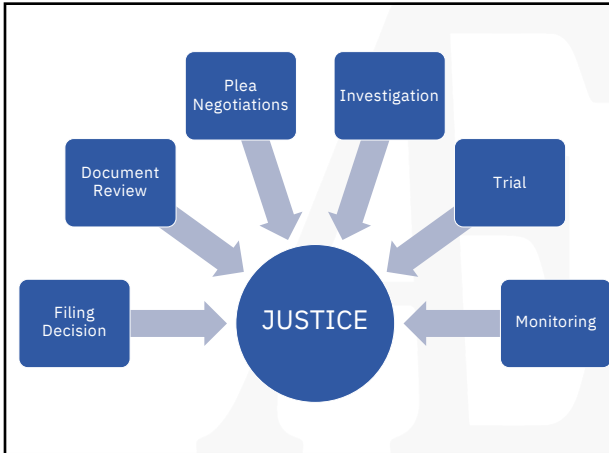
“...as such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer...”

6

“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. U.S., 295 U.S. 78, 88 (1935)

7



8



9

The Case

- Anthony is charged with assault, stalking, and witness tampering
 - Assault based on incident involving Anthony pinning his wife Eva up against wall and holding her up by the neck for several seconds
- Eva disclosed incident to her mother
- Injuries documented in medical forensic report

10

What Happens When...

Eva calls the prosecutor

- Says Anthony never assaulted her
- Says she lied about everything

11

What Happens When...

Prosecutor believes:

- Incident happened as initially reported
- Eva is recanting because she is afraid of Anthony and does not want to testify

12

Questions

- Does the prosecutor have to drop the case?
- If the recantation happened prior to charges being filed, should the prosecutor file charges anyway?
- Should the prosecutor put Eva in front of a Grand Jury?

13

Ethical Guidance

ABA's Model Rules for Professional Conduct

- Rule 3.8 Special Responsibilities of a Prosecutor

ABA's Criminal Justice Standards for the Prosecution Function

- "They are written and intended to be entirely consistent with the ABA's Model Rules of Professional Conduct"

NDAA's National Prosecution Standards

14

ABA Model Rules

Rule 3.8 Special Responsibilities of a Prosecutor

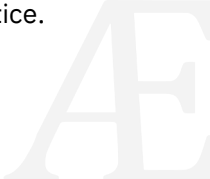
The prosecutor in a criminal case shall:
(a) refrain from prosecuting a charge that the prosecutor **knows** is not supported by probable cause...

15

Minimum Requirements for Filing and Maintaining Criminal Charge

ABA Standards for the Prosecution Function 3-4.3(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.



16

NDAA Prosecution Standards

4-2.2 Propriety of Charges

A prosecutor should file charges that he or she believes adequately encompass the accused's criminal activity and which he or she reasonably believes can be substantiated by **admissible evidence** at trial.



17

Admissible Evidence

Crawford, et al.

Search & seizure issues

Relevance



18

Some Factors to Consider

Combination of Ethical Guidance

- **Consistent with the interests of justice**
- The strength of the case
- The extent or absence of harm, whether the crime includes violence
- The views and motives of the victim
- The defendant's relative level of culpability in the criminal activity; defendant's criminal history
- The status of the victim, including the victim's age or special vulnerability
- The possible influence of any cultural, ethnic, socioeconomic or other improper biases
- The impact of the crime on the community
- Any other aggravating or mitigating circumstances.

19

Factors Not to Consider

NDAAs Prosecution Standards 4-1.4

Factors that should not be considered in the screening decision include the following:

- The prosecutor's individual or the prosecutor's office rate of conviction;**
- Personal advantages or disadvantages that a prosecution might bring to the prosecutor or others in the prosecutor's office;
- Political advantages or disadvantages that a prosecution might bring to the prosecutor;
- Characteristics of the accused that have been recognized as the basis for invidious discrimination, insofar as those factors are not pertinent to the elements or motive of the crime...

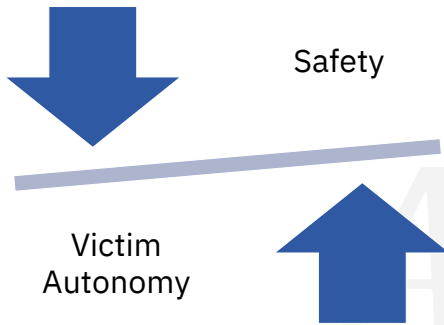
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A prosecutor may file and maintain charges even if juries in the jurisdiction have tended to acquit persons accused of the particular kind of criminal act in question.

ABA Standards for the Prosecution Function 3-4.4(c)

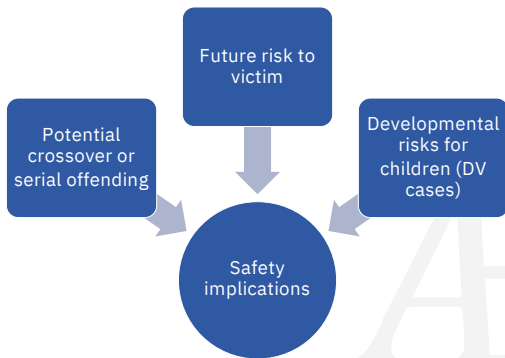
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Weighing Offender Risks with Victim Autonomy



22

Risks to Victim and Public Safety



23

Impact of Next-Level Measures on Victims

- Loss of freedom
 - Cascade effect on employment, education, childcare
- Criminal record
 - Cascade effect on current/future employment, child custody, etc.
- Embarrassment/humiliation of arrest and booking
- Increased reluctance to participate in future cases
 - Can cause increased rates of non-reporting by current victim and other victims watching
- May boomerang against prosecution in current case

24

Federal Funding Impact

34 U.S.C. § 10454

In order for a prosecutor's office to be eligible to receive grant funds under this subchapter [grants to combat violence against women], the head of the office shall certify...that the office will...engage in planning, developing and implementing—

...

- 3) a protocol outlining alternative practices and procedures for material witness petitions and bench warrants, consistent with best practices, that shall be exhausted before employing material witness petitions and bench warrants to obtain victim-witness testimony in the investigation, prosecution, and trial of a crime related to domestic violence, sexual assault, dating violence, and stalking of the victim in order to prevent further victimization and trauma to the victim.

25

The Bottom Line

NDAA Prosecution Standards 1-1.1

The prosecutor is an independent administrator of justice. **The primary responsibility of a prosecutor is to seek justice**, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected.

26

The Investigation

- The Officer asks “is there is anything else you want me to do in the case?”
- How do you respond to the officer?



27

Absolute Immunity

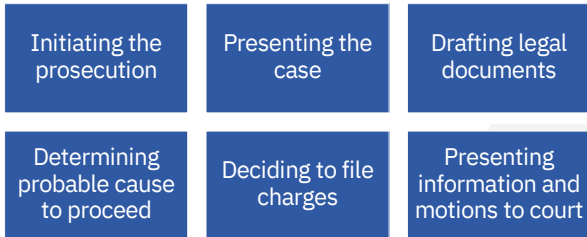
Imbler v. Pachtman, 424 US 429 (1976)

For functions that are **“intimately associated with the judicial phase of the criminal process.”**



28

“Intimately associated”



29

Does Not Include

- Acting as your own investigator
- Giving advice to police during investigation
- Attesting to the truth of facts in support of an arrest warrant
- Signing a search warrant affidavit

Kalina v. Fletcher, 522 U.S. 118 (1997); Imbler v. Pachtman, 424 U.S. 429 (1976); Burns v. Reed, 500 U.S. 478 (1991)



30

Qualified Immunity

Buckley v. Fitzsimmons, 509 U.S. 259 (1993)

- Offering legal advice to police about an unarrested suspect
- Police investigative work
- Administrative activities

“When the functions of prosecutors and detectives are the same ... the immunity that protects them is also the same.”

31

Qualified Immunity Standard

Harlow v. Fitzgerald, 457 U.S. 800 (1982)

“...[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

32

Can you conduct an online search of the suspect?

- Can you follow his social media accounts?
- Can you send him a “friend request”?



33

Considerations

- Would conducting an online search be considered “investigation” and affect your immunity?
- Is following a public account considered “investigation” and/or “communication” with a represented party?
- Is following a public account different than “friending” someone? How?
- Some social media companies have terms of service that disallow undercover accounts, with specific exceptions for law enforcement

34

ABA Prosecution Standards

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.

ABA Standards for the Prosecution Function 3-4.1
(Investigative Function of the Prosecutor)

35

Recantation

Does the prosecutor have to tell the defense about the recantation?



36

ABA Model Rules

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

37

Identification and Disclosure of Information and Evidence

ABA Standards for the Prosecution Function 3-5.4(a)

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

38

Identification and Disclosure of Information and Evidence

ABA Standards for the Prosecution Function 3-5.4, Cont'd

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

39

Identification and Disclosure of Information and Evidence

ABA Standards for the Prosecution Function 3-5.4, Cont'd

- c) Before trial of a criminal case, a prosecutor should make timely disclosure to the defense of information described in (a) above that is known to the prosecutor, regardless of whether the prosecutor believes it is likely to change the result of the proceeding, unless relieved of this responsibility by a court's protective order...

40

Identification and Disclosure of Information and Evidence

ABA Standards for the Prosecution Function 3-5.4, Cont'd

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

41

Identification and Disclosure of Information and Evidence

ABA Standards for the Prosecution Function 3-5.4, Cont'd

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

42

What if the defense has not invoked discovery?



43

Due Process

Brady v. Maryland, 373 U.S. 83 (1963)

Duty to disclose *Brady* material is a due process right, not a discovery rule dependent on a request by the defense

- *United States v. Agurs* (1976) 427 U.S. 97

The standard of materiality is the same regardless of whether there has been no request for discovery

- *United States v. Bagley* (1985) 473 U.S. 667

44

What if...

Eva takes the stand and testifies consistently with her original statement.



45

Can the prosecutor be called to rebut her testimony?

46

Lawyer as Witness

ABA Model Rule 3.7(a)

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an **uncontested issue...**



47

When the prosecutor refuses to drop the charges, Eva calls the defense attorney.

48

Questions

- Can the defense attorney take her call?
- What if Eva offers to pay the defense attorney's retainer to defend Anthony?

49

Conflict of Interest

Model Rules of Prof'l Conduct, R. 1.7

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a **concurrent conflict of interest**. A concurrent conflict of interest exists if:

- (1) the representation of one client will be **directly adverse to another client**; or
- (2) there is a significant risk that the representation of one or more clients will be **materially limited by the lawyer's responsibilities to another client**, a former client or a third person or by a personal interest of the lawyer.

50

Conflict of Interest

Model Rules of Prof'l Conduct, R. 1.7, cont'd

(b) **Notwithstanding** the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide **competent and diligent representation to each** affected client;
- (2) the representation is not prohibited by law;
- (3) the representation **does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation** or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

51

The defense attorney filed a motion to compel the victim's cell phone.

Does the prosecution need to give the defense the victim's cell phone?



52

Responses to Motions to Compel

The item is not within your care, custody, or control

Rule 16, Federal Rules of Criminal Procedure



Victim has a right to privacy

See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)



Defendant cannot go on a "fishing expedition"; they must articulate a specific reason why they believe the evidence is necessary or exculpatory

53

Brady prohibits suppression of evidence, it does not require the government to act as a private investigator and valet for the defendant, gathering evidence and delivering it to opposing counsel.

United States v. Tadros,
310 F.3d 999, 1005 (7th Cir. 2002)

54

What if the police had conducted a forensic examination of the phone?

55

Discovery of Forensic Examination

- Comply with discovery and due process obligations
 - Discovery is material if the information sought is relevant to the case and will lead to the discovery of admissible evidence. See *US v Holihan*, 236 F.Supp.2d 255 (2002); *United States v. Stevens*, 985 F.2d 1175 (2d Cir.1993)
- Make appropriate redactions
- Ask for an *in camera* inspection of forensic report
- Remember *Brady* and *Giglio* obligations
 - *These may change based on pre-trial rulings

56

You find out the victim has a prior arrest.

Are you obligated to disclose to the defense?



57

Giglio v. United States

405 U.S. 150 (1972)

- Requires disclosure
 - Any “deals” made by the government to a witness
 - Any impeachment evidence for any witness
- Has been construed to require the disclosure of anything of value provided to a witness by the “prosecution team”

58

“A prosecution team may have many members with different responsibilities. At its core, members of the team perform investigative duties and make strategic decisions about the prosecution of the case...Interacting with the prosecution team, without more, does not make someone a team member...Among many others, these circumstances include whether the individual actively investigates the case, acts under the direction of the prosecutor, or aids the prosecution in crafting trial strategy.”

IAR Sys. Software, Inc. v. Superior Court, 12 Cal. App. 5th 503, 517, 218 Cal. Rptr. 3d 852, 862 (Ct. App. 2017), as modified on denial of reh'g (June 30, 2017), review denied (Oct. 11, 2017) (citations removed)

59

What should you do with this information?

AE

60

The Plea

- The morning of trial you see that Eva called and left a message over the weekend stating that she did not want to go to trial and that she was leaving the state.
- When you get to the courthouse, the defense attorney approaches you and tells you that his client, Anthony, has decided to take the plea offer you previously made so there is no need to go to trial.
- What can you say if the defense attorney asks about whether the victim will be testifying?

61

Do you still go forward with the case?



62

Candor Towards Tribunal

ABA Model Rule 3.3(a)

A lawyer shall not knowingly:
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

63

Candor Towards Tribunal

ABA Model Rule 3.3, Comment

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. **A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.**

64

Can you accept the plea?

65

ABA Prosecution Standards

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

ABA Standards for the Prosecution Function Standard 3-5.6(e)
(Conduct of Negotiated Disposition Discussions)

66

Crime Victim's Rights

18 U.S. Code § 3771

- (1) The right to be **reasonably protected** from the accused.
- (2) The right to **reasonable, accurate, and timely notice** of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right **not to be excluded from any such public court proceeding**, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be **reasonably heard** at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

67

Crime Victims' Rights

18 U.S. Code § 3771, Cont.

- (5) The reasonable right to **confer with the attorney for the Government** in the case.
- (6) The right to **full and timely restitution** as provided in law.
- (7) The right to proceedings **free from unreasonable delay**.
- (8) The right to be treated with **fairness** and with respect for the victim's **dignity and privacy**.
- (9) The right to be **informed in a timely manner of any plea bargain** or deferred prosecution agreement.
- (10) The right to be informed of the rights under this section...

68

“When the Government gives information to victims, it cannot be misleading. While the Government spent untold hours negotiating the terms and implications of the NPA with [the defendant’s] attorneys, scant information was shared with victims. Instead, the victims were told to be ‘patient’ while the investigation proceeded.”

Doe 1 v. United States, 359 F. Supp. 3d 1201, 1219 (S.D. Fla. 2019)

69

Jury Selection

During jury selection, you notice that the defense is using all their peremptory strikes against Latina women.



70

Juror Challenges



71

After the Trial

- Anthony was found guilty at trial and was sentenced to 1 year of probation.
- As a condition of probation, he was ordered to stay away from Eva.
- Eva calls to invite Anthony to the former marital home.



72

Knowing that Eva invited Anthony over, can the prosecutor move to have probation revoked?

73

Resolve the Case

- Recognize the continuum of the balance of victim safety and offender accountability:
 - Offender accountability with victim cooperation
 - Balancing victim safety against offender accountability
 - Prioritizing victim safety over offender accountability
- When holding offenders accountable, pursue sentencing conditions that address abuser's manipulative, controlling, and abusive behavior

74

Resolve the Case

Cont'd

- Work with probation to ensure that offenders follow the conditions of their probation and are held accountable when they do not
- Consult with the victim regarding the potential impact of the offender's sentence
- Recognize the dangerousness of arresting victims

75

“The prosecutor has more control over life, liberty, and reputation, than any other person in America.”

24 J. AM. JUDICATURE SOC'Y 18 (1940) (Address delivered at the Second Annual Conference of United States Attorneys, April 1, 1940)

76

“Nothing better can come out of this meeting ... than a rededication to the spirit of fair play and decency that should animate the ... prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done.”

24 J. AM. JUDICATURE SOC'Y 18 (1940) (Address delivered at the Second Annual Conference of United States Attorneys, April 1, 1940)

77

“The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.”

24 J. AM. JUDICATURE SOC'Y 18 (1940) (Address delivered at the Second Annual Conference of United States Attorneys, April 1, 1940)

78

Going Forward

Identify and comply with ethical obligations.

Navigate challenges related to prosecutorial discretion, recantation, and disclosure of evidence.

Approach prosecution decisions from an ethical framework.

79