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ABA Standards for Criminal Justice  
*Third Edition*

# Prosecutorial Investigations

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The commentary contained herein does not necessarily represent the official position of the ABA. Only the text of the black-letter standards has been formally approved by the ABA House of Delegates as official policy. The commentary, although unofficial, serves as a useful explanation of the black-letter standards.

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# **ABA Standards for Criminal Justice**

*Third Edition*

## **Prosecutorial Investigations**

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“Black letter” Standards approved by ABA House of Delegates,  
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## DEDICATION

The Task Force on Prosecutorial Investigations dedicates its work on the *Prosecutorial Investigations Standards* to Andrew Taslitz who with intelligence, creativity, humor and dedication, served as the Task Force Liaison from the ABA/CJS Innocence Committee until his untimely death on February 9, 2014.



# Prosecutorial Investigations

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**FUTURE REVISIONS, ADDITIONS OR DELETIONS  
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The “black letter” Standards in this publication constitute ABA policy until and unless superseded. Any revisions, additions or deletions related to these Standards will be noted on the ABA Criminal Justice Section website. Please check the website to confirm the most recent version.

[http://www.americanbar.org/groups/criminal\\_justice/policy/standards.html](http://www.americanbar.org/groups/criminal_justice/policy/standards.html)

## Current ABA Criminal Justice Standards

*Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, ©2004  
*Criminal Appeals*, ©1980; 1986 supp. (out of print)  
*Discovery and Trial by Jury*, ©1996  
*DNA Evidence*, ©2007  
*Electronic Surveillance: Section A: Private Communications*, ©2002  
*Electronic Surveillance: Section B: Technologically-Assisted Physical Surveillance*, ©1999  
*Fair Trial and Public Discourse*, ©2013  
*Joinder & Severance*, ©1980, 1986 supp. (out of print)  
*Law Enforcement Access to Third Part Records*, ©2013  
*Mental Health*, ©1986, 1989 (being updated)  
*Pleas of Guilty*, ©1999  
*Postconviction Remedies*, ©1980, 1986 supp. (out of print; being updated)  
*Pretrial Release*, ©2007  
*Prosecution Function and Defense Function*, ©1993 (being updated)  
*Providing Defense Services*, ©1992  
*Sentencing*, ©1994  
*Special Functions of the Trial Judge*, ©2000  
*Speedy Trial and Timely Resolution of Criminal Cases*, ©2006  
*Treatment of Prisoners*, © 2011

## Current Standards Drafting Projects

Diversion and Specialized Courts (new)  
Fair Trial and Free Press (update)  
Mental Health (update)  
Monitors (new)  
Prosecution and Defense Function (update)  
Post-Conviction Remedies (update)

Order information, on-line access to the current Standards, and other information about the Standards project can be found at:  
[http://www.americanbar.org/groups/criminal\\_justice/policy/standards.html](http://www.americanbar.org/groups/criminal_justice/policy/standards.html)

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## INTRODUCTION

Traditionally, police finished an investigation before prosecutors determined if the evidence gathered warranted pursuing criminal charges. This division of responsibility continues to work well today for the majority of investigations.

However, many prosecutors participate in investigations involving organized crime, political corruption, corporate and financial fraud, money laundering, environmental and other regulatory crimes, and terrorism.<sup>1</sup> Legal rules governing search and seizure, the right to counsel, electronic surveillance, investigative grand juries, immunity, undercover operations, and a host of other issues have propelled prosecutors and other government lawyers into an active role in the investigative stage of a criminal matter. This development provides a clear benefit, as it increases the likelihood that:

- investigations will be conducted in a manner consistent with applicable legal rules so that evidence obtained will be legally admissible;
- the administration of justice will be fair and impartial; and
- if a prosecution is brought, the evidence will be sufficient to obtain and sustain a conviction.

Early involvement of the prosecutor, however, also creates the risk that the prosecutor's investment of time and resources in an investigation will lead to premature or inaccurate conclusions as to guilt or innocence. As a nation, we do not expect prosecutors to be typical advocates. We expect them to hold truth, justice, and mercy more sacred than winning. Their client is the public, not victims and not the police. Thus, prosecutors are expected to make decisions in the best interest of that client, both in what cases they bring and how they investigate and prosecute them.

In the fight against crime, our society has given law enforcement powerful investigative tools—tools designed to uncover the facts that

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1. See Margaret McGhee, *Preliminary Proceedings, Prosecutorial Discretion*, 88 Geo. L. J. 1057, 1058-59 (2000) (describing the role and authority of prosecutors involved in criminal investigations).

would justify a prosecutor presenting a case to a tribunal for a judgment. These tools range from a police officer's right to "stop and frisk" a citizen when reasonable suspicion exists,<sup>2</sup> to a grand jury's power to issue subpoenas for documents and testimony,<sup>3</sup> to a court's ability to issue search or eavesdropping warrants.<sup>4</sup>

But, from the very beginning of our republic, it was understood that investigative tools could be intrusive, dangerous, and oppressive. The Constitution forbids certain investigative steps and limits others. For example, law enforcement may never require a person to be a witness against themselves,<sup>5</sup> and (absent limited circumstances) the police may not search a person's home or papers without obtaining a warrant upon a showing of probable cause.<sup>6</sup>

These constraints are at the very core of our legal system. They reflect the principle that some means of investigation violate basic freedoms.

Within these constitutional and legal boundaries, however, an array of permissible investigative tools exist that, if misused, can destroy an

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2. See *Terry v. Ohio*, 392 U.S. 1 (1968).

3. See FED. R. CRIM. P. 17; *United States v. Calandra*, 414 U.S. 338 (1974); see also *Branzburg v. Hayes*, 408 U.S. 665, 682-86 (1972) (discussing grand jury's power to compel testimony from reporter); *Costello v. United States*, 350 U.S. 359, 360 (1956) (discussing the broad investigative powers of the grand jury as necessary for the discharge of its public role).

4. See FED. R. CRIM. P. 41.

5. See U.S. CONST. amend. V.

6. See U.S. CONST. amend. IV.

innocent person's reputation,<sup>7</sup> injure a legitimate business,<sup>8</sup> and impose financial and other costs on witnesses and subjects in the process of complying with the demands of a government investigation.<sup>9</sup>

In 1940, when he was the U.S. Attorney General, Justice Robert Jackson warned of the danger of abuse in criminal investigations: "The prosecutor has more control over life, liberty and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations."<sup>10</sup> As Justice Jackson said, "While the prosecutor at his best is one of the most beneficent forces in our society, when he acts for malice or other base motives, he is one of the worst."<sup>11</sup> Poor investigative technique, or the abuse of investigative discretion can lead to results that undermine the

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7. The FBI investigated Dr. Steven J. Hatfill for the anthrax attacks that followed shortly after the attacks of September 11, 2001. Hatfill was later found to be innocent, and the Justice Department agreed to pay him over \$4.5 million dollars to settle his claims against the government. Scott Shane & Eric Lipton, *Scientist Is Paid Millions by U.S. in Anthrax Suit*, N.Y. TIMES, June 28, 2008, available at [http://www.nytimes.com/2008/06/28/washington/28hatfill.html?sq=Scientist\\_Is\\_Paid\\_Millions\\_by\\_U.S.\\_in\\_Anthrax\\_Suit.html](http://www.nytimes.com/2008/06/28/washington/28hatfill.html?sq=Scientist_Is_Paid_Millions_by_U.S._in_Anthrax_Suit.html); David Freed, *The Wrong Man*, THE ATLANTIC, May 2010, available at <http://www.theatlantic.com/magazine/archive/2010/05/the-wrong-man/8019/>. In 1996, the FBI announced that it was investigating Richard Jewell, a security guard, for the attempted bombing at the Centennial Olympic Park in Atlanta, GA. Jewell found the pipe bomb shortly before it exploded, was first lauded as a hero, and later vilified as a terrorist. The FBI cleared Jewell 88 days after it initiated an investigation. Kevin Sack, *A Man's Life Turned Inside Out By Government and the Media*, N.Y. TIMES, Oct. 28, 1996, available at <http://www.nytimes.com/1996/10/28/us/a-man-s-life-turned-inside-out-by-government-and-the-media.html>.

8. In 1996, the owner of construction company obtained a \$1 million settlement resolving a lawsuit claiming that his business had been damaged by subpoenas issued to customers and suppliers. Selwyn Raab, *New York City Settles Lawsuit on Mob Ties*, N.Y. TIMES, Feb. 7, 1996, available at <http://www.nytimes.com/1996/02/07/nyregion/new-york-city-settles-lawsuit-on-mob-ties>.

9. One area in which the costs of both litigation and government inquiry into criminal wrongdoing have exponentially increased is e-discovery. One report states that the costs to U.S. companies of e-discovery have tripled in the space of one year, from \$437,000 for an average-sized company in 2008 to \$1.29 million in 2009. Cynthia Cotts, *U.S. Companies' Electronic-Discovery Spending Tripled in 2009*, BLOOMBERG, Oct. 20, 2009, available at [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a\\_qD\\_YdAZA7o](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a_qD_YdAZA7o).

10. See Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

11. See *id.*

integrity of the criminal justice system, from harassment to conviction of the innocent.<sup>12</sup>

The danger of abuse in conducting criminal investigations remains a legitimate concern in the seventy years since Justice Jackson's speech. For example, in October 2010, a study published in *USA Today* identified some 200 cases in which judges determined that federal prosecutors had violated laws or ethical rules.<sup>13</sup> More recently, the court-appointed attorney that assessed the government's conduct in the trial of U.S. Senator Ted Stevens concluded that the investigation and prosecution "were permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens's defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness."<sup>14</sup> These revelations, among others, led the government to dismiss the charges against Senator Stevens.<sup>15</sup> These examples should, of course, be considered in the context of the thousands of properly-conducted investigations and prosecutions by federal, state, and local prosecutors. But they should not be dismissed as mere outliers. In addition to whatever manifest

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12. See ABA CRIMINAL JUSTICE SECTION, AD HOC INNOCENCE COMM., *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY* at 13-14 (Paul Giannelli & Myra Raeder, eds., 2006) [hereinafter *ACHIEVING JUSTICE*].

13. Brad Heath & Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, *USA TODAY*, Sept. 23, 2010, available at [http://usatoday30.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform\\_N.htm](http://usatoday30.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm).

14. Notice of Filing of Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009, at 12, *In Re Special Proceedings* (D.D.C. Mar. 15, 2012) (No. 1:09-mc-00198-EGS). Henry Schuelke, the Special Counsel appointed by Judge Sullivan to review the investigation and prosecution of Senator Stevens, stated that his investigation "found evidence which compels the conclusion, and would prove beyond a reasonable doubt, that other *Brady* information was intentionally withheld from the attorneys for Senator Stevens." *Id.* at 39.

15. *Id.*; see also *United States v. Stevens*, No. 1:08-cr-00231-EGS, 2009 WL 6525926 (D.D.C. 2009) (dismissal of conviction against former Senator Ted Stevens because line prosecutors withheld exculpatory material developed during the investigation). The internal investigation performed by the U.S. Department of Justice's ("DOJ") Office of Professional Responsibility also found that government prosecutors violated their obligations under department policy and constitutional principles to disclose certain exculpatory information to Stevens's lawyers. OFFICE OF PROF'L RESPONSIBILITY, U.S. DEPARTMENT OF JUSTICE, *INVESTIGATION OF ALLEGATIONS OF PROSECUTORIAL MISCONDUCT IN UNITED STATES V. THEODORE F. STEVENS*, CRIM. NO. 08-231 (D.D.C. 2009) (EGS) 25-29 (Aug. 15, 2011).

injustice misconduct may cause in a particular case, such actions erode the public's trust and undermine the legitimacy of the justice system as a whole.

The line prosecutor, the primary intended audience for the Standards, does not work in a vacuum. Prosecutors' offices are institutions that, at their best, instill a tradition of professionalism and fairness. This teaching can come in the form of written policies and formal training, but most powerfully it comes from discussions about what are the right actions in each case—what is the right charge, what is the right investigative technique, what is the right disposition? Young prosecutors who engage in these discussions will ultimately develop into the supervisors for their offices' next generation.

In the course of writing these Standards, the Task Force found that there was broad consensus among the prosecutorial and defense bars, and among judges, as to what kinds of investigative steps are appropriate in what kinds of cases. In some sense, there is an unwritten "common law" of prosecutorial good practices, and members of the bar know when a prosecutor violates it. Where it exists, these Standards attempt to reflect that consensus. Where it does not, the Standards are an attempt to forge one.

The investigative function of the prosecutor is briefly addressed in the *Prosecution Function Standards*<sup>16</sup> that were first approved in 1971 and updated in 1980 and 1992. Specifically, the *Prosecution Function Standards* include a sub-part devoted to "Investigation for Prosecution Decision" consisting of eleven Standards. At a meeting in November 2000, the Criminal Justice Standards Committee appointed a subcommittee to consider supplementing those Standards to provide more comprehensive and detailed guidance to prosecutors engaged in complex criminal investigations.<sup>17</sup> Upon the recommendation of that subcommittee, in the summer of 2002, the Standards Committee appointed a Task Force on Prosecutorial Investigations and charged it with the responsibility of drafting such Standards.

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16. ABA HOUSE OF DELEGATES, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 3-1.1 (3d ed. 1993) [hereinafter PFS].

17. A driving force for the formation of the Task Force was an article written by Professor Rory Little, in which Little called for ABA Standards on this subject. See Rory Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723 (2000). Little served as a member of the Task Force.

Between November 2002 and March 2005, the Task Force met nine times. In December 2005, it forwarded its proposed Standards to the Criminal Justice Section's Standards Committee, which considered them at four meetings between January 2006 and January 2007. In April 2007, the Standards Committee circulated the revised draft to the Criminal Justice Section Council and a wide range of interested individuals and organizations within and without the ABA. As required by the procedures governing consideration of new or revised Criminal Justice Standards, the Council considered the Standards at two readings. The first reading began in May 2007 and was continued in August 2007. At the second reading in November 2007, the Council approved the Standards for forwarding to the ABA's policymaking House of Delegates. At its Midyear Meeting in February 2008, the House of Delegates approved the Standards.

# BLACK LETTER

## PREAMBLE

A prosecutor's investigative role, responsibilities and potential liability are different from the prosecutor's role and responsibilities as a courtroom advocate. These Standards are intended as a guide to conduct for a prosecutor actively engaged in a criminal investigation or performing a legally mandated investigative responsibility, e.g., serving as legal advisor to an investigative grand jury or as an applicant for a warrant to intercept communications. These Standards are intended to supplement the Prosecution Function Standards, not to supplant them. These Standards may not be applicable to a prosecutor serving in a minor supporting role to an investigation undertaken and directed by law enforcement agents.

## PART I. GENERAL STANDARDS

### Standard 26-1.1 The function of these Standards

(a) These Standards address the investigative stage of the criminal justice process. They address the charge or post-charge stages of the criminal justice process only when those stages overlap with the investigative stage.

(b) Standards are not intended to serve as the basis for the imposition of professional discipline, nor to create substantive or procedural rights for accused or convicted persons. These Standards do not modify a prosecutor's ethical obligations under applicable rule of professional conduct. These Standards are not intended to create a standard of care for civil liability, nor to serve as a predicate for a motion to suppress evidence or dismiss a charge.

(c) The use of the term "prosecutor" in these Standards applies to any prosecutor or other attorney, regardless of agency or title, who serves as an attorney in a governmental criminal investigation.

## **Standard 26-1.2 General Principles**

(a) An individual prosecutor is not an independent agent but is a member of an independent institution the primary duty of which is to seek justice.

(b) The prosecutor's client is the public, not particular government agencies or victims.

(c) The purposes of a criminal investigation are to:

(i) develop sufficient factual information to enable the prosecutor to make a fair and objective determination of whether and what charges should be brought and to guard against prosecution of the innocent, and

(ii) develop legally admissible evidence sufficient to obtain and sustain a conviction of those who are guilty and warrant prosecution.

(d) The prosecutor should:

(i) ensure that criminal investigations are not based upon premature beliefs or conclusions as to guilt or innocence but are guided by the facts;

(ii) ensure that criminal investigations are not based upon partisan or other improper political or personal considerations and do not invidiously discriminate against, nor wrongly favor, persons on the basis of race, ethnicity, religion, gender, sexual orientation, political beliefs, age, or social or economic status;

(iii) consider whether an investigation would be in the public interest and what the potential impacts of a criminal investigation might be on subjects, targets and witnesses; and

(iv) seek in most circumstances to maintain the secrecy and confidentiality of criminal investigations.

(e) Generally, the prosecutor engaged in an investigation should not be the sole decision-maker regarding the decision to prosecute matters arising out of that investigation.

(f) The prosecutor should be aware of and comply with the ethical rules and other legal standards applicable to the prosecutor's conduct during an investigation.

(g) The prosecutor should cooperate with other governmental authorities regarding matters that are of legitimate concern to such

authorities when doing so is permitted by law and would not compromise an investigation or other criminal justice goals.

(h) The prosecutor's office should provide organizational structure to guide its members' investigative work.

### **Standard 26-1.3 Working with police and other law enforcement agencies**

(a) The prosecutor should respect the investigative role of police and other law enforcement agents by:

- (i) working cooperatively with them to develop investigative policies; and
- (ii) providing independent legal advice regarding their investigative decisions.

(b) The prosecutor should take steps to promote compliance by law enforcement agents with relevant legal rules.

(c) The prosecutor should be aware of the experience, skills and professional abilities of police and other law enforcement agents assigned to an investigation.

(d) The prosecutor's office should assist in providing training to police and other law enforcement agents concerning potential legal issues and best practices in criminal investigations.

(e) Before and throughout the course of complex or non-routine investigations, the prosecutor should work with the police and other participating agencies and experts to develop an investigative plan that analyzes:

- (i) the investigative predicate or information concerning the matter that is then known;
- (ii) the goals of the investigation;
- (iii) the potential investigative techniques and the advantages of each, singularly and in combination, in producing relevant information and admissible evidence; and
- (iv) the legal issues likely to arise during the investigation.

(f) The prosecutor should promote timely communications with police and other law enforcement agents about material developments in the investigation.

(g) The prosecutor should not seek to circumvent ethical rules by instructing or recommending that others use means that the prosecutor is ethically prohibited from using. The prosecutor may

provide legal advice to law enforcement agents regarding the use of investigative techniques that law enforcement agents are authorized to use.

### **Standard 26-1.4 Victims, potential witnesses, and targets during the investigative process**

(a) Throughout the course of the investigation as new information emerges, the prosecutor should reevaluate:

- (i) judgments or beliefs as to the culpability or status of persons or entities identified as “witnesses,” “victims,” “subjects” and “targets,” and recognize that the status of such persons or entities may change; and
- (ii) the veracity of witnesses and confidential informants and assess the accuracy and completeness of the information that each provides.

(b) Upon request and if known, the prosecutor should inform a person or the person’s counsel, whether the person is considered to be a target, subject, witness or victim, including whether their status has changed, unless doing so would compromise a continuing investigation.

(c) The prosecutor should know the law of the jurisdiction regarding the rights of victims and witnesses and should respect those rights.

(d) Absent a law or court order to the contrary, the prosecutor should not imply or state that it is unlawful for potential witnesses to disclose information related to or discovered during an investigation. The prosecutor may ask potential witnesses not to disclose information, and in doing so, the prosecutor may explain to them the adverse consequences that might result from disclosure (such as compromising the investigation or endangering others). The prosecutor also may alert an individual who has entered into a cooperation agreement that certain disclosures might result in violation of the agreement.

(e) The prosecutor should not imply the existence of legal authority to interview an individual or compel the attendance of a witness if the prosecutor does not have such authority.

(f) The prosecutor should comply with applicable rules and case law that may restrict communications with persons represented by counsel.

(g) The prosecutor should not take into consideration any of the following factors in making a determination of whether an organization has been cooperative in the context of a government investigation unless the specified conduct of the organization would constitute a violation of law or court order:

- (i) that the organization has provided, or agreed to provide counsel to, or advanced, reimbursed or indemnified the legal fees and expenses of, an employee;
- (ii) that the organization entered into or continues to operate under a joint defense or information sharing and common interest agreement with regard to the investigation;
- (iii) that the organization shared its records or other historical information relating to the matter under investigation with an employee; or
- (iv) that the organization did not sanction or discharge an employee who invoked his or her Fifth Amendment privilege against self-incrimination in response to government questioning of the employee.

(h) The prosecutor should not interfere with, threaten, or seek to punish persons or entities seeking counsel in connection with an investigation, nor should the prosecutor interfere with, threaten or seek to punish those who provide such counsel unless by doing so such conduct would constitute a violation of law or court order. A good faith basis for raising a conflict of interest, or for investigating possible criminal conduct by the defense attorney, is not “interference” within the meaning of this Standard.

### **Standard 26-1.5    Contacts with the public during the investigative process**

(a) The prosecutor should neither confirm nor deny the existence of an investigation, or reveal the status of the investigation, nor release information concerning the investigation, with the following exceptions:

- (i) releasing information reasonably necessary to obtain public assistance in solving a crime, apprehending a suspect, or calming public fears;
  - (ii) responding to a widely disseminated public call for an investigation by stating that the prosecutor will investigate, or decline to investigate the matter;
  - (iii) responding to a law enforcement or regulatory matter of significant public safety concern, by stating that the prosecutor will begin an investigation or begin a special initiative to address the issue, or by releasing information reasonably necessary to protect public safety, subject to restrictions in the law of the jurisdiction;
  - (iv) announcing future investigative plans in order to deter criminal activity;
  - (v) stating in an already publicized matter and where justice so requires, that the prosecutor will not initiate, will not continue, or has concluded an investigation of a person, entity, or matter and, if applicable, has informed the subject or potential subject of the decision not to file charges;
  - (vi) responding to widely disseminated false statements that the prosecutor is, or is not, investigating a person, entity, or matter;
  - (vii) stating whether and when, if court rules so permit, an event open to the public is scheduled to occur;
  - (viii) offering limited comment when public attention is generated by an event in the investigation (e.g., arrests, the execution of search warrants, the filing of charges, or convictions), subject to governing legal standards and court rules; and
  - (ix) making reasonable and fair responses to comments of defense counsel or others.
- (b) Except as a proper part of a court proceeding and in accordance with applicable rules, the prosecutor should not publicly make the following types of statements or publicly disclose the following information about an investigation:
- (i) statements of belief about the guilt or innocence, character or reputation of subjects or targets of the investigation;

- (ii) statements that have a substantial likelihood of materially prejudicing a jury or jury panel;
  - (iii) information about the character or reputation of a person or entity under investigation, a prospective witness, or victim;
  - (iv) admissions, confessions, or the contents of a statement or alibi attributable to a person or entity under investigation;
  - (v) the performance or results of tests or the refusal or agreement of a suspect to take a test;
  - (vi) statements concerning the credibility or anticipated testimony of prospective witnesses; and
  - (vii) the possibility or likelihood of a plea of guilty or other disposition.
- (c) The prosecutor should endeavor to dissuade police and other law enforcement agents and law enforcement personnel from making public information that the prosecutor would be prohibited from making public, or that may have an adverse impact on the investigation or any potential prosecution.

## PART II. STANDARDS FOR SPECIFIC INVESTIGATIVE FUNCTIONS OF THE PROSECUTOR

### Standard 26-2.1 The decision to initiate or to continue an investigation

- (a) The prosecutor should have wide discretion to select matters for investigation. Thus, unless required by statute or policy:
- (i) the prosecutor should have no absolute duty to investigate any particular matter; and
  - (ii) a particularized suspicion or predicate is not required prior to initiating a criminal investigation.
- (b) In deciding whether an investigation would be in the public interest, the prosecutor should consider, but not necessarily be dissuaded by, the following:
- (i) a lack of police interest;
  - (ii) a lack of public or political support;

- (iii) a lack of identifiable victims;
  - (iv) fear or reluctance by potential or actual witnesses; or
  - (v) unusually complex factual or legal issues.
- (c) When deciding whether to initiate or continue an investigation, the prosecutor should consider:
- (i) whether there is evidence of the existence of criminal conduct;
  - (ii) the nature and seriousness of the problem or alleged offense, including the risk or degree of harm from ongoing criminal conduct;
  - (iii) a history of prior violations of the same or similar laws and whether those violations have previously been addressed through law enforcement or other means;
  - (iv) the motive, interest, bias or other improper factors that may influence those seeking to initiate or cause the initiation of a criminal investigation;
  - (v) the need for, and expected impact of, criminal enforcement to:
    - (A) punish blameworthy behavior;
    - (B) provide specific and/or general deterrence;
    - (C) provide protection to the community;
    - (D) reinforce norms embodied in the criminal law;
    - (E) prevent unauthorized private action to enforce the law;
    - (F) preserve the credibility of the criminal justice system; and
    - (G) other legitimate public interests.
  - (vi) whether the costs and benefits of the investigation and of particular investigative tools and techniques are justified in consideration of, among other things, the nature of the criminal activity as well as the impact of conducting the investigation on other enforcement priorities and resources
  - (vii) the collateral effects of the investigation on witnesses, subjects, targets and non-culpable third parties, including financial damage and harm to reputation
  - (viii) the probability of obtaining sufficient evidence for a successful prosecution of the matter in question, including, if there is a trial, the probability of obtain-

- ing a conviction and having the conviction upheld upon appellate review; and
- (ix) whether society's interest in the matter might be better or equally vindicated by available civil, regulatory, administrative, or private remedies.
- (d) When deciding whether to initiate or continue an investigation, the prosecutor should not be influenced by:
- (i) partisan or other improper political or personal considerations, or by the race, ethnicity, religion, gender, sexual orientation, political beliefs or affiliations, age, or social or economic status of the potential subject or victim, unless they are elements of the crime or are relevant to the motive of the perpetrator; or
  - (ii) hostility or personal animus towards a potential subject, or any other improper motive of the prosecutor.
- (e) The prosecutor's office should have an internal procedure to document the reason(s) for declining to pursue prosecution following a criminal investigation.

## Standard 26-2.2 Selecting investigative techniques

- (a) The prosecutor should be familiar with routine investigative techniques and the best practices to be employed in using them.
- (b) The prosecutor should consider the use of costlier, riskier, or more intrusive means of investigation only if routine investigative techniques would be inappropriate, ineffective, or dangerous, or if their use would impair the ability to take other desirable investigative steps. If non-routine techniques are used, the prosecutor should regularly reevaluate the need for them and whether the use of routine investigative techniques will suffice.
- (c) The prosecutor should consider, in consultation with police and other law enforcement agents involved in the investigation, the following factors:
- (i) the likely effectiveness of a particular technique;
  - (ii) whether the investigative means and resources to be utilized are appropriate to the seriousness of the offense;
  - (iii) the risk of physical danger to law enforcement officers and others;

- (iv) the costs involved with various investigative techniques and the impact such costs may have on other efforts within the prosecutor's office;
  - (v) the possibility of lost opportunity if an investigative technique is detected and reveals the investigation;
  - (vi) means of avoiding unnecessary intrusions or invasions into personal privacy;
  - (vii) the potential entrapment of otherwise innocent persons;
  - (viii) the risk of property damage, financial loss to persons or businesses, damage to reputation or other harm to persons;
  - (ix) interference with privileged or confidential communication;
  - (x) interference with or intrusion upon constitutionally protected rights; and
  - (xi) the risk of civil liability or other loss to the government.
- (d) The prosecutor should consider the views of experienced police and other law enforcement agents about safety and technical and strategic considerations in the use of investigative techniques.
- (e) The prosecutor may consider that the use of certain investigative techniques could cause the subject of the investigation to retain legal counsel and thereby limit the use of some otherwise permissible investigative techniques.
- (f) The prosecutor should avoid being the sole interviewer of a witness, being alone with a witness, or otherwise becoming an essential witness to any aspect of the investigation.
- (g) While the prosecutor may, and sometimes should, seek changes in law and policy, the prosecutor should abide by existing legal restraints, even if the prosecutor believes that they unjustifiably inhibit the effective investigation of criminal conduct.

### **Standard 26-2.3 Use of undercover law enforcement agents and undercover operations**

- (a) For the purpose of these Standards, an "undercover law enforcement agent" is an employee of a government agency working under the direction and control of a government agency in a criminal investigation, whose true identity as a law enforcement agent involved in the investigation is concealed from third parties.

(b) For the purpose of these Standards, an “undercover operation” means an investigation in which undercover law enforcement agents or other persons working with law enforcement conceal their purpose of detecting crime or obtaining evidence to prosecute those engaged in illegal activities.

(c) In deciding whether to use or to advise the use of undercover law enforcement agents or undercover operations, the prosecutor should consider potential benefits, including:

- (i) the character and quality of evidence likely to be obtained; and
- (ii) the ability to prevent or solve crimes where obtaining reliable and admissible evidence to do so would otherwise be difficult or impossible to obtain.

(d) In deciding whether to use or to advise the use of undercover law enforcement agents or undercover operations, the prosecutor should consider potential risks, including:

- (i) physical injury to law enforcement agents and others;
  - (ii) lost opportunity if the operation is revealed;
  - (iii) unnecessary intrusions or invasions into personal privacy;
  - (iv) entrapment of otherwise innocent persons;
  - (v) property damage, financial loss to persons or businesses, damage to reputation or other harm to persons;
  - (vi) interference with privileged or confidential communications;
  - (vii) interference with or intrusion upon constitutionally protected rights;
  - (viii) civil liability or other adverse impact on the government;
  - (ix) personal liability of the law enforcement agents;
  - (x) involvement in illegal conduct by undercover law enforcement agents or government participation in activity that would be considered unsuitable and highly offensive to public values and that may adversely impact a jury’s view of a case; and
  - (xi) the possibility that the undercover operation will unintentionally cause an increase in criminal activity.
- (e) The prosecutor advising an undercover investigation should:
- (i) consult with appropriate police or law enforcement agents on a regular basis about the continued propriety

- of the operation and the legal sufficiency and quality of the evidence that is being produced by the operation;
  - (ii) seek periodic internal review of the investigation to determine whether the operation's benefits continue to outweigh its risks and costs, including the extent to which:
    - (A) the goals of the investigation have been accomplished;
    - (B) there is potential for the acquisition of additional useful and non-duplicative information;
  - (iii) the investigation can continue without exposing the undercover operation; and
  - (iv) continuation of the investigation may cause financial or other injury to innocent parties.
- (f) The prosecutor should seek to avoid or minimize the risks involved in the active participation of undercover police or law enforcement agents in illegal activity, and provide such agents guidance about authorized participation in otherwise criminal conduct.
- (g) Records of funds expended and generated by undercover activity should be retained and accounted for in a manner that facilitates a comprehensive and accurate audit.

### **Standard 26-2.4 Use of confidential informants**

- (a) As used in these Standards, a "confidential informant" is a person who supplies information to police or law enforcement agents pursuant to an agreement that the police or investigative agency will seek not to disclose the person's identity. The identity of a confidential informant may also be unknown to the prosecutor. A confidential informant may in some instances become a cooperator, and in such circumstances reference should be made to Standard 2.5.
- (b) The prosecutor should consider possible benefits from the use of a confidential informant, including whether the confidential informant might enable the government to obtain:
- (i) first-hand, eyewitness accounts of criminal activity;
  - (ii) critical background information about the criminal activity or criminal organization under investigation;

- (iii) information necessary to provide a basis for additional investigative techniques or court-ordered means of investigation such as a search warrant; and
  - (iv) identification of witnesses or leads to witnesses who can provide direction to further the investigation or valuable testimony to a grand jury or at trial.
- (c) The prosecutor should consider possible risks from the use of a confidential informant. These include risks that the confidential informant will:
- (i) be untruthful, or provide misleading or incomplete information;
  - (ii) compromise the criminal investigation by revealing information to others, including the subjects or targets of the investigation;
  - (iii) engage in behavior constituting entrapment;
  - (iv) commit or continue to commit crimes;
  - (v) be subject, or subject others, to serious risk of physical harm as a result of cooperating with law enforcement; and
  - (vi) interfere with privileged or confidential relationships or communications or violate the rights of the investigation's subject.
- (d) The prosecutor should avoid being alone with a confidential informant, even for a brief period of time.
- (e) Before deciding to rely upon the information provided by a confidential informant for significant investigative steps, the prosecutor should review the following with the police or law enforcement agents:
- (i) the ability of the confidential informant to provide or obtain information relevant to the criminal investigation;
  - (ii) means of corroborating information received from the confidential informant;
  - (iii) the possible motives or biases of the confidential informant, including the motive to gain a competitive advantage over others in either criminal or legitimate enterprises;
  - (iv) the nature of any and all promises made to the prospective confidential informant by other prosecutors, police or law enforcement agents, including promises

- related to the treatment of associates or relatives of the confidential informant;
  - (v) the prior history of the confidential informant , including prior criminal activity and other information, including the informant's true identity if necessary for the prosecutor's review;
  - (vi) whether the prospective confidential informant is represented by an attorney or is party to a joint defense agreement with other targets of the investigation and, if so, how best to address potential legal or ethical issues related to the representation or agreement;
  - (vii) if reasonably available, the experience other prosecutors and law enforcement agents have had with the confidential informant;
  - (viii) whether the proposed compensation or benefits to be received by the confidential informant are reasonable under the circumstances;
  - (ix) the risk that the prospective confidential informant may be an agent of the subjects of the investigation or of other criminal groups and individuals, or may reveal investigative information to them; and
  - (x) the risk that the prospective confidential informant will engage in criminal activity not authorized by the prosecutor, and the seriousness of that unauthorized criminal activity.
- (f) The prosecutor's office should work with police and law enforcement agents to develop best practices and policies for the use of confidential informants that include:
- (i) a rule that investigative information obtained from other sources should not be provided to the confidential informant unless doing so would materially advance the investigation;
  - (ii) prohibitions on making promises of compensation or other benefits that would shock the conscience of a moral society or would risk compromising the credibility of the informant in any proceeding in which the informant's testimony may be important;
  - (iii) prohibitions on making promises that the police or law enforcement agents are unlikely to be able to keep;

- (iv) routine instructions to confidential informants to refrain from criminal conduct other than as directed by law enforcement; and
- (v) the routine use of standard form agreements when such agreements are entered into by law enforcement officers without the involvement of the prosecutor.

### **Standard 26-2.5 Cooperation agreements and cooperating individuals and organizational witnesses**

(a) As used in these Standards, “cooperation agreements” are agreements between the prosecutor and otherwise culpable individuals or entities (“cooperators”) who provide the government with assistance useful to an investigation in exchange for benefits. A cooperator may have been a confidential informant earlier in the investigation.

(b) The prosecutor should ordinarily seek to have the cooperator plead guilty to an appropriate criminal charge rather than provide the cooperator immunity for culpable conduct.

(c) In deciding whether to offer a cooperator significant benefits, including a limit on criminal liability, immunity, or a recommendation for reduction of sentence, the prosecutor should consider whether:

- (i) the cooperator is able and willing to provide valuable assistance to the investigation;
- (ii) the cooperator will maintain the confidentiality or secrecy of the investigation;
- (iii) the cooperator has biases or personal motives that might result in false, incomplete, or misleading information;
- (iv) leniency or immunity for the criminal activity of the cooperator is warranted by the goals of the investigation and the public interest, including appropriate consideration for victim(s) interests;
- (v) providing leniency, immunity or other benefits would be seen as offensive by the public or cause a reasonable juror to doubt the veracity of the cooperator’s testimony;
- (vi) information that has been provided (such as through an attorney proffer or by a debriefing of the coopera-

- tor) has been corroborated or can otherwise shown to be accurate;
  - (vii) the culpability of other participants in the criminal activity relative to the cooperator's culpability has been determined as accurately as possible;
  - (viii) there is a likelihood that the cooperator will provide useful information only if given leniency or immunity;
  - (ix) the case could be successfully prosecuted without the cooperator's assistance; and
  - (x) the cooperator could be successfully prosecuted without the admissions of the cooperator made pursuant to the agreement.
- (d) The cooperation agreement should not:
- (i) promise to forego prosecution for future criminal activity, except where such activity is necessary as part of an officially supervised investigative and enforcement program; or
  - (ii) adversely affect third parties' legal rights.
- (e) The prosecutor should:
- (i) be aware that anything said to the cooperator might be repeated to the cooperator's criminal associates or in open court; and
  - (ii) be aware of the disclosure requirements under relevant law if a cooperator ultimately testifies at trial, including disclosure of any and all agreements and promises made to the cooperator and evidence which could impact the cooperator's credibility, including the complete criminal history of the cooperator. The prosecutor should take steps to assure the preservation of such evidence.
- (f) The prosecutor should recognize and respect the role of the cooperator's attorney in the decision to cooperate and in the disposition of significant legal rights.
- (g) Ordinarily, a prosecutor who offers leniency in exchange for cooperation should not withdraw or threaten to withdraw the offer because of the potential cooperator's request to consult with counsel prior to deciding whether to accept it. However, if the time required for the potential cooperator to consult with counsel would render the agreement ineffective, the prosecutor may withdraw or threaten to withdraw the offer before there is opportunity for such consulta-

tion. In that event, the prosecutor may condition cooperation on an immediate and uncounseled decision to proceed.

(h) The prosecutor should reduce a cooperation agreement to writing as soon as practicable. An agreement should only cover those crimes known to the government at the time it is made, and should specify:

- (i) the specific details of all benefits and obligations agreed upon;
  - (ii) the specific activities to be performed by the cooperator;
  - (iii) the requirement that the cooperator be truthful in dealing with the government and in all legal proceedings;
  - (iv) the prohibition against the cooperator's engaging in any criminal conduct other than as directed by law enforcement;
  - (v) the extent of the disposition of the potential criminal and civil claims against the cooperator;
  - (vi) a complete list of any other promises, financial benefits or understandings;
  - (vii) the limitations of the agreement with respect to the terms it contains and to the identified jurisdiction or jurisdictions; and
  - (viii) the remedy in the event the cooperator breaches the agreement.
- (i) The prosecutor should avoid being alone with a cooperator even for a brief period of time.
- (j) The prosecutor should guard against the cooperator obtaining information from others that invades the attorney-client or work product privileges or violates the Sixth Amendment right to counsel.
- (k) Prior to relying on the cooperator's information in undertaking an investigative step that could cause adverse consequences to the investigation or to a third party, the prosecutor should be satisfied as to the truthfulness of the cooperator.
- (l) If an investigative step involves an application to a court or other official body, the prosecutor should make appropriate and required disclosures about the cooperator to the court or other body.
- (m) If the prosecutor suspects that the cooperator is not being truthful, the prosecutor should take reasonable steps to address

such concerns and seek further corroboration of the cooperator's information.

(n) If the prosecutor determines that a cooperator has knowingly provided false information or otherwise breached the cooperation agreement, the prosecutor should:

- (i) seek guidance from a supervisor;
- (ii) undertake or request the initiation of an investigation into the circumstances;
- (iii) consider the possible prosecution of the cooperator, and;
- (iv) carefully reevaluate the investigation.

### **Standard 26-2.6 The decision to arrest during a continuing criminal investigation**

(a) In making a tactical decision whether, when or where to arrest a subject during a continuing investigation, the prosecutor should consider the potential benefits of the arrest, including:

- (i) protecting the public from a person known to present an imminent danger;
- (ii) reducing the likelihood of flight;
- (iii) preventing the destruction of evidence and providing an opportunity to obtain evidence of a crime pursuant to a search incident to arrest;
- (iv) stopping or deterring the harassment or coercion of witnesses or other acts of obstruction of justice;
- (v) creating an opportunity to ask questions about an unrelated crime;
- (vi) encouraging other culpable individuals or witnesses to surrender to law enforcement and to cooperate with the investigation;
- (vii) inducing relevant conversation or other communication likely to be intercepted by law enforcement; and
- (viii) protecting the existence of an undercover agent or confidential informant, a cooperator or an undercover operation.

(b) In deciding whether, when or where to arrest a subject during a continuing investigation, the prosecutor should consider the potential risks of the arrest, including:

- (i) limiting the continued conduct of a criminal investigation by alerting others involved in continuing criminal activity;
  - (ii) restricting the use of some investigative techniques;
  - (iii) triggering speedy charge and speedy trial rules;
  - (iv) triggering disclosure obligations that have been subject to delayed notice;
  - (v) appearing to be illegitimate or pre-textual and thus adversely affecting community support for police and prosecution efforts; and
  - (vi) causing significant shame, embarrassment or prejudice to the arrestee or innocent third parties and unintended and unfair financial impacts.
- (c) The prosecutor should be aware that Sixth Amendment right to counsel issues raised by the filing of criminal charges may limit the availability of some investigative options, including:
- (i) use of the grand jury as an investigative technique;
  - (ii) soliciting incriminating information from a charged individual; and
  - (iii) contacts with the individuals or entities who have been charged.

### Standard 26-2.7 Use of subpoenas

(a) As used in these Standards, a “subpoena,” however named or designated, is a written command for a person or entity to provide physical evidence, testimony or documents. A subpoena may be issued by a prosecutor, a court, a grand jury or a law enforcement agency, as provided by the law of the jurisdiction.

(b) In deciding whether to use a subpoena, the prosecutor should consider potential benefits including:

- (i) the conservation of law enforcement resources by requiring others to search for and provide factual information and physical evidence needed for an investigation;
- (ii) the imposition of an obligation on the subject of the subpoena to provide factual information or physical evidence;
- (iii) the fact that no predicate or less of a showing is required to issue a subpoena, as compared to a search warrant;

- (iv) the ability to delay or prevent a third party from voluntarily or compulsorily disclosing information about the subpoena (including the disclosure of either the fact of the subpoena itself or of any information provided in response) as a means to preserve the secrecy of the investigation if authorized by law; and
  - (v) voluntary disclosures or cooperation by witnesses and subjects prompted by receipt of the subpoena.
- (c) In deciding whether to use a subpoena, the prosecutor should consider the following potential risks and ways to mitigate them:
- (i) that evidence will be destroyed or altered in between receipt and production;
  - (ii) that information responsive to the subpoena will be improperly withheld or that the request will be interpreted narrowly; and
  - (iii) that knowledge of the subpoena will cause the subjects of the investigation to disguise criminal activity, or take actions to impede or obstruct the investigation.
- (d) The prosecutor using a subpoena should:
- (i) seek to limit the scope of the subpoena to the needs of the investigation, avoid overbroad requests, and avoid seeking the production of attorney-client privileged material; and
  - (ii) provide reasonable accommodations based on factors such as the size or nature of the request, the impact of the request on legitimate business operations, or the time reasonably needed to perform a review for privileged or other legally protected fact information, unless doing so would be outweighed by the government's interest in avoiding delay.
- (e) The prosecutor should ensure that materials received pursuant to a subpoena are properly stored, logged or indexed, and are readily retrievable.
- (f) The prosecutor should accept copies of documents subject to a subpoena unless there is a specific need for original documents that outweighs the producing party's need and right to retain its original materials.

(g) The prosecutor should provide copies, or if necessary, reasonable access to copies or original documents to the person or entity who has produced the copies or originals.

(h) The prosecutor should seek to minimize the cost and dislocation suffered by a person or entity to whom a subpoena is issued and, where applicable, should inform the person or entity of any right to compensation allowed by law.

(i) The prosecutor should arrange for the return of subpoenaed documents and materials when the purpose for which they were subpoenaed has ended.

(j) The prosecutor involved in an investigation where police or law enforcement agents have legal authority to issue written requests for various records and data without probable cause or judicial oversight, should provide advice as to whether the proposed use of such authority is consistent with the limits of the applicable law, the Constitution, and the circumstances of the investigation.

## Standard 26-2.8 Search warrants

(a) As used in these Standards a “search warrant” is a written command issued by a judge or magistrate that permits law enforcement agents to search specified persons or premises and seize specified effects and information.

(b) The prosecutor should consider the following potential benefits associated with using a search warrant:

- (i) securing evidence that might otherwise be removed, hidden, altered or destroyed;
- (ii) removing contraband from commerce before it is transferred or used;
- (iii) seeing and documenting the precise location of the items to be seized in their natural or unaltered state or location;
- (iv) obtaining statements by individuals at the scene of the search that might further the investigation;
- (v) observing and recording the presence of individuals found together at the scene of the search as evidence of their coordination; and
- (vi) encouraging other culpable individuals or witnesses to come forward and provide information to the investigation.

(c) The prosecutor should consider the following potential costs and risks before applying for a search warrant:

- (i) the extensive utilization of limited government resources during the preparation and execution of a search warrant, as compared with other means of gathering information, such as a subpoena;
- (ii) the intrusive nature of the execution of the warrant and its impact on personal privacy or on legitimate business operations;
- (iii) the impact of execution of the warrant on innocent third parties who may be on the premises at the time the warrant is executed; and
- (iv) the potential danger or harm to third parties.

(d) When the prosecutor is involved in an investigation, the prosecutor should review search warrant applications prior to their submission to a judicial officer. In all other cases, the prosecutor should encourage police and law enforcement agents to seek prosecutorial review and approval of search warrants prior to their submission to a judicial officer.

(e) In jurisdictions that authorize telephonic warrants, the prosecutor should be familiar with the rules governing the use of such warrants and should be available to confer with law enforcement agents about them.

(f) In reviewing a search warrant application, the prosecutor should:

- (i) seek to assure the affidavit is complete, accurate and legally sufficient;
- (ii) seek to determine the veracity of the affiant and the accuracy of the information, especially when the application is based on information from a confidential informant; and
- (iii) seek to ensure that the affidavit is not misleading and does not omit material information which has a significant bearing on probable cause.

(g) The prosecutor involved in the investigation should:

- (i) generally, if time permits, meet in advance with all law enforcement and other personnel who will participate in the execution of the warrant to explain the scope of

the warrant, including the area(s) to be searched and the items to be seized;

- (ii) consistent with the goals of the investigation, provide legitimate business operations and third parties reasonable access to seized records;
- (iii) avoid becoming a necessary percipient witness at the scene of the execution of the warrant but be readily available and accessible to respond to immediate questions or to assist in the preparation of additional warrant applications;
- (iv) seek to ensure that an inventory is filed as required by relevant rules; and
- (v) seek to preserve exculpatory evidence obtained during a search and consider the impact of such evidence on the criminal investigation.

(h) When searching an attorney's office, or any place where attorney-client or other privileged material is likely to be located or is discovered, the prosecutor should arrange for evidence to be recovered in such manner as to prevent or minimize any unauthorized intrusion into confidential relationships or information privileged under law.

(i) The prosecutor should seek to prevent or minimize the disclosure of information to the public which a person or entity may consider private or proprietary.

(j) The prosecutor should consider seeking to delay notice about the execution of a search warrant if such delay is authorized by law and if prompt disclosure of the execution of the warrant could reasonably be expected to result in:

- (i) the endangerment of life or physical safety of an individual;
- (ii) the intimidation of potential witnesses;
- (iii) the flight from prosecution by a target of any investigation;
- (iv) the destruction of or tampering with evidence in any investigation; or
- (v) any other serious jeopardy to an investigation.

(k) The prosecutor should not notify media representatives of a search before it occurs and should advise law enforcement agents acting with the prosecutor in the investigation not to do so.

(l) The prosecutor should consider whether the papers supporting the search warrant should be sealed after the warrant is executed and should make application to do so only when the prosecutor believes that the public's interest in knowing of the warrant is outweighed by the need to maintain secrecy of the investigation or to prevent unfair publicity to the persons or organizations whose premises were searched.

### **Standard 26-2.9 Use of the investigative powers of the grand jury**

(a) In deciding whether to use a grand jury, the prosecutor should consider the potential benefits of the power of the grand jury to compel testimony or elicit other evidence by:

- (i) conferring immunity upon witnesses;
- (ii) obtaining evidence in a confidential forum;
- (iii) obtaining evidence from a witness who elects not to speak voluntarily to the police or prosecutor;
- (iv) obtaining documentary or testimonial evidence with the added reliability provided by the oath and the secrecy requirements of the grand jury;
- (v) obtaining documentary evidence from a third party that may be difficult to obtain from a target; and
- (vi) preserving witnesses' accounts in the form of sworn testimony where the jurisdiction provides for recording or transcription of the proceedings.

(b) In deciding whether to use a grand jury, the prosecutor should consider the potential risks including:

- (i) revealing the existence or direction of an investigation;
- (ii) obtaining evasive or untruthful testimony from witnesses who are loyal to targets or fearful of them;
- (iii) relying on witnesses to obey the commands of subpoenas directing them to produce documents or physical evidence;
- (iv) granting immunity to witnesses:
  - (A) who are not believed culpable at the time of the grant but are later found to be culpable; or
  - (B) who are later found to be more culpable than the prosecutor believed at the time of the grant;

- (v) exposing grand jury witnesses to reputational, economic or physical reprisal; and
  - (vi) exposing grand jury witnesses to collateral consequences such as lost time from employment or family obligations, financial costs of compliance, and potential damage to their reputation from association with a criminal investigation.
- (c) In pursuing an investigation through the grand jury, the prosecutor should:
- (i) only bring a matter before the grand jury with the primary purpose of seeking justice and to be mindful of the ex parte nature of proceedings;
  - (ii) prepare adequately before conducting grand jury examinations;
  - (iii) know and follow the laws of the jurisdiction and the rules, practices, and policies of the prosecutor's office;
  - (iv) pose only legal and proper questions and, if within the knowledge of the prosecutor questioning may elicit a privileged or self-incriminating response, advise the witness of the existence of the applicable privilege; and
  - (v) unless prohibited by the law of the jurisdiction, ensure that grand jury proceedings are recorded.
- (d) The prosecutor should use grand jury processes fairly and should:
- (i) treat grand jurors with courtesy and give them the opportunity to have appropriate questions answered; however, the prosecutor should not allow questions that:
    - (A) elicit facts about the investigation that should not become known to the witness; or
    - (B) call for privileged, prejudicial, misleading or irrelevant evidence;
  - (ii) issue a subpoena ad testificandum only if the prosecutor intends to bring the witness before the grand jury;
  - (iii) refrain from issuing a subpoena that is excessively broad or immaterial to the legitimate scope of the grand jury's inquiry;
  - (iv) make reasonable efforts before a witness appears at the grand jury to determine that the testimony is needed,

- including offering the witness or witness' counsel a voluntary pre-appearance conference;
  - (v) grant reasonable requests for extensions of dates for appearance and production of documents when doing so does not impede the grand jury's investigation; and
  - (vi) resist dilatory tactics by witnesses that undermine the grand jury's investigation, authority, or credibility.
- (e) The prosecutor should examine witnesses with courtesy and in a manner designed to elicit truthful testimony, and should:
- (i) consider warning a witness suspected of perjury of the obligations to tell the truth;
  - (ii) insist upon definite answers that will:
    - (A) fully inform the members of grand jury; and
    - (B) establish a clear record so that a witness committing perjury or contempt can be held responsible for such actions;
  - (iii) inform grand jury witnesses of their right to consult with their attorneys to the extent provided by the policy, procedure or law of the jurisdiction; and
  - (iv) seek a compulsion order only when the testimony sought is in the public interest, there is no other reasonable way to elicit such testimony, and the witness has refused to testify or has indicated an intent to invoke the privilege against self-incrimination.
- (f) In determining whether obtaining testimony from a culpable witness will outweigh the cost of granting immunity, a prosecutor should consider the following factors:
- (i) the relative culpability of the witness to be immunized as compared with the person against whom the testimony will be offered;
  - (ii) the gravity of the crime(s) being investigated;
  - (iii) the probability that the testimony would advance the investigation or an eventual prosecution;
  - (iv) the gravity of the crime(s) for which the witness would be granted immunity;
  - (v) the character and history of the witness being considered for immunity, including how these factors might affect the witness's credibility;
  - (vi) the scope of the immunity that the witness would receive;

- (vii) the risk that the immunized witness would lie or feign lack of memory;
- (viii) the risk that the immunized witness would falsely claim responsibility for criminal acts committed by another; and
- (ix) the potential for the grand jury testimony to enhance truthful testimony by hostile or reluctant witnesses at trial or provide evidence to prove perjury if a witness lies at trial.

(g) Ordinarily, the prosecutor should not seek to compel testimony from a close relative of a target of an investigation by threatening prosecution or offering immunity, unless:

- (i) the relative participated criminally in an offense or criminal enterprise with the target and the testimony sought would relate to that enterprise's activities;
- (ii) the testimony sought relates to a crime involving overriding prosecutorial concerns; or
- (iii) comparable testimony is not readily available from other sources.

(h) Ordinarily, the prosecutor should give notice to a target of a grand jury investigation and offer the opportunity for the target to testify without immunity before the grand jury. However, notice need not be provided if there is a reasonable possibility it will result in flight of the target, endanger other persons, or obstruct justice. Prior to taking a target's testimony, the prosecutor should advise the target of the privilege against self-incrimination and obtain a waiver of that right.

(i) A prosecutor with personal knowledge of non-frivolous evidence that directly negates the guilt of a subject of the investigation should present or otherwise disclose that evidence to the grand jury. If evidence is provided to the prosecutor by the subject or target of the investigation and the prosecutor decides not to provide the evidence to the grand jury, the prosecutor should notify the subject, target or their counsel of that decision without delay, so long as doing so would not jeopardize the investigation or prosecution or endanger others.

### **Standard 26-2.10 Technologically assisted physical surveillance**

(a) As used in these Standards, “technologically-assisted physical surveillance” includes: video surveillance, tracking devices, illumination devices, telescopic devices, and detection devices.

(b) In deciding whether to use technologically-assisted physical surveillance, the prosecutor should consider the potential benefits, including:

- (i) detecting the criminal possession of objects that are dangerous or difficult to locate; and
- (ii) seeing or tracing criminal activity by means that are minimally intrusive and limiting the risks posed to the public and law enforcement personnel.

(c) In deciding whether to use technologically-assisted physical surveillance, the prosecutor should consider the legal and privacy implications for subjects, victims and third parties. The prosecutor should seek to use such surveillance techniques in proportion to the seriousness of the criminal activity being investigated and the needs of the particular investigation and in a manner designed to be minimally intrusive.

(d) In deciding whether to use technologically-assisted physical surveillance, the prosecutor should consider the legal requirements applicable to the technique under consideration, and whether those requirements have been met.

### **Standard 26-2.11 Consensual interception, transmission and recording of communications**

(a) As used in these Standards “consensual interception” is an electronic, digital, audio or video interception and recording of communications to which one or more but not all participants in the communications has consented.

(b) In deciding whether to use consensual interception, the prosecutor should consider the potential benefits, including obtaining direct, incriminating, and credible evidence that can be used alone or to corroborate other information.

(c) In deciding whether to use consensual interception, the prosecutor should consider the potential risks, including:

- (i) problems of audibility and admissibility;
  - (ii) the danger of detection, including physical risk to those participating, and the risk of disclosure of the investigation;
  - (iii) selective recording of communications by the cooperating party;
  - (iv) the danger of obtaining false, misleading or self-serving statements by a party to the conversation who is aware or suspects that the conversation is being recorded;
  - (v) the risk that the consenting individual will conspire with the subject of the investigation to create false or misleading statements; and
  - (vi) the risk that the import of a conversation will be distorted by the cooperating party.
- (d) To maximize the benefits and to minimize the risks of using consensual interception, the prosecutor should:
- (i) obtain written or recorded consent from the consenting individual; and minimize to the extent practicable recording outside the presence of law enforcement agents and, if such a recording occurs or will occur:
    - (A) have law enforcement agents test and activate the recording equipment before the cooperating party meets with the subject; and
    - (B) minimize the necessity for the cooperating party to operate the recording equipment and, if it is necessary for the cooperating party to operate the equipment, provide that individual specific directions on how to operate the equipment and strict instruction to be present with it during such operation.
- (e) The prosecutor, in consultation with the law enforcement agents, should regularly review all or selected recordings obtained during consensual interceptions.
- (f) The prosecutor should take steps to ensure law enforcement agents comply with procedures relating to the acquisition of, custody of, and access to electronic equipment and recording media and to the secure preservation of any recordings produced whether they are obtained by consenting individuals or by law enforcement agents.

## Standard 26-2.12 Non-consensual electronic surveillance

(a) As used in these Standards “non-consensual electronic surveillance” is the court-ordered interception of communications, actions, or events.

(b) In deciding whether to request a court order for non-consensual electronic surveillance, the prosecutor should consider the potential benefit of obtaining direct, incriminating, and credible evidence that can be used alone or to corroborate other information.

(c) In deciding whether to request a court order for non-consensual electronic surveillance, the prosecutor should consider the potential costs and risks, including:

- (i) whether the suspected criminal activity being investigated is sufficiently serious and persistent to justify:
  - (A) the significant intrusion on the privacy interests of targets and innocent third parties;
  - (B) the need to obtain periodic reauthorization for electronic surveillance; and
  - (C) the financial and resource costs associated with such surveillance.
- (ii) whether all requirements of the law are met.

(d) The prosecutor, including an applicant, should be aware of the reporting requirements under federal and state law and heightened obligations and accountability to the court in connection with the application and use of non-consensual electronic surveillance.

(e) Prior to the initiation of non-consensual electronic surveillance, the prosecutor should review the following with the law enforcement agents and contract personnel such as interpreters who will assist in the execution of the order:

- (i) the scope of the order;
- (ii) obligations of the monitoring law enforcement agents and monitoring personnel to minimize the interception of privileged conversations and other conversations outside the scope of the order and to alert the prosecutor promptly when recording evidence of new crimes;
- (iii) the prohibition on listening without recording;
- (iv) rules related to protecting the integrity and chain of custody of recordings;

- (v) instructions to contact the prosecutor whenever a noteworthy event occurs, or there is a question regarding the execution of the order; and
  - (vi) the need to adhere to non-disclosure requirements.
- (f) The prosecutor should stay informed of actions of law enforcement agents and contract personnel throughout the use of non-consensual electronic surveillance and should take appropriate steps to determine whether the required procedures are being followed by those carrying out the surveillance.

### **Standard 26-2.13 Conducting parallel civil and criminal investigations**

(a) In deciding whether to conduct a criminal investigation and throughout any such investigation that is undertaken, the prosecutor should consider whether society's interest in the matter might be better or equally vindicated by available civil, regulatory, administrative, or private remedies.

(b) When doing so would not compromise a proper prosecutorial interest, and to the degree permitted by law, the prosecutor should cooperate with other governmental authorities regarding their investigations for the purpose of instituting remedial actions that are of legitimate concern to such entities. In the course of such cooperation, the prosecutor:

- (i) should retain sole control of the criminal investigation and maintain independent judgment at all times;
- (ii) should be aware of rules that prohibit or restrict the sharing or disclosure of information or material gathered through certain criminal investigative techniques;
- (iii) should not be a party to nor allow the continuation of efforts by civil investigative agencies or attorneys to use the criminal process for the purpose of obtaining a civil settlement; and
- (iv) may, in order to preserve the integrity of a criminal investigation or prosecution, ask a civil investigative agency to refrain from taking an investigative step or bringing an action but, in considering whether to do so, should consider the detriment to the public that may result from such forbearance.

(c) A prosecutor should consider the appropriateness of non-criminal or global (civil and criminal resolutions) dispositions suggested by subjects or targets, whether or not they choose to cooperate, and may consider proposals by them to include civil or regulatory sanctions as part of a disposition or cooperation agreement.

**Standard 26-2.14 Terminating the investigation, retention of evidence and post-investigation analysis**

(a) The prosecutor should diligently pursue the timely conclusion of criminal investigations.

(b) The prosecutor's office should periodically review matters under investigation in the office and determine whether the interests of justice would be served by terminating the investigation.

(c) The prosecutor should determine whether information obtained in investigations should be made available for civil enforcement purposes, administrative remedies, or for other purposes consistent with law and the public interest.

(d) To the extent feasible, the prosecutor and members of the investigative agencies should analyze investigations retrospectively, to evaluate techniques and steps that worked well or that proved to be deficient.

(e) Post-investigation analysis by the prosecutor's office should include seeking to identify ways other than prosecution to prevent, minimize or deter similar crimes from occurring in the future.

(f) Prosecutors should be aware of the requirements and office practices regarding the preservation of investigative records and of their compliance obligations with regard to information access and privacy law provisions.

(g) To the extent practicable, the prosecutor should, upon request, provide notice of termination of the investigation to subjects who became aware of the investigation.

(h) Upon termination of the investigation and related proceedings, physical evidence other than contraband should be returned promptly to the person from whom it was obtained, absent an agreement, court order or requirement of law to the contrary.

## Standard 26-2.15 Guidance and training for line prosecutors

- (a) A prosecutor's office should be organized in a manner to provide line prosecutors guidance consistent with these Standards.
- (b) To guide the exercise of discretion, a prosecutor's office should:
  - (i) encourage consultation and collaboration among prosecutors;
  - (ii) appoint supervisors with appropriate experience, strong skills and a commitment to justice and ethical behavior;
  - (iii) require consultation and approval at appropriate supervisory levels for investigative methods of different levels of intrusiveness, risk and costs;
  - (iv) provide regular supervisory review throughout the course of investigations;
  - (v) regularly review investigative techniques and promote best practices to reflect changes in law and policy;
  - (vi) create and implement internal policies, procedures, and standard practices that teach and reinforce standards of excellence in performance, professionalism, and ethics;
  - (vii) create and implement policies and procedures that protect against practices that could result in unfair hardships, the pursuit of baseless investigations, and the bringing of charges against the innocent;
  - (viii) develop and support practices designed to prevent and to rectify conviction of the innocent.
  - (ix) determine what types of investigative steps require formal supervisory approval, and at what supervisory level, and
  - (x) require line attorneys to consult with supervisors or experienced colleagues when making significant investigative decisions absent exigent circumstances.
- (c) A prosecutor's office should provide guidance and training by:
  - (i) strongly encouraging consultation and collaboration among line assistants;
  - (ii) appointing supervisors with appropriate experience and strong commitments to justice, and fostering close working relationships between supervisors and those they supervise;

- (iii) providing formal training programs on investigative techniques and the ethical choices implicated in using them; and
- (iv) creating internal policies and standard practices regarding investigations that memorialize and reinforce standards of excellence, professionalism, and ethics. In doing so:
  - (A) policy and practice materials should be regularly reviewed and updated and should allow flexibility for the exercise of prosecutorial discretion, and
  - (B) written policies and procedures should not be a substitute for regular training for all office members and a commitment to mentoring less-experienced attorneys.

(d) When a line prosecutor believes the needs of an investigation or some extraordinary circumstance require actions that are contrary to or outside of existing policies, the prosecutor should seek prior approval before taking such actions.

(e) A prosecutor's office should develop policies and procedures that address the initiation and implementation of the investigative tools discussed in these Standards in advance of the specific needs of an investigation.

### **Standard 26-2.16 Special prosecutors, independent counsel and special prosecution units**

(a) As used in these Standards, a "special prosecutor" or an "independent counsel" is a prosecutor serving independently from the general prosecution office under a particularized appointment and whose service in that role typically ends after the purpose of the appointment is completed. A "special prosecution unit" is typically a unit that focuses on a particular type of crime, criminal activity, or victim.

(b) Although the special prosecutor and the special prosecution unit are removed from the responsibilities of a general prosecution office, a prosecutor in this role should:

- (i) be bound by the same policies and procedures as regular prosecutors in their jurisdiction, unless to do so would be incompatible with their duties;

- (ii) base judgments about the merits of pursuing a particular investigation upon the same factors that should guide a regular prosecutor, including the seriousness of the offense, the harm to the public, and the expenditure of public resources; and
- (iii) in choosing matters to investigate, consider the danger that the narrow focus or limited jurisdiction of the prosecutor or the unit will lead to the pursuit of what would, in a general prosecution office, be considered an insubstantial violation, or one more appropriately resolved by civil or administrative actions.

**Standard 26-2.17 Use of information, money,  
or resources provided by  
non-governmental sources**

(a) The prosecutor may use information provided by non-governmental sources that is pertinent to a potential or existing criminal investigation. However, consistent with the principles in Standard 2.1, the prosecutor should make an independent evaluation of the information and make an independent decision as to whether to allocate or continue to allocate resources to investigating the matter.

(b) If the law of the jurisdiction permits the acceptance of financial or resource assistance from non-governmental sources, the decision to accept such assistance should be made with caution by the chief public prosecutor or an accountable designee after careful consideration of:

- (i) the extent to which the law of the jurisdiction permits the acceptance of financial or resource assistance;
- (ii) the extent to which the offer is in the public interest, as opposed to an effort to achieve the limited private interests of the non-governmental sources;
- (iii) the extent to which acceptance may result in forgoing other cases;
- (iv) the potential adverse impact on the equal administration of the criminal law;
- (v) the extent to which the character and magnitude of the assistance might unduly influence the

- prosecutor's subsequent exercise of investigative and prosecutorial discretion;
- (vi) the likelihood that the community may view accepting the assistance as inconsistent with the fair and equal administration of criminal justice;
  - (vii) the likelihood that accepting assistance from private sources may create an appearance of undue influence over law enforcement; and
  - (viii) the extent to which financial or resource assistance would enhance or enable the investigation of criminal activity;
- (c) The prosecutor should consider the risk that encouraging information gathering by non-governmental sources may lead to abusive, dangerous or even criminal actions by private parties.
- (d) The office of the prosecutor should have procedures designed to protect the independent exercise of investigative discretion from being influenced by the receipt of outside financial or resource assistance, including careful accounting and recordkeeping of the amounts and terms of such assistance and clear disclosure that providing assistance will not guide the exercise of investigative or prosecutorial discretion.
- (e) The prosecutor, consistent with the law of the jurisdiction, should disclose significant non-governmental assistance to relevant legislative or public bodies having oversight over the prosecutor's office and, when appropriate, the public.
- (f) Non-governmental assistance should be disclosed to affected parties as part of the discovery process.

**Standard 26-2.18 Use of Sensitive, classified or other information implicating investigative privileges**

- (a) The prosecutor should be alert to the need to balance the government's legitimate interests in protecting certain information from disclosure, and the legitimate interests and Constitutional rights of the public and of defendants favoring disclosure.
- (b) When appropriate, the prosecutor should request court orders designed to protect the disclosure of law enforcement means and methods, informant identities, observation posts, and such other information that might jeopardize future investigations or the

safety or reputation of persons directly or indirectly involved in an investigation.

(c) In investigations believed to have the potential to include classified or sensitive information, prosecutors should seek to obtain the relevant information and consult laws, regulations and other requirements for handling such information before making any charging decisions.

### **PART III. PROSECUTOR'S ROLE IN RESOLVING INVESTIGATION PROBLEMS**

#### **Standard 26-3.1 Prosecutor's role in addressing suspected law enforcement misconduct**

(a) If the prosecutor has reason to suspect misconduct or unauthorized illegal activity at any level of the prosecutor's office or in any agency or department engaged in a criminal investigation, the prosecutor should promptly report the suspicion and the reason for it to appropriate supervisory personnel in the prosecutor's office who have authority to address the problem, or to the appropriate inspector general's office, or similar agency, if reporting within the prosecutor's own office is problematic. Reporting may also be required to comply with requirements of the applicable rules of professional conduct, the Model Rules and the law of the jurisdiction.

(b) If the prosecutor has reason to believe that a criminal investigation or prosecution is, or is likely to be, adversely affected by incompetence, lack of skilled personnel or inadequate resources in the prosecutor's office or in any other relevant agency or department, the prosecutor should promptly report that belief and the reason for it to supervisory personnel in the prosecutor's office.

(c) A supervisory prosecutor who receives an allegation of misconduct, unauthorized illegal conduct, or who receives an allegation of incompetence, inadequate resources, or lack of skilled personnel that is, or is likely to, adversely affect a criminal investigation, should undertake a prompt and objective review of the facts and circumstances or refer the matter to an appropriate agency or component responsible for addressing such allegations. When practica-

ble, the line prosecutor making any such allegations should not be involved in subsequent investigation(s) relating to the allegation(s).

(d) If the prosecutor's office concludes that there is a reasonable belief that personnel in any agency or department have engaged in unauthorized illegal conduct, the prosecutor's office should initiate a criminal investigation into the conduct or seek the initiation of such an investigation by an appropriate outside agency or office.

(e) If the prosecutor's office concludes that there was not unauthorized illegal conduct, but concludes that there was incompetence or non-criminal misconduct, the prosecutor's office should take appropriate action to notify the relevant agency or department, and if within the prosecutor's own office, to impose sanctions for the conduct.

(f) Decisions on how to respond to allegations of unauthorized illegal conduct, misconduct, or significant incompetence should generally be made without regard to adverse consequences on pending cases or investigations.

### **Standard 26-3.2 Prosecutor's role in addressing suspected judicial misconduct**

(a) Although judges are not exempt from criminal investigation, the prosecutor's office should protect against the use of false allegations as a means of harassment or abuse that may impact the independence of the judiciary.

(b) If a line prosecutor has reason to believe that there is significant misconduct or illegal activity by a member of the judiciary, the line prosecutor should promptly report that belief and the reasons for it to supervisory personnel in the prosecutor's office.

(c) Upon receiving from a line prosecutor, or from any source, an allegation of significant misconduct or illegal conduct by a member of the judiciary, a supervisory prosecutor should undertake a prompt and objective review of the facts and circumstances.

(d) If the prosecutor's office has a reasonable belief that a member of the judiciary has engaged in criminal conduct, the prosecutor's office should initiate, or seek the initiation of, a criminal investigation.

(e) If the prosecutor's office concludes that a member of the judiciary has not engaged in illegal conduct, but has engaged in

non-criminal misconduct, the prosecutor's office should take appropriate action to inform the relevant officer of the judicial authorities. Reporting may also be required to comply with requirements of the applicable rules of professional conduct, the Model Rules and the law of the jurisdiction.

(f) The prosecutor's office should take reasonable steps to assure the independence of any investigation of a judge before whom the prosecutor's office practices. In some instances, this may require the appointment of a "pro tem" or "special" prosecutor or use of a "fire-wall" within the prosecutor's office.

### **Standard 26-3.3 Prosecutor's role in addressing suspected misconduct by defense counsel**

(a) Although defense counsel are not exempt from criminal investigation, the prosecutor's office should protect against the use of false allegations as a means of harassment or abuse that may impact the independence of the defense counsel or the Constitutionally protected right to counsel.

(b) If a line prosecutor has reason to believe that defense counsel is engaging in criminal conduct, is violating the duty to protect a client, or is engaging in unethical behavior or misconduct, the prosecutor should promptly report that belief and the reasons for it to supervisory personnel in the prosecutor's office.

(c) Upon receiving from a line prosecutor, or from any source, an allegation of misconduct or illegal conduct by defense counsel, a supervisory prosecutor should undertake a prompt and objective review of the facts and circumstances.

(d) If the prosecutor's office has a reasonable belief that defense counsel has engaged in illegal conduct, the prosecutor's office should initiate, or seek the initiation of, an investigation into the conduct.

(e) If the prosecutor's office concludes that defense counsel has not engaged in illegal conduct, but has engaged in non-criminal misconduct as defined by the governing ethical code and the rules of the jurisdiction, the prosecutor's office should take appropriate action to inform the appropriate disciplinary authority.

(f) The prosecutor's office should take reasonable steps to assure the independence of any investigation of a defense counsel includ-

ing, if appropriate, the appointment of a pro tem or special prosecutor or use of a “fire-wall” within the prosecutor’s office. At a minimum, an investigation of defense counsel’s conduct should be conducted by a prosecutor who has not been involved in the initial matter or in ongoing matters with that defense counsel.

(g) The prosecutor investigating defense counsel should consider whether information regarding conduct by defense counsel should be provided to a judicial officer involved in overseeing aspects of the investigation in which the misconduct occurred.

(h) The prosecutor investigating defense counsel who is representing a client in a criminal matter under the jurisdiction of the prosecutor’s office ordinarily should notify the attorney and the court in a timely manner about the possibility that potential charges against the attorney may create a conflict of interest.

#### **Standard 26-3.4 Prosecutor’s role in addressing suspected misconduct by witnesses, informants or jurors**

(a) If a line prosecutor has reason to believe that there has been illegal conduct or non-criminal misconduct by witnesses, informants, or jurors, the prosecutor should seek supervisory review of the matter.

(b) Upon receiving an allegation of unauthorized illegal conduct or non-criminal misconduct by witnesses, informants or jurors, the prosecutor’s office should undertake a prompt and objective review. If there is a reasonable belief that there has been illegal conduct or non-criminal misconduct, the prosecutor’s office should initiate an investigation into the conduct. All relevant evidence should be preserved in the event it must be disclosed if criminal charges are filed against the individual alleged to have engaged in the conduct.

(c) If the misconduct relates to the official duties of a juror or witness, it must also be reported to an appropriate judicial officer.

#### **Standard 26-3.5 Illegally obtained evidence**

(a) If a prosecutor reasonably believes that evidence has been illegally obtained, the prosecutor should consider whether there are potential criminal acts that should be investigated or mis-

duct that should be addressed or reported. The prosecutor should be familiar with the laws of their jurisdiction regarding the admissibility of illegally obtained evidence.

(b) The prosecutor should take appropriate steps to limit the taint, if any, from the illegally obtained evidence and determine if the evidence may still be lawfully used.

(c) The prosecutor should notify the parties affected by the illegal conduct at the earliest time that will not compromise the investigation or subsequent investigation, or at an earlier time if required by law.

### **Standard 26-3.6 Responding to political pressure and consideration of the impact of criminal investigations on the political process**

(a) The prosecutor should resist political pressure intended to influence the conduct, focus, duration or outcome of a criminal investigation.

(b) The prosecutor should generally not make decisions related to a criminal investigation based upon their impact on the political process.

(c) When, due to the nature of the investigation or the identity of investigative targets, any decision will have some impact on the political process (such as an impending election), the prosecutor should make decisions and use discretion in a principled manner and in a manner designed to limit the political impact without regard to the prosecutor's personal political beliefs or affiliations.

(d) The prosecutor should carefully consider the language in Standard 1.5 ("Contacts with the Public During the Investigative Process") when making any statements or reports regarding a decision to prosecute, or to decline to prosecute, in a matter that may have some impact on the political process.

### **Standard 26-3.7 Review and oversight of criminal investigations by government agencies and officials**

(a) Prosecutors' offices should attempt to respond in a timely, open, and candid manner to requests from public officials for general information about the enforcement of laws under their jurisdiction or about law reform matters. However, if public officials seek information about ongoing or impending investigations, the prosecutors' offices should consider the potential negative impact of providing such information and should inform public officials about such concerns.

(b) Generally, responses to public officials should be made by high-ranking officials in the prosecutor's office who have policy-making authority. Prosecutors' offices should resist allowing line-attorneys to respond to requests for information by public officials.

(c) Generally, responses to information requests by public officials should be through testimony or by providing pertinent statistics and descriptive and analytical reports, and not by providing information about particular matters. Prosecutors' offices should resist requests for materials that are subject to deliberative process or work product privileges related to pending criminal investigations or closed investigations whose materials have not otherwise been made public, and should oppose disclosure of information that would adversely affect a person or entity.

(d) Prosecutor's offices may respond to requests about the handling of fully adjudicated cases. Absent unusual circumstances, information about adjudicated cases should be provided by high-ranking officials with policy-making authority, and not by line attorneys.

(e) The Prosecutor's office should establish clear and consistent policies to address its responsibilities under public disclosure laws and with regard to the public's potential access to closed matters. The Prosecutor's office should provide sufficient resources to make prompt and appropriate replies to any public disclosure requests.

## BLACK LETTER WITH COMMENTARY

### *Preamble*

A prosecutor's investigative role, responsibilities and potential liability are different from the prosecutor's role and responsibilities as a courtroom advocate. These Standards are intended as a guide for a prosecutor actively engaged in a criminal investigation or performing a legally mandated investigative responsibility—*e.g.*, serving as legal advisor to an investigative grand jury or as an applicant for a warrant to intercept communications. These Standards are intended to supplement the Prosecution Function Standards, not to supplant them. These Standards may not be applicable to a prosecutor serving in a minor supporting role to an investigation undertaken and directed by law enforcement agents.

### *Related Standards*

ABA Criminal Justice Standards: Prosecution Function  
Part III 3-1.1 (Function of the Standards)

### *Commentary*

The Preamble is intended to delimit the circumstances in which these Standards apply and to clarify the relationship between these Standards and the *Prosecution Function Standards*. Specifically, these Standards focus solely on the prosecutor, or other government attorney, who plays an active role in the criminal investigation.



## PART I. GENERAL STANDARDS

### Standard 26-1.1 The Function of These Standards

(a) These Standards address the investigative stage of the criminal justice process. They address the charge or post-charge stages of the criminal justice process only when those stages overlap with the investigative stage.

(b) Standards are not intended to serve as the basis for the imposition of professional discipline, nor to create substantive or procedural rights for accused or convicted persons. These Standards do not modify a prosecutor's ethical obligations under applicable rule of professional conduct. These Standards are not intended to create a standard of care for civil liability, nor to serve as a predicate for a motion to suppress evidence or dismiss a charge.

(c) The use of the term "prosecutor" in these Standards applies to any prosecutor or other attorney, regardless of agency or title, who serves as an attorney in a governmental criminal investigation.

#### *Related Standards*

ABA Criminal Justice Standards: Prosecution Function

Part III (Investigation for Prosecution Decision), generally

Standard 3-1.1 (The Function of the Standards)

Standard 3-1.2 (The Function of the Prosecutor)

Standard 3-1.3 (Conflicts of Interest)

ABA Model Rules of Professional Conduct

Preamble and Scope, comments 19 and 20

Rule 3.8 (Special Responsibilities of a Prosecutor)

NDA National Prosecution Standards (Investigations)

#### *Commentary*

These Standards do not apply to all criminal investigations, nor do they apply to the non-investigative stages of the criminal process that follow the investigation. Prosecutorial guidance in general—and, in

particular, with respect to charging and post-charging responsibilities—can be found in the *Prosecution Function Standards*<sup>18</sup> and in Standards governing other stages of the criminal justice process (e.g., the Standards on Pretrial Release, Discovery, Joinder and Severance, Guilty Pleas, Trial by Jury, and Sentencing).

As with other Criminal Justice Standards, a violation of these Standards does not give rise to a cause of action, and the Standards are not designed to be a basis for civil liability. Moreover, their purpose can be subverted if they are invoked by opposing parties as a procedural weapon. These Standards are governed by the same functional limitations as the Prosecution Function Standards<sup>19</sup>—*i.e.*, they provide prosecutors with professional advice. They are not intended to serve as rules to be used as the basis for the imposition of professional discipline, nor are they intended to create substantive or procedural rights for accused or convicted persons.

These Standards are intended to apply to all attorneys actively participating in criminal investigations, whether they are full-time prosecutors, government attorneys working for a state or federal regulatory agency who work on criminal investigations, or (in rare circumstances) private attorneys who provide legal advice, counsel or other legal support for criminal investigators, or government attorneys working on criminal investigations. Attorneys can be “actively participating” under this Standard while still playing a minor role in an investigation.

## Standard 26-1.2 General Principles

- (a) An individual prosecutor is not an independent agent but is a member of an independent institution the primary duty of which is to seek justice.
- (b) The prosecutor’s client is the public, not particular government agencies or victims.
- (c) The purposes of a criminal investigation are to:
  - (i) develop sufficient factual information to enable the prosecutor to make a fair and objective determination of whether and what charges should be brought and to guard against prosecution of the innocent, and

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18. See PFS, *supra* note 16, § 3-1.1.

19. See *id.*

- (ii) develop legally admissible evidence sufficient to obtain and sustain a conviction of those who are guilty and warrant prosecution.
- (d) The prosecutor should:
  - (i) ensure that criminal investigations are not based upon premature beliefs or conclusions as to guilt or innocence but are guided by the facts;
  - (ii) ensure that criminal investigations are not based upon partisan or other improper political or personal considerations and do not invidiously discriminate against, nor wrongly favor, persons on the basis of race, ethnicity, religion, gender, sexual orientation, political beliefs, age, or social or economic status;
  - (iii) consider whether an investigation would be in the public interest and what the potential impacts of a criminal investigation might be on subjects, targets and witnesses; and
  - (iv) seek in most circumstances to maintain the secrecy and confidentiality of criminal investigations.
- (e) Generally, the prosecutor engaged in an investigation should not be the sole decision-maker regarding the decision to prosecute matters arising out of that investigation.
- (f) The prosecutor should be aware of and comply with the ethical rules and other legal standards applicable to the prosecutor's conduct during an investigation.
- (g) The prosecutor should cooperate with other governmental authorities regarding matters that are of legitimate concern to such authorities when doing so is permitted by law and would not compromise an investigation or other criminal justice goals.
- (h) The prosecutor's office should provide organizational structure to guide its members' investigative work.

### *Related Standards*

- ABA Criminal Justice Standards: Prosecutorial Investigations  
Part II (Specific Investigative Functions of the Prosecutor)  
Standard 2-2.1 (The Decision to Initiate or to Continue  
an Investigation)
- Standard 2-2.13 (Conducting Parallel Civil and  
Criminal Investigations)

ABA Criminal Justice Standards: Prosecution Function

Part III (Investigation for Prosecution Decision), generally

Standard 3-1.1 (The Function of the Standards)

Standard 3-1.2 (The Function of the Prosecutor)

Standard 3-1.3 (Conflicts of Interest)

ABA Model Rules of Professional Conduct

Rule 3.8 (Special Responsibilities of a Prosecutor)

Rule 4.2 (Communication with Person Represented by Counsel)

Rule 4.3 (Dealing with Unrepresented Person)

Rule 5.1 (Responsibilities of Partners, Managers, and  
Supervisory Lawyers)

Rule 5.2 (Responsibilities of a Subordinate Lawyer)

Rule 5.3 (Responsibilities regarding Nonlawyer Assistants)

NDAA National Prosecution Standards, Standard 1.1

### *Commentary*

Standard 1.2 sets forth the general principles for investigations that are expanded upon throughout the Standards. It discusses the function of the prosecutor and the prosecutor's office, the purpose of a criminal investigation, and it lists the basic considerations that a prosecutor should have in mind while conducting an investigation.

#### **Commentary to Subdivision 26-1.2 (a)**

As Justice Sutherland famously wrote:

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. . . .<sup>20</sup>

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20. *United States v. Berger*, 295 U.S. 78, 88 (1935) (holding that defendant was entitled to a new trial based on the cumulative effects of prosecutor's misconduct). This view is of even older legal provenance. *See People v. Greenwall*, 115 N.Y. 520, 526 (1889) (district attorney's reference to defendant's former conviction under the same indictment was not enough for a reversal as the defendant was not injured, but the court noted that a district attorney must "put himself under proper restraint, and should not in his remarks, in the hearing of the jury, go beyond the evidence or the bounds of a reasonable moderation"); *Appeal of Nicely*, 18 A. 737, 738 (Pa. 1889) (refusing to overturn a conviction based on

Two critical concepts underlie this subsection. First, the prosecutor's justice-seeking duties are pursued by the prosecutor as a member of the office of the prosecutor; the pursuit of justice in this context is not an individual endeavor. Thus, in seeking justice, the prosecutor should abide by the policies, procedures, and practices of his or her office. At the same time, however, the duty to seek justice is not only an institutional responsibility, it is also a personal one.<sup>21</sup> Second, because the pursuit of a just result is the primary duty of the prosecutor, prosecutors should initiate and continue investigations only insofar as they reasonably believe that doing so will further the broad interests of justice, not simply to obtain a guilty plea or conviction.<sup>22</sup>

### Commentary to Subdivision 26-1.2 (b)

All prosecutors covered by these Standards serve the public as their "client." This is demonstrated each time a prosecutor stands up in a local, state, or federal court and announces his or her appearance on behalf of the "people," or of a county, a state, or the United States (and not on behalf of any person or agency). This simple act captures the evo-

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remarks/asides made by the prosecutor to the jury, but noting that "the district attorney is a quasi judicial officer . . . he represents the commonwealth, and the commonwealth demands no victims . . . hence, he should act impartially . . . [.] should present the commonwealth's case fairly, and should not press upon the jury any deductions from the evidence that are not strictly legitimate"); *O'Neill v. State*, 207 N.W. 280, 281 (Wis. 1926) (setting aside the conviction of an alleged pedophile because prosecutor made references to killing or disposing of the pedophile-defendant during trial).

21. The Supreme Court, for example, has imposed a personal obligation on the prosecutor to learn of, preserve, and communicate with the defense regarding exculpatory and impeachment evidence in the government's possession. See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding that prosecutor remains responsible for disclosing favorable evidence to a defendant—regardless of whether police investigators failed to inform the prosecutor of evidence—because the prosecutor can establish procedures and regulations to ensure communication of all relevant information to every lawyer associated with the case). That said, these Standards begin, but do not complete, the task of answering the questions posed by Professor Bruce A. Green: "Which decisions should be entrusted to junior prosecutors, which to supervisors, and which to office policy? . . . [W]hat does it mean to seek justice and how is that idea to be put into action? To what extent should professional preferences about prosecutorial conduct and discretion be codified . . . and to what extent should they be left to individual prosecutors and their offices . . .?" Bruce A. Green, *Prosecutors' Professional Independence: Reflections on Garcetti v. Ceballos*, ABA CRIMINAL JUSTICE, Summer 2007, at 10.

22. See ACHIEVING JUSTICE, *supra* note 12, at xxvii.

lution of the legal system over hundreds of years that led to the creation of the public prosecutor, and away from the dependence upon, or the right of, private persons to bring criminal charges.<sup>23</sup>

The prosecutor should give appropriate consideration to the rights and interests of victims and witnesses of crime, to the concerns and priorities of criminal investigators and their offices or government agencies, but they are to regard none of these as “clients.”<sup>24</sup>

### Commentary to Subdivisions 26-1.2 (c) - (d)

The prosecutor’s role was described by then U.S. Attorney General Jackson who observed that the prosecutor should be “dispassionate, reasonable and just.”<sup>25</sup>

The prosecutor must address the following questions:

- How should person(s) or entities subject to the investigation be categorized: defendant, witness, or victim; and
- What, if any, actions should be undertaken by the government as a result of the investigation: e.g., criminal charges, civil referral, or administrative remedies, public reports, or nothing?

To do so, and to maintain the legitimacy of the criminal justice system, requires a fact gathering process that is conducted within legal, practical, ethical, and moral constraints. Determining the truth is, by its nature, an imperfect endeavor. In making decisions during an investiga-

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23. W. Scott Van Alstyne, Jr., Comment, *The District Attorney—A Historical Puzzle*, 1952 WIS L. REV. 125, 138 (1952).

24. To highlight the principle that prosecutors should be independent, this Standard defines the prosecutor’s client as the “public.” These Standards are not intended to address the issue of whether or not an attorney-client relationship exists between government attorneys and other government personnel for the purpose of maintaining the confidentiality of those communications. Whether government agencies may assert that those communications fall within the “attorney-client privilege” is a separate issue. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 (2000); EDNA EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 179 (5th ed. 2007); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000); Douglas Letter, *Lawyering and Judging on Behalf of the United States: All I Ask For Is a Little Respect*, 61 GEO. WASH. L. REV. 1295 (1993); Nancy Leong, Note, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 GEO. J. LEGAL ETHICS 163, (2007); Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269 (1999); Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170 (2002).

25. See Jackson, *supra* note 10, at 3-4.

tion, the prosecutor should be mindful of the risk to the fair administration of justice resulting from a failure to conduct the fact-finding process within these constraints. When premature conclusions as to guilt drive the investigation, the investigation becomes a warped search for facts to support that conclusion.<sup>26</sup> In service of this effort, these Standards support the view that the Constitutional prohibition on selective *prosecution* based on improper considerations such as race, gender, religion and the like, should be applied by the prosecutor to criminal *investigations*.<sup>27</sup>

Of course, these considerations should not paralyze the prosecutor from pursuing an investigation with vigor, while at the same time constantly evaluating and reevaluating conclusions or views as to guilt or innocence of the subjects of the investigation. As an investigation progresses, it will be difficult for all involved, including the prosecutor, to suspend judgments on guilt or innocence. The prosecutor, with the ultimate authority on whether a case will go forward, has a particular obligation to suspend judgment, protect the innocent, avoid missing crucial investigative avenues, and exercise discretion in the use of criminal sanctions for the conduct that is the subject of the investigation.

Nor may the prosecutor conduct an investigation for an improper motive and thus the prosecutor should not allow personal or political considerations to improperly influence decisions regarding a criminal investigation and should remain mindful that the duty to seek justice includes accurate determinations of guilt and innocence, as well as the

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26. In a notorious case of prosecutorial misconduct, the Disciplinary Hearing Commission of the North Carolina State Bar disbarred Prosecutor Michael Nifong (by then the former District Attorney for the Fourteenth Prosecutorial District in Durham County, North Carolina) finding that his premature conclusions, and public statements about those conclusions, had “resulted in significant actual harm to the justice system.” *N.C. State Bar v. Nifong*, No. 06 DHC 35 (July 24, 2007). Further discussion of this case is found in the Commentary to Standard 1.5 regarding contacts with the public.

27. *See Whren v. United States*, 517 U.S. 806, 813 (1996) (noting that “the Constitution prohibits selective enforcement of the law based on considerations such as race,” but refusing to apply an enhanced reasonable suspicion standard to traffic stops as a cure for racial profiling because the basis for objecting to such intentional discriminatory investigation is the Equal Protection Clause, not the Fourth Amendment); *see also United States v. Avery*, 137 F.3d 343, 354 (6th Cir. 1997) (refusing to reverse conviction of defendant on appeal because he failed to show that airport police engaged in intentional selection of blacks for drug investigation as required under the Equal Protection clause); U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (June 2003).

exoneration of the innocent. In this regard, although prosecutors are accountable to the public directly (if elected) or indirectly (if appointed), they should not be swayed or influenced in the exercise of discretion by their own political interests, or those of their sponsor to the office.<sup>28</sup>

#### **Commentary to Subdivision 26-1.2 (e)**

As noted above, direct involvement in an investigation may make it difficult for the prosecutor to exercise independent judgment. A prosecutor is unlike other advocates. Private lawyers are often “instructed” by their clients as to what positions to take. In the sphere of criminal justice, the prosecutor’s office is essentially “instructing” itself. To meet this challenge, it is recommended that, when determining whether or not to proceed with a significant step in the investigation, the prosecutor should seek guidance from an experienced colleague or supervisor who is not otherwise involved in the particular investigation. Similarly, when determining whether or not to move a case from investigation to prosecution the prosecutor’s office should, if feasible, include review of the investigation by one or more experienced prosecutors not involved in the investigation. That said, the Standards Committee recognizes that these practices may be difficult to implement in a small office, which may have only a few full-time prosecutors.

#### **Commentary to Subdivision 26-1.2 (f)**

The prosecutor should be aware of and regularly consult sources of guidance that may apply to the prosecutor during the criminal investigation, such as court opinions, published ethical codes, and bar and ethics opinions.

Such sources, however, do not always address the particular circumstances of the prosecutor as investigator. For example, the Oregon Supreme Court in *In re Conduct of Gatti*, held that the relevant Oregon rule (similar to Model Rule 8.4) prohibited all lawyers, including those participating in undercover investigations, from engaging in dishonesty, fraud, deceit, misrepresentation, or false statements.<sup>29</sup> The case involved a *private* attorney who had used deception in order to investi-

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28. See Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939 (1997).

29. *In re Conduct of Gatti*, 8 P.3d 966, 973 (Or. 2000).

gate a private case. In telephone calls to individuals the attorney falsely presented himself as a chiropractor interested in working with the individual's company. Subsequently, one of the individuals who received the call made a complaint to the state bar, alleging that the attorney had engaged in deceitful practices in violation of the state bar rules. The private attorney did not dispute that he had engaged in deceit, but argued that there should be an exception for private attorneys (and prosecutors) when they are "engaged in misrepresentations ... limited only to identity or purpose and [are] made solely for purposes of discovering information." The private attorney was disciplined by the state bar. The attorney appealed the bar sanction to the Oregon State Supreme Court. Amicus briefs were filed by the U.S. Attorney for the District of Oregon and the Oregon Attorney General, each of whom argued for an exception from the rule forbidding deceit for prosecutors' conduct during the course of a criminal investigation. The Oregon Supreme Court declined to so rule, and, as a result, all undercover operations in the state were shut down. Since *Gatti*, some states (including Oregon) have altered their rules or issued ethics opinions to account for the participation of prosecutors in their role as attorneys during the course of an undercover investigation.<sup>30</sup> The Department of Justice filed suit to enjoin the Oregon State Bar from disciplining government attorneys for overseeing or participating in undercover operations.<sup>31</sup> The suit was dismissed without prejudice by stipulation of the parties due to a change in the rules.<sup>32</sup> However, the situation is far from resolved.<sup>33</sup> Some state rules have been changed or

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30. See Chris Toth & Allison Frisbee, *Don't Be Deceived — It's Not a Simple Matter: The Use of Deception by Law Enforcement Attorneys and Rule 8.4(c)*, NAAGAZETTE, Feb. 29, 2008, available at <http://naag.org/nt-be-deceived-its-not-a-simple-matter-the-use-of-deception-by-law-enforcement-attorneys-and-rule-8.php>; David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791 (1995).

31. Complaint, *United States v. Oregon State Bar*, No. 6:01-cv-06168 (D. Or.) (May 23, 2001).

32. Stipulated Order of Dismissal, *United States v. Oregon State Bar*, No. 6:01-cv-06168 (D. Or.) (Feb. 13, 2002).

33. See *In re Pautler*, 47 P.3d 1175, 1180-81 (Colo. 2002) (suspending assistant district attorney from practice for three months after he pretended to be a public defender in order to negotiate the surrender of an individual subsequently convicted of three murders and a rape); see also 28 U.S.C. § 530B (2006); MODEL RULES OF PROF'L CONDUCT Rs. 3.3, 3.4, 3.8, 4.2, 8.4 (2011).

interpreted only to provide a safe harbor for government attorneys,<sup>34</sup> while others apply the rule more broadly.<sup>35</sup>

### Commentary to Subdivision 26-1.2 (g)

In certain circumstances a criminal investigation may reveal continuing conduct that, if left unchecked, will cause substantial injury to persons, property, or the environment. This may arise in a drug investigation where there is a risk of letting illegal drugs reach the street. Another example would be the continued illegal discharge of dangerous chemicals or other pollutants from a company under investigation that could pose a substantial threat of imminent bodily harm or harm to the environment. In the latter case, the prosecutor should consider using legal and appropriate means to provide otherwise restricted information to other government agencies that are equipped with the legal tools (*e.g.*, injunctive relief) to promptly prevent, mitigate, or rectify such injury. In this regard, the prosecutor should also consider Standards 2.1(c)(9) and 2.13, regarding the decision to initiate or continue a criminal investigation and the use of non-criminal authorities to vindicate the public interest in a particular matter.

### Commentary to Subdivision 26-1.2 (h)

The purpose of a criminal investigation is to uncover sufficient facts to determine whether to bring charges, to obtain legally sufficient evidence to obtain a conviction, and to guard against the prosecution of the innocent. It is not to inflict punishment or damage reputations through the process of the investigation itself.

In service of these goals, the Standards set forth various factors. The first of these, which should be self-apparent, is that the investigation should be guided by the facts. Simply put, the prosecutor should follow the facts wherever they go.<sup>36</sup>

In some instances, prosecutors formed a theory early, and then only sought facts to fit their theory. This has led innocent people to be charged

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34. *See, e.g.*, ALA. RULES OF PROF'L CONDUCT R. 3.8(2) (2010); FL. RULES OF PROF'L CONDUCT R. 4-8.4, cmt. (2010); IOWA CODE OF PROF'L RESPONSIBILITY R. 32:8-4, cmt. 6 (2005); Utah Bar Ethics Adv. Op. 02-04, 2002 WL 459018 (Mar. 18, 2002).

35. MO. RULES OF PROF'L CONDUCT R. 4-8.4(c) (2012); OR. RULES OF PROF'L CONDUCT R. 8.4(b) (2009).

36. *See* Standard 1.2(d)(i).

and convicted and has allowed the guilty to elude justice.<sup>37</sup> It is impossible to conduct an investigation without forming investigative hypotheses, but the investigative lodestar must be the truth, and the prosecutor must constantly evaluate and reevaluate, and test and stress the theory of the case. The prosecutor cannot dismiss or diminish evidence simply because it controverts a theory. Instead, the prosecutor must identify and grapple with conflicting information, and be able to explain its significance or lack thereof to both him or herself and to supervisors.

In addition, the prosecutor must decide whether an investigation is warranted at all. As Justice Jackson said, “Law enforcement is not automatic. It isn’t blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints.”<sup>38</sup> Thus, the Standards require the prosecutor to determine whether the investigation should start, or continue, and in making this decision, the prosecutor should consider, among other things, what effect the investigation will have on subjects, targets, and witnesses.<sup>39</sup> Indeed, being mindful of the collateral consequences of investigative acts is a theme that runs throughout these Standards.<sup>40</sup>

To support the prosecutor in this effort, the prosecutors’ offices should make available sources of guidance, advice, or approval. The prosecutors’ office should maintain an organizational culture that encourages ethical conduct and a commitment to compliance with relevant legal and professional standards. The office should (1) make available to the attorneys and non-attorney personnel (*e.g.*, paralegals, IT personnel, legal assistants) appropriate training; and (2) provide oversight and professional evaluation needed to monitor the effectiveness of the

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37. The Second Circuit recently wrote of one investigation: “Perhaps because they were certain of . . . petitioner’s guilt, they were unfazed by the lack of physical evidence and may have felt comfortable cutting corners in their investigation. After all, [t]horoughness is frequently a casualty of such cases.” *Friedman v. Rehal*, 618 F.3d 142, 158 (2d Cir. 2010) (citation omitted). Similarly, Joseph Lamont Abbitt was exonerated on September 2, 2009 in North Carolina after new DNA evidence showed that he was not guilty of raping two young women. He spent 14 years in prison after a conviction that was based on eyewitness misidentification. The Innocence Project, *Know the Case: Joseph Lamont Abbitt*, [http://www.innocenceproject.org/Content/Joseph\\_Abbitt.php](http://www.innocenceproject.org/Content/Joseph_Abbitt.php).

38. See Jackson, *supra* note 10, at 5.

39. See Standard 1.2(d)(iii).

40. See, *e.g.*, Standards 1.2(d), 1.3(e) and (g), 1.4, 1.5.

office's adherence to the relevant legal and professional standards.<sup>41</sup> This includes assigning matters with due recognition of the skill and experience of the attorney involved, implementing appropriate disciplinary measures for failing to meet the relevant standards, and maintaining clear avenues of communication for individual attorneys and other office personnel to raise issues or concerns within their office without fear of retribution or reprisal.

### **Standard 26-1.3 Working with police and other law enforcement agencies**

**(a) The prosecutor should respect the investigative role of police and other law enforcement agents by:**

- (i) working cooperatively with them to develop investigative policies; and**
- (ii) providing independent legal advice regarding their investigative decisions.**

**(b) The prosecutor should take steps to promote compliance by law enforcement agents with relevant legal rules.**

**(c) The prosecutor should be aware of the experience, skills and professional abilities of police and other law enforcement agents assigned to an investigation.**

**(d) The prosecutor's office should assist in providing training to police and other law enforcement agents concerning potential legal issues and best practices in criminal investigations.**

**(e) Before and throughout the course of complex or non-routine investigations, the prosecutor should work with the police and other participating agencies and experts to develop an investigative plan that analyzes:**

- (i) the investigative predicate or information concerning the matter that is then known;**
- (ii) the goals of the investigation;**

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41. See Ethics Resource Center, *The Federal Sentencing Guidelines for Organizations at Twenty Years: A Call to Action for More Effective Promotion and Recognition of Effective Compliance and Ethics Programs*, at 94 (2012) (Recommendation 3.2, recommending that federal government agencies develop and implement their own compliance and ethics programs).

- (iii) the potential investigative techniques and the advantages of each, singularly and in combination, in producing relevant information and admissible evidence; and
- (iv) the legal issues likely to arise during the investigation.

(f) The prosecutor should promote timely communications with police and other law enforcement agents about material developments in the investigation.

(g) The prosecutor should not seek to circumvent ethical rules by instructing or recommending that others use means that the prosecutor is ethically prohibited from using. The prosecutor may provide legal advice to law enforcement agents regarding the use of investigative techniques that law enforcement agents are authorized to use.

### *Related Standards*

- ABA Criminal Justice Standards: Prosecutorial Investigations
  - Standard 2-2.14 (Terminating the Investigation)
  - Standard 3-3.1 (Prosecutor's Role in Addressing Suspected Law Enforcement Misconduct)
- ABA Criminal Justice Standards: Prosecution Function
  - Standard 3-2.7 (Relations with Police)
- ABA Criminal Justice Standards: Urban Police Function (2d ed.)
  - Standard 1-5.2 (Need for Positive Approaches)
- NDAA National Prosecution Standards
  - Standard 19.1 (Law Enforcement Communications)
  - Standard 19.2 (Case Status Advisement)
  - Standard 20.1 (Law Enforcement Training)
  - Standard 21.1 (Liaison Assignment)
  - Standard 22.1 (Advice on Legal Compliance)

### *Commentary*

#### **Commentary to Subdivisions 26-1.3 (a) - (c)**

"The relationship between police and prosecutors, which should be the closest and most successfully cooperative relationship for police, is often the worst. . . . As a result, police officers sometimes suffer dismissal of cases or plea bargaining because the officer has not provided the pros-

ecutor with the evidence necessary to make a case in court. . . . Why . . . is their relationship frequently so negative?"<sup>42</sup>

The nature of the relationship between the prosecutor and police and investigators is critical to the proper handling of any criminal investigation. This Standard urges prosecutors involved in an investigation to respect the experience and expertise of police and investigators, while maintaining and providing independent judgment as "ministers of justice."

This is easier said than done. Experienced police and criminal investigators may find themselves frustrated by the need to coordinate their work with a less experienced attorney. Attorneys may find it difficult to establish and maintain good working relationships with police or investigators, while at the same time maintaining their proper independence in the criminal justice system.

Moreover, police and other criminal investigators are generally supervised by their own departments, bureaus or agencies, and not by prosecutors. Thus, forging a strong relationship with individual investigators also requires that the prosecutor understand the policies, procedures, and command structure of the police and other investigative agencies.

Whatever the circumstances, police, investigators, and prosecutors should seek to work cooperatively and should encourage joint planning, frequent communication, the use of prospective investigative plans, and retrospective "after action" analyses to maximize successful investigations that secure the evidence needed to obtain and sustain a conviction and which promote adherence to the rules, laws and policies that govern criminal investigations.

Difficulties may arise when addressing issues such as the proper allocation of investigative resources, the selection of investigative techniques, and other crucial investigative decisions. Ideally, these should be the product of effective cooperation and collaboration between investigators and government lawyers. The prosecutors' office should be mindful of this difficult role for both offices and should work to develop ways to promote and maintain appropriate coordination in the course of criminal investigations.

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42. M. L. DANTZKER, *UNDERSTANDING TODAY'S POLICE* 45-46 (4th ed. 2005).

**Commentary to Subdivision 26-1.3 (b)**

Police errors during an investigation, such as search and seizure violations or the failure to preserve exculpatory evidence, can impair or entirely undermine a case. While the focus of these Standards is on the criminal *investigation*, in any case that proceeds to prosecution, the prosecutor has a duty to learn of and to disclose any evidence obtained during the investigation that the government knows is favorable to a defendant. Even in cases where a prosecutor is not informed of exculpatory evidence by police or another prosecutor, the prosecutor may be held responsible for failing to disclose that evidence.<sup>43</sup> The prosecutor should seek access to all police notes and reports that may contain exculpatory evidence, and police departments should be encouraged to promulgate administrative processes that require police officers to be trained to preserve potentially exculpatory evidence and to turn such evidence over to prosecutors. In some instances, police departments have used dual reporting practices, maintaining a “street file” containing all information (including facts favorable to the defendant) and another file that is to be shared with the prosecutor’s office.<sup>44</sup> When a prosecutor issues a subpoena for police records or responds to a defense motion for exculpatory evidence, he or she should seek and request *all* documentation on the specific case.

**Commentary to Subdivision 26-1.3 (d)**

This principle directs the prosecutor’s office to promote best investigative practices through joint training exercises and policy development.

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43. *See, e.g.,* *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (reversing defendant’s conviction where evidence that police failed to give prosecutor would have made a contrary result “reasonably probable” in capital murder case); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (reversing defendant’s conviction in light of prosecution’s failure to inform the jury of the state’s grant of leniency to a key witness, despite the fact that the Assistant United States Attorney (“AUSA”) who tried the case was unaware that the AUSA who presented the case to the grand jury had promised the star witness that he would not be prosecuted if he testified).

44. *See* *Jones v. City of Chicago*, 856 F.2d 985, 991-95 (7th Cir. 1988) (discussing Chicago Police Department’s dual reporting practice); *Palmer v. City of Chicago*, 562 F. Supp. 1067 (N.D. Ill. 1983) (finding that Chicago prosecutors may not have been aware of city-wide existence of “street files”), *rev’d*, 755 F.2d 560 (7th Cir. 1985).

Information about best practices is widely available.<sup>45</sup> This general principle seeks to engage the prosecutor and the prosecutor's office in efforts to identify and promote the use of best practices for investigative techniques. It is far more effective to raise and resolve these issues in the context of joint training exercises and joint policy development than to attempt to do so during the course of an investigation. Thus, the prosecutor involved in criminal investigations should consider whether the fact-gathering processes generally used in his or her jurisdiction reflect the current state of knowledge regarding investigative matters, such as the use of non-suggestive line-ups<sup>46</sup> and the videotaping of custodial interrogations and confessions.

### Commentary to Subdivision 26-1.3 (e)

Investigative planning helps maximize the use of scarce law enforcement resources. It can also improve the quality of communication between the prosecutor and law enforcement agencies. A plan may be written or oral, depending upon the circumstances.<sup>47</sup> The advantages

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45. See SHERI E. MECKLENBURG, ILLINOIS STATE POLICE, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES (Mar. 17, 2006), <http://eyewitness.utep.edu/Documents/IllinoisPilotStudyOnEyewitnessID.pdf>; NATIONAL INSTITUTE OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEPARTMENT OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (Oct. 1999), <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>.

46. See Gary L. Wells et al., *A Test of the Simultaneous vs. Sequential Lineup Methods*, An Initial Report of the AJS National Eyewitness Identification Field Studies, American Judicature Institute (2011).

47. Preparing an investigative plan gives rise to the question as to whether a written investigative plan could be discoverable by a defendant at trial. The answer to that question is nuanced. If the investigative plan is truly a "plan," containing the strategic and tactical considerations of the government, then it is not likely to be discoverable. At least in the federal system, "[t]here is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). That said, the government has a constitutional obligation to turn over exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), which includes information that impeaches the credibility of a government witness, *Giglio v. United States*, 405 U.S. 150, 154-55 (1972), and the government's other discovery obligations are set by statute, *see, e.g.*, Jencks Act (codified at 18 U.S.C. § 3500), and rule, *e.g.*, FED. R. CRIM. P. 16.

In inverse order, Rule 16 of the Federal Rules of Criminal Procedure imposes certain basic discovery obligations on the government, but Rule 16(a)(2) expressly exempts from disclosure "reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or

of producing a written plan include clarity as to the approach to the investigation among all those involved through a document that can be shared with others who are or become involved in the investigation, and a clear statement of the methods and means of investigating, as well as an agreement to regularly evaluate the status of the investigation. However, the decision to reduce to writing the fruits of the investigative planning process will be determined by each individual office and the circumstances of each investigation.<sup>48</sup>

A widely used approach to the development of an investigative plan is to have it formulated by an investigative team composed of individuals possessing the skills and disciplines required to undertake the assignment (such as an attorney, an investigator, a forensic accountant, and a researcher/analyst). A four-step process in developing such a plan would proceed as follows:

First, define the investigative predicate. The team initially would conduct a broad based assessment of the factual context in which the proposed investigation was initiated. This process may require the review of information from a number of sources, including law enforcement (intelligence and evidentiary), public records, databases, and elsewhere.

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prosecuting the case.” This provision recognizes “the prosecution’s need for protecting communications concerning legitimate trial tactics” and investigative techniques. *United States v. Pfingst*, 490 F.2d 262, 274-75 n.14 (2d Cir. 1973).

Under the Jencks Act the government must disclose “statements” of government witnesses that relate to the subject matter of their direct testimony at trial. In some circumstances, that disclosure obligation could include witness statements made to, and recorded in a writing, by a prosecutor. *Goldberg v. United States*, 425 U.S. 94, 108 (1976) (The “work product doctrine” does not, by itself, bar production of writings by the prosecutor that are otherwise required to be produced under *Jencks*) Notably, the Court in *Goldberg* observed that the obligation to disclose would not extend to a “Government lawyer’s recordation of mental impressions, personal beliefs, trial strategy” and so on. *Id.* at 105. Thus, an investigative plan that is truly work product would be unlikely to fall within these discovery obligations.

Similarly, the government has a constitutional obligation to disclose exculpatory evidence. *E.g., Brady*, 373 U.S. at 87. An investigative plan describing the government’s strategy and tactics should not implicate a defendant’s interest under *Brady*, unless the investigative plan contained exculpatory evidence that was not otherwise disclosed and that would be deemed material under *Brady*.

48. This effort should not result in additional paperwork. For example, the process of developing a search warrant or Title III affidavit, in which legal and logistical issues must be identified and addressed, can serve as a substitute for a written investigative plan.

An analyst can be particularly helpful in gathering such information and distilling it into a useful form.

Second, determine the goals of the investigation. The goals of the investigation should be articulated and appropriate potential remedies should be identified. This may include prosecution, but also, asset recovery, use of civil remedies, development of informants, or the identification of structural or institutional changes to limit vulnerability to criminal conduct.

Third, analyze the potential approaches. This is perhaps the most difficult part of the process, flowing, as it must, from the first two steps. Alternative means of investigation should be explored, and the likely impact of each on producing the desired results, the resource constraints, and related issues should be evaluated.

Fourth, identify legal issues. A proper assessment of investigative alternatives often requires a concomitant evaluation of the legal issues likely to arise during the investigation. Accordingly, the team should seek to anticipate and resolve any legal issues that might jeopardize a successful investigation, prosecution, or other remedial action.

Obviously, as the investigation progresses and new evidence and intelligence are obtained, the plan should be re-evaluated and, if appropriate, modified.

#### **Commentary to Subdivision 26-1.3 (f)**

Communication during the course of a criminal investigation should be a two-way street. Absent special security concerns, justice is ill-served when members of the investigative team are in the dark about important developments. Prosecutors and government attorneys should maintain close and effective communication with law enforcement officers during all phases of the investigation. Not only should there be frequent internal contact; the prosecution should establish more formal mechanisms (such as status conferences or team meetings) for doing so as well.

The prosecutor involved in the criminal investigation is uniquely situated to address problems that can contribute to the conviction of the innocent. Among other actions that can be taken to address this problem, the prosecutor who reasonably concludes that a target or subject of an investigation is innocent should communicate that view and, unless provided with a reasonable basis to change that view, should

oppose the continuation of the criminal investigation as to the particular subject or target.<sup>49</sup>

### Commentary to Subdivision 26-1.3 (g)

Police can take certain steps that an attorney ethically may not. For example, a police officer may, in some circumstances, contact a represented witness or make extra-judicial statements about a pending matter. The prosecutor may not elude ethical restrictions by encouraging or eliciting the help of an agent to do what the prosecutor may not. The prosecutor, however, is not foreclosed from answering officers' questions about what they may and may not do, and rendering appropriate legal advice.

This section should not be read to forbid prosecutors from participating in or supervising undercover investigations, which by definition involve "deceit."<sup>50</sup> "Prosecutors routinely direct law enforcement agents to mislead suspects about the agents' identities and goals,"<sup>51</sup> and numerous courts have permitted it.<sup>52</sup>

Similarly, while attorneys are barred under the Model Rules from using "dishonesty, fraud, deceit or misrepresentation," government lawyers, especially prosecutors, regularly supervise undercover investigations and are allowed to use the fruits of this practice in court.<sup>53</sup>

In some circumstances, other governmental attorneys (such as agency lawyers) may not be bound by the same restrictions as those that apply to public prosecutors. The prosecutor may also run afoul of the intent of those standards if the prosecutor utilizes an agency attorney to undertake an action that the prosecutor cannot, or is aware of the agency attorney's intent to do so and fails to take reasonable care to prevent such actions. For example, the United States Attorneys Manual (USAM) prohibits federal prosecutors, except in specific circumstances, from seeking the waiver of the attorney-client privilege in a criminal

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49. See also Standard 2.14 (regarding the termination of investigations).

50. MODEL RULES OF PROF'L CONDUCT R. 4.1.

51. Fred Zacharias & Bruce Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 231 (2000).

52. See, e.g., *United States v. Parker*, 165 F. Supp. 2d 431, 478 (W.D.N.Y. 2001); *Apple Corps Ltd. v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456, 475 (D.N.J. 1998); see also Barry R. Temkin, *Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis*, 32 SEATTLE UNIV. L. R. 123, 137 (Fall 2008) (cataloging ethics opinions).

53. MODEL RULES OF PROF'L CONDUCT R. 8.4.

investigation.<sup>54</sup> However, there are federal agency attorneys who routinely participate in criminal investigations, and who are not bound by the USAM. It would be contrary to the aspiration of this Standard if a federal prosecutor subverted this provision of the USAM by utilizing a law enforcement agent or agency attorney, or law enforcement personnel from a state or local jurisdiction, to make such a request in the course of a federal criminal investigation. Similarly, the prosecutor is prohibited from making extrajudicial comments that “have a substantial likelihood of ... increasing public condemnation of the accused.”<sup>55</sup> Beyond this direct prohibition, the prosecutor is required to exercise “reasonable care” to prevent “persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor.”<sup>56</sup>

However, police and investigators may be able to engage in conduct that the attorney may not, for example, by providing “field immunity”<sup>57</sup> in the course of an ongoing criminal investigation, contacting an individual who is represented by counsel, or recommending or facilitating actions that the attorney is ethically prohibited from engaging in.<sup>58</sup>

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54. See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.720(b) (2008), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/) (“A corporation need not disclose, and prosecutors may not request, the disclosure of such attorney work product as a condition for the corporation’s eligibility to receive cooperation credit.”) (emphasis added) [hereinafter “USAM”].

55. See MODEL RULES OF PROF’L CONDUCT R. 3.8(f) cmt. 5.

56. *Id.* at cmt. 6.

57. Note that while some jurisdictions may permit police and law enforcement agents to provide immunity “in the field,” the practice may not be authorized by law. See, e.g., *United States v. Flemmi*, 225 F.3d 78, 86 (1st Cir. 2000) (holding that FBI agents lack the authority to promise an informant use immunity).

58. The application of *ex parte* communication rules to prosecutors (and those persons acting either in concert with them or under their supervision) remains an issue of great debate. Notably, federal prosecutors should be familiar with the rules applicable to them, which may include not only the rule of the state in which they are admitted, but also the state(s) in which the case is being investigated. See 18 U.S.C. § 530B.

**Standard 26-1.4 Victims, potential witnesses, and targets during the investigative process**

(a) Throughout the course of the investigation as new information emerges, the prosecutor should reevaluate:

- (i) judgments or beliefs as to the culpability or status of persons or entities identified as “witnesses,” “victims,” “subjects” and “targets,” and recognize that the status of such persons or entities may change; and
- (ii) the veracity of witnesses and confidential informants and assess the accuracy and completeness of the information that each provides.

(b) Upon request and if known, the prosecutor should inform a person or the person’s counsel, whether the person is considered to be a target, subject, witness or victim, including whether their status has changed, unless doing so would compromise a continuing investigation.

(c) The prosecutor should know the law of the jurisdiction regarding the rights of victims and witnesses and should respect those rights.

(d) Absent a law or court order to the contrary, the prosecutor should not imply or state that it is unlawful for potential witnesses to disclose information related to or discovered during an investigation. The prosecutor may ask potential witnesses not to disclose information, and in doing so, the prosecutor may explain to them the adverse consequences that might result from disclosure (such as compromising the investigation or endangering others). The prosecutor also may alert an individual who has entered into a cooperation agreement that certain disclosures might result in violation of the agreement.

(e) The prosecutor should not imply the existence of legal authority to interview an individual or compel the attendance of a witness if the prosecutor does not have such authority.

(f) The prosecutor should comply with applicable rules and case law that may restrict communications with persons represented by counsel.

(g) The prosecutor should not take into consideration any of the following factors in making a determination of whether an organization has been cooperative in the context of a government inves-

tigation unless the specified conduct of the organization would constitute a violation of law or court order:

- (i) that the organization has provided, or agreed to provide counsel to, or advanced, reimbursed or indemnified the legal fees and expenses of, an employee;
- (ii) that the organization entered into or continues to operate under a joint defense or information sharing and common interest agreement with regard to the investigation;
- (iii) that the organization shared its records or other historical information relating to the matter under investigation with an employee; or
- (iv) that the organization did not sanction or discharge an employee who invoked his or her Fifth Amendment privilege against self-incrimination in response to government questioning of the employee.

(h) The prosecutor should not interfere with, threaten, or seek to punish persons or entities seeking counsel in connection with an investigation, nor should the prosecutor interfere with, threaten or seek to punish those who provide such counsel unless by doing so such conduct would constitute a violation of law or court order. A good faith basis for raising a conflict of interest, or for investigating possible criminal conduct by the defense attorney, is not “interference” within the meaning of this Standard.

### *Related Standards*

ABA Criminal Justice Standards: Discovery

Standard 11-6.3 (Investigations Not to Be Impeded)

ABA Criminal Justice Standards: Fair Trial and Free Press

Standard 8-1.1 (Extrajudicial Statements by Attorneys)

ABA Criminal Justice Standards: Prosecution Function

Standard 3-3.1 (Investigative Function of Prosecutor)

Standard 3-3.2 (Relations with Victims and Prospective Witnesses)

ABA Model Rules of Professional Conduct

Rule 3.8 (Special Responsibilities of a Prosecutor)

Rule 4.1 (Truthfulness in Statements to Others)

Rule 4.2 (Communication with Person Represented by Counsel)

Rule 4.3 (Dealing with Unrepresented Person)

## Commentary

### Commentary to Subdivision 26-1.4 (a)

A fundamental tenet of these Standards is that investigations should be driven by facts, not an inflexible investigative hypothesis. Nowhere is this more important than in deciding whether a person is a victim, witness, or target.

Facts often wholly exonerate those suspected of crimes, or show their culpability in a lesser light. And, indeed, even when the facts do show culpability, the final choice is still often a matter of judgment. For example, an illegal alien who is working for the leader of a criminal enterprise (such as illegal asbestos removal without worker protection) is factually (a) an offender, (b) a victim, and (c) a witness of crimes committed by numerous other offenders (the leader and the other illegal aliens so employed). It is the prosecutor's job to decide which *legal* categories will govern. Prosecutors are given extraordinary discretion to make these choices during investigations—for inmate, drug offenders, undocumented workers, offenders who are victims of police brutality, subordinates of white collar criminals, potential cooperators, and many others.

This Standard requires that they make a considered choice and that they re-evaluate their choices throughout the course of the investigation. This is not meant to result in crippling indecision, but rather a continued openness and recognition that a fuller understanding of the facts can dramatically change the picture of what will be a just exercise of discretion.

Thus, during the investigative stage of a case, police, investigators, and prosecutors may interview persons not knowing whether they will ultimately be considered victims, witnesses, or defendants. The prosecutor should keep an open mind regarding the potential status of all prospective "witnesses," "subjects," and "targets" of an investigation. Witnesses (including victims) may become culpable defendants (hostile or friendly), and as an investigation progresses the prosecutor should consider whether the status of a witness or a target should evolve or change as facts are gathered.

The prosecutor, for purposes of this section, need not consider as a "victim" someone who is also culpable for the crime being investigated. However, a person culpable in other matters may be a "victim" of the

crime the prosecutor is investigating. Thus, for example, a person's status as an inmate does not disqualify the person from being considered the victim of a crime. Nor does the fact that a person may have committed a crime, but was subjected to excessive police force during the arrest for that crime, disqualify the person from being considered a victim of excessive police force. As noted in 1.2(a), the prosecutor should exercise independent judgment as to who, under the law, is a victim of the crime under investigation.

#### **Commentary to Subdivision 26-1.4(b)**

When asked, the prosecutor should be forthright about a person's status. The prosecutor should not, for example, mislead a "subject" or "target" in order to obtain information by stating or suggesting that the person is only a "witness" when the prosecutor has a reasonable belief that the government views the person as a "subject" or a "target."<sup>59</sup>

#### **Commentary to Subdivision 26-1.4 (c)**

The prosecutor should uphold the legal rights of victims and witnesses and should treat them with fairness and dignity, and with respect for their privacy. Every state in the country has enacted victim-rights laws and a crime victim compensation fund.<sup>60</sup> However, there is widespread agreement that the delivery of services to crime victims can be improved. Adherence to the intent of these laws compels the prosecutor's office to properly identify victims and their legitimate needs, as well as supporting efforts to address the rights of both victims and witnesses.<sup>61</sup>

#### **Commentary to Subdivision 26-1.4 (d)**

The prosecutor should not obstruct communication between prospective witnesses and counsel for those who are the subject or target of an

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59. See, e.g., *United States v. Stringer*, 535 F.3d 929, 940 (9th Cir. 2008) (declaring that the government has a duty not to "affirmatively mislead" subjects of parallel investigations about the potential for criminal charges).

60. See, e.g., U.S. DEP'T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME (OVC), LINKS TO VICTIM ASSISTANCE & COMPENSATION PROGRAMS, available at <http://www.ojp.usdoj.gov/ovc/help/links.htm>; VictimLaw, <http://www.victimlaw.info/victimlaw/start.do>.

61. See, e.g., NDAA NATIONAL PROSECUTION STANDARDS §§ 2-9.1-2-10.1 (Nat'l Dist. Attorneys Ass'n 2009) (describing the prosecutor's central role in safeguarding the rights of victims and witnesses).

investigation. Witnesses do not “belong” to either the government or private parties. However, in cases involving a substantial possibility of witness tampering or intimidation, the prosecutor may take steps to protect the witnesses’ confidentiality and safety.

Thus, the prosecutor may properly tell a witness that he or she may contact the prosecutor prior to talking to a defense attorney or private investigator. The prosecutor may also request the opportunity to be present at the interview of a witness, but may not make his or her presence a condition of the interview. It is also proper for the prosecutor to caution a witness concerning the need to exercise care in subscribing to a statement prepared by another person, including the potential for a conflict of interest between the witness and private parties. The prosecutor may fairly describe the likely process of legal proceedings, including the likely course of direct and cross-examination should the witness choose to be interviewed by private counsel or private investigators.

If a witness does provide a statement to private parties (depending upon the laws of the jurisdiction), the prosecutor should inform the witness that the witness should be provided with a copy of such a statement upon request. The prosecutor’s obligations to disclose the identity of potential witnesses are not governed by this Standard, but by the applicable law in the jurisdiction pertaining to discovery.

#### **Commentary to Subdivision 26-1.4 (e)**

The prosecutor should not seek to compel a witness to be interviewed by the government without legal authority to do so. The ABA Prosecution Function Standards have previously observed that “some prosecution offices have occasionally scheduled persons for interviews by means of documents that in format and language resemble official judicial subpoenas or similar judicial process even though they lack subpoena power in these instances.”<sup>62</sup> These attempts are generally outside the authority of the prosecutor’s office, and these Standards, in both the context of the use of the grand jury<sup>63</sup> and in the overall conduct of the investigation, oppose such practices.

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62. PFS, *supra* note 16, at § 3-3.1.

63. See Standards 2.9(d)(ii) (advising prosecutor to issue a witness subpoena for a grand jury appearance only if the prosecutor intends to bring the witness before the grand jury) and 2.9(d)(iv) (advising prosecutor to make reasonable efforts to determine

### Commentary to Subdivision 26-1.4 (f)

Prosecutors should ensure that contacts with represented persons conform with local rules, case law, and other applicable constraints. Compliance with the limit on contacts with represented persons or parties should not undermine the administration of justice. Thus, if a person who has been represented by counsel perceives a conflict in that representation, and *that person initiates the contact with a prosecutor or investigator* for the purpose of providing truthful information about potential criminal activity, the prosecutor may advise the person of the right to substitute counsel and should provide the person with an opportunity to obtain counsel without informing prior counsel. Absent exigent circumstances before proceeding to question such a person, the prosecutor should generally wait until substitute counsel has been selected by the person, or a neutral magistrate has determined that the person wishes to speak to the government without benefit of representation.<sup>64</sup>

In the event an officer or agent asks the prosecutor whether it is proper or obligatory to submit to an interview by private counsel or private investigators, the prosecutor should respond that there is no legal obligation to submit to an interview with private counsel, if that is correct under the law of the jurisdiction. The prosecutor may wish to be present for an interview between an officer or agent and private counsel. However, the prosecutor is present on behalf of the prosecuting authority and not as a legal representative of the officer or agent. Thus, the prosecutor should inform the officer or agent that the prosecutor is not his or her personal lawyer prior to the interview.<sup>65</sup>

### Commentary to Subdivisions 26-1.4 (g) - (h)

In September 2008, the Department of Justice significantly revised the “Principles of Federal Prosecution of Business Organizations” and

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if a witness appearance is needed, including offering the witness or witness’s counsel a voluntary pre-appearance conference).

64. See *United States v. Talao*, 222 F.3d 1133, 1136 (9th Cir. 2000) (AUSA involved in criminal investigation of corporation and its principals did not violate ethical rules prohibiting *ex parte* contacts with represented parties when she engaged in discussions with corporation’s represented bookkeeper. The bookkeeper initiated contact and told the AUSA she did not want the corporation’s representation as its principals were pressuring her to testify untruthfully.)

65. MODEL RULES OF PROF’L CONDUCT R. 1.13.

issued guidelines to prohibit federal prosecutors from routinely requesting that corporations waive the attorney-client privilege in the context of criminal investigations.<sup>66</sup> The revised document also protects the right of corporations to advance or reimburse the attorneys' fees of officers and directors who are the subject of a criminal investigation.<sup>67</sup> The guidelines state that federal prosecutors may not consider such reimbursement when assessing whether a company has cooperated with a criminal investigation.<sup>68</sup>

The Department's new guidelines coincided with a decision by the Second Circuit that upheld a lower court's dismissal of criminal fraud charges against 13 employees because of the government's position that payment of attorneys' fees for the employees would undermine the company's ability to receive credit for cooperation with the investigation.<sup>69</sup> Under that threat, the company cut off payment of the attorneys' fees for several of the employees, a result that the court found directly attributable to the government's actions and which was therefore a violation of the employees' Sixth Amendment right to counsel.<sup>70</sup> The Standards Committee considered these same issues when developing the language of this provision.

### **Standard 26-1.5    Contacts with the public during the investigative process**

- (a) The prosecutor should neither confirm nor deny the existence of an investigation, or reveal the status of the investigation, nor release information concerning the investigation, with the following exceptions:**
- (i) releasing information reasonably necessary to obtain public assistance in solving a crime, apprehending a suspect, or calming public fears;**

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66. The revised guidelines have now been incorporated into the U.S. Attorneys' Manual for the first time. See USAM, *supra* note 54, at 9-28.710.

67. *Id.* at 9-28.730.

68. *Id.*

69. *United States v. Stein*, 541 F.3d 130, 140 (2d Cir. 2008).

70. *Id.* at 156-57.

- (ii) responding to a widely disseminated public call for an investigation by stating that the prosecutor will investigate, or decline to investigate the matter;
- (iii) responding to a law enforcement or regulatory matter of significant public safety concern, by stating that the prosecutor will begin an investigation or begin a special initiative to address the issue, or by releasing information reasonably necessary to protect public safety, subject to restrictions in the law of the jurisdiction;
- (iv) announcing future investigative plans in order to deter criminal activity;
- (v) stating in an already publicized matter and where justice so requires, that the prosecutor will not initiate, will not continue, or has concluded an investigation of a person, entity, or matter and, if applicable, has informed the subject or potential subject of the decision not to file charges;
- (vi) responding to widely disseminated false statements that the prosecutor is, or is not, investigating a person, entity, or matter;
- (vii) stating whether and when, if court rules so permit, an event open to the public is scheduled to occur;
- (viii) offering limited comment when public attention is generated by an event in the investigation (e.g., arrests, the execution of search warrants, the filing of charges, or convictions), subject to governing legal standards and court rules; and
- (ix) making reasonable and fair responses to comments of defense counsel or others.

(b) Except as a proper part of a court proceeding and in accordance with applicable rules, the prosecutor should not publicly make the following types of statements or publicly disclose the following information about an investigation:

- (i) statements of belief about the guilt or innocence, character or reputation of subjects or targets of the investigation;
- (ii) statements that have a substantial likelihood of materially prejudicing a jury or jury panel;

- (iii) information about the character or reputation of a person or entity under investigation, a prospective witness, or victim;
- (iv) admissions, confessions, or the contents of a statement or alibi attributable to a person or entity under investigation;
- (v) the performance or results of tests or the refusal or agreement of a suspect to take a test;
- (vi) statements concerning the credibility or anticipated testimony of prospective witnesses; and
- (vii) the possibility or likelihood of a plea of guilty or other disposition.

(c) The prosecutor should endeavor to dissuade police and other law enforcement agents and law enforcement personnel from making public information that the prosecutor would be prohibited from making public, or that may have an adverse impact on the investigation or any potential prosecution.

### *Related Standards*

- ABA Criminal Justice Standards: Prosecutorial Investigations
  - Standard 1-1.2 (Maintaining Fairness in the Conduct of the Criminal Investigation) and Commentary
- ABA Criminal Justice Standards: Prosecution Function
  - Standard 3-1.4 (Public Statements)
- ABA Criminal Justice Standards: Fair Trial and Free Press
  - Standard 8-1.1 (Extrajudicial Statements by Attorneys)
  - Standard 8-2.1 (Release of Information from Law Enforcement Agencies)
  - Standard 8-2.2 (Disclosures by Court Personnel)
- ABA Grand Jury Principles
  - Principle 21 (Regarding unavailability of identity of grand jury witnesses)
- ABA Model Rules of Professional Conduct
  - Rule 1.6 (Confidentiality of Information)
  - Rule 3.6 (Trial Publicity)
  - Rule 3.8 (Special Responsibilities of a Prosecutor)
- NDAA National Prosecution Standards
  - Standard 34.1 (Limitations on Media Comments—the Prosecutor)
  - Standard 34.2 (Bars on Information)

## Commentary

### Commentary to Subdivisions 26-1.5 (a) - (b)

To conduct effective investigations, the law provides prosecutors with powerful investigative tools that permit deep intrusions into citizens' privacy. With this authority comes the responsibility to use those tools fairly. Thus, it is often said that prosecutors should do their speaking in court, not on the courthouse steps.

The Standards recognize that a stigma attaches when a person is named in connection with an investigation, whether as a victim, witness, or target. Sometimes the damage is primarily emotional, such as when family and friends read and are hurt by newspaper articles. Other times the damage is financial, as when clients avoid doing business with one who is publicly linked to scandal. This harm is inflicted even if ultimately no charges are ever brought. Thus the Standards require the prosecutor to maintain the secrecy and confidentiality of the investigations,<sup>71</sup> except in the carefully delineated circumstances described above. Undue publicity can have grave effects. Recent highly publicized investigations have seen mobs gather at the homes of subjects and potential targets committing suicide.<sup>72</sup>

Perhaps the best-known recent example of a prosecutor publicly stigmatizing defendants is the case of North Carolina prosecutor Michael

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71. See Standard 1.2(d)(iv).

72. For example, in mid-March 2009, New York State Attorney General Andrew Cuomo publicly released the letter he sent to AIG seeking information about the size of bonuses the company paid to its executives after the federal bailout. See Michael de la Merced, *Cuomo Seeks A.I.G. Bonus Information*, N.Y. TIMES, Mar. 16, 2009, available at <http://dealbook.nytimes.com/2009/03/16/cuomo-seeks-aig-bonus-information/>. Within days, AIG executives received death threats, and busloads of angry people gathered at their homes. See James Barron & Russ Buettner, *Scorn Trails A.I.G. Executives, Even in Their Driveways*, N.Y. TIMES, Mar. 19, 2009, available at <http://www.nytimes.com/2009/03/20/nyregion/20siege.html>.

The pressure of high profile investigations also has led to suicides. After a seven-year investigation into the post-September 11th anthrax attacks in August 2008, Bruce Ivins, a suspect, committed suicide. Upon Ivins's death, his lawyer said, "The relentless pressure of accusation and innuendo takes its toll in different ways on different people . . . . In Dr. Ivins's case, it led to his untimely death." David Stout & Mitchell L. Blumenthal, *U.S. Researcher Commits Suicide as Authorities Pursued Anthrax Inquiry*, N.Y. TIMES, Aug. 1, 2008, available at <http://www.nytimes.com/2008/08/01/world/americas/01iht-anthrax.4.14954032.html>.

Nifong. In its review of the matter, the governing Disciplinary Hearing Commission found the following facts: (1) in March 2006, Nifong had begun an investigation into allegations of sexual assault by members of a collegiate athletic team at a party in Durham, North Carolina; (2) within two weeks of the start of the investigation, Nifong learned that there were significant factual questions that undermined the allegations; (3) notwithstanding those facts, Nifong began to make public comments and statements to representatives of the news media and participated in numerous interviews about the case, indicating his belief in the guilt of the subjects of the investigation; (4) many of the facts in those statements were untrue.<sup>73</sup> Despite receiving evidence, including DNA evidence, that was exculpatory, Nifong proceeded to indict several students. In doing so, he made misleading and materially false statements to the defendants' attorneys and the presiding court, while violating direct orders of the court regarding discovery. Ultimately Nifong recused himself from the case and the State Attorney General reviewed the evidence and dismissed all charges in April of 2007.

While the Disciplinary Hearing Commission concluded that Nifong had violated several North Carolina Rules,<sup>74</sup> the gross nature of Nifong's conduct should not obscure the need to be vigilant in protecting the criminal investigation process from abuse without regard to the guilt or innocence of the subjects of the investigation. Notably, Nifong's conduct would violate these Standards even if the evidence demonstrated that the defendants were in fact guilty of an offense.

At times it is unavoidable that a victim, witness, or target will be identified by the investigative process. But prosecutorial press conferences during investigations can be avoided entirely, and leaks by the government are abhorrent. The default position in these Standards is clear: during an investigation, absent several clear exceptions, a prosecutor should maintain the confidentiality of the criminal investigation.

Even in the circumstances where justice or the sound administration of law enforcement can require the prosecutor to speak, significant care

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73. *See* N.C. State Bar v. Nifong, No. 06 DHC 35 (July 24, 2007).

74. The list of rules Nifong violated was long and included the following: 3.3 governing Candor toward the Tribunal; 3.4 governing Fairness to Opposing Party and Counsel; 3.6 governing Trial Publicity; 3.8 governing the Responsibilities of the Prosecutor; 4.1 governing Truthfulness in Statements to Others; and, both 8.1 and 8.4 involving Disciplinary proceedings (because of false statements that Nifong made to the Disciplinary Hearing Commission itself). *See id.*

and restraint should be exercised to provide only the information necessary under the circumstances.

Thus, it is proper for a prosecutor to ask for public assistance in identifying a criminal, or to calm public fears by describing prudent actions that are being taken while a serial killer is being pursued.<sup>75</sup> It would similarly be proper to announce, for example, a new initiative into domestic violence,<sup>76</sup> securities fraud, or drug dealing<sup>77</sup> in a particular neighborhood, whether in response to a public call for action or not; here the very point of the announcement is to deter crime, not to embarrass those already being investigated.

A prosecutor may also make statements designed to remove unfair stigma. Thus, a prosecutor may correct a false rumor that it is investigating someone, and may announce that an investigation has concluded and no charges will be brought.<sup>78</sup> A prosecutor may also make fair responses to public statements by defense lawyers, may state when public events (an arraignment, for example) will take place, and may make limited comment when the public events do take place.<sup>79</sup>

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75. See Standard 1.5(a)(i). During the DC sniper attacks of 2002, Montgomery County (Maryland) Chief of Police Charles Moose became the public face of the investigation, updating the public regularly and advising them on safety while the sniper was on the loose. John Allen Muhammad and Lee Boyd Malvo were eventually arrested on tips from two citizens. *Reflections on D.C. Sniper Attacks*, NBC News (Oct. 23, 2003), <http://www.msnbc.msn.com/id/3079858>.

76. On October 4, 2010, the Pima County Attorney in Tucson, Arizona, announced an initiative to address domestic violence, described as “one of the most common crimes in the local community.” <http://www.kvoa.com/news/pima-county-attorney-office-announces-domestic-violence-initiatives>.

77. On January 24, 2010, The Nassau County District Attorney, in New York, along with two state legislators, announced new legislation intended to combat what was described as a “heroin epidemic” on Long Island by making those who sell controlled substances subject to prosecution for manslaughter if one of their customers dies from consuming the drugs they have sold. Press Release, Office of Sen. Johnson, *Senator Johnson, Assemblyman Weisenberg, DA Rice, Announce Legislation to Combat LI Heroin Epidemic* (Jan. 24, 2010), available at <http://www.nysenate.gov/press-release/senator-johnson-assemblyman-weisenberg-da-rice-announce-legislation-combat-li-heroin-e>.

78. In exonerating the Duke lacrosse players charged with rape, North Carolina Attorney General Roy Cooper noted that “[s]ometimes it takes time for false accusations to get resolved through the legal system....” Lara Setrakian, *Charges Dropped in Duke Lacrosse Case*, ABC News (Apr. 11, 2007), <http://abcnews.go.com/US/LegalCenter/story?id=3028515&page=1>.

79. See Standard 1.5 (a)(vii-ix).

However, these exceptions should not be used as loopholes. The prosecutor's job includes the use of care to prevent the infliction of reputational, financial, and personal damage while the work of the investigation is incomplete. Fairness demands that the government seek to do its work in confidence until the investigation has reached a point when public adversarial proceedings begin, and the well-established safeguards of law and due process apply.



## **PART II. STANDARDS FOR SPECIFIC INVESTIGATIVE FUNCTIONS OF THE PROSECUTOR**

### **Standard 26-2.1 The decision to initiate or to continue an investigation**

(a) The prosecutor should have wide discretion to select matters for investigation. Thus, unless required by statute or policy:

- (i) the prosecutor should have no absolute duty to investigate any particular matter; and
- (ii) a particularized suspicion or predicate is not required prior to initiating a criminal investigation.

(b) In deciding whether an investigation would be in the public interest, the prosecutor should consider, but not necessarily be dissuaded by, the following:

- (i) a lack of police interest;
- (ii) a lack of public or political support;
- (iii) a lack of identifiable victims;
- (iv) fear or reluctance by potential or actual witnesses; or
- (v) unusually complex factual or legal issues.

(c) When deciding whether to initiate or continue an investigation, the prosecutor should consider:

- (i) whether there is evidence of the existence of criminal conduct;
- (ii) the nature and seriousness of the problem or alleged offense, including the risk or degree of harm from ongoing criminal conduct;
- (iii) a history of prior violations of the same or similar laws and whether those violations have previously been addressed through law enforcement or other means;
- (iv) the motive, interest, bias or other improper factors that may influence those seeking to initiate or cause the initiation of a criminal investigation;

- (v) the need for, and expected impact of, criminal enforcement to:
    - (A) punish blameworthy behavior;
    - (B) provide specific and/or general deterrence;
    - (C) provide protection to the community;
    - (D) reinforce norms embodied in the criminal law;
    - (E) prevent unauthorized private action to enforce the law;
    - (F) preserve the credibility of the criminal justice system; and
    - (G) other legitimate public interests.
  - (vi) whether the costs and benefits of the investigation and of particular investigative tools and techniques are justified in consideration of, among other things, the nature of the criminal activity as well as the impact of conducting the investigation on other enforcement priorities and resources
  - (vii) the collateral effects of the investigation on witnesses, subjects, targets and non-culpable third parties, including financial damage and harm to reputation
  - (viii) the probability of obtaining sufficient evidence for a successful prosecution of the matter in question, including, if there is a trial, the probability of obtaining a conviction and having the conviction upheld upon appellate review; and
  - (ix) whether society's interest in the matter might be better or equally vindicated by available civil, regulatory, administrative, or private remedies.
- (d) When deciding whether to initiate or continue an investigation, the prosecutor should not be influenced by:
- (i) partisan or other improper political or personal considerations, or by the race, ethnicity, religion, gender, sexual orientation, political beliefs or affiliations, age, or social or economic status of the potential subject or victim, unless they are elements of the crime or are relevant to the motive of the perpetrator; or
  - (ii) hostility or personal animus towards a potential subject, or any other improper motive of the prosecutor.

**(e) The prosecutor’s office should have an internal procedure to document the reason(s) for declining to pursue prosecution following a criminal investigation.**

### *Related Standards*

ABA Criminal Justice Standards: Prosecution Function

Standard 3-3.1 (Investigative Function of Prosecutor)

ABA Criminal Justice Standards: Prosecutorial Investigations

Standard 1-1.3 (Working with Police and other Law Enforcement Agents)

ABA Model Rules of Professional Conduct

Rule 3.8 (Special Responsibilities of a Prosecutor)

NDAA National Prosecution Standards

Standard 42.1 (Prosecutorial Discretion); 2.3 (Factors to Consider)

Standard 42.4 (Factors Not to Consider)

Principles of Federal Prosecution, USAM, Title 9 (including 9-27.000 and 9-28.000 et seq.)

U.S. Department of Justice Civil Rights Division, Guidance Regarding The Use Of Race by Federal Law Enforcement Agencies (June 2003)

### *Commentary*

The prosecutor has almost unlimited discretion in deciding what and whom to investigate, with what allocation of resources, and for how long. This extraordinary and nearly unreviewable power can have a profound effect. A prosecutor can virtually decriminalize certain categories of offenses, while turning others into areas where small transgressions can lead to criminal liability. This Standard seeks to assist the prosecutor in this most central aspect of the exercise of investigative discretion.

### **Commentary to Subdivisions 26-2.1 (a)**

This standard states that there is no “duty to investigate.” This statement reflects two intertwined issues. First, the independence of the public prosecutor, who is expected to exercise sound discretion in choosing which cases to investigate (and prosecute). Second, that investigative discretion is also a product of the practical reality of the constraints imposed by resource limitations—not only of the prosecutor’s office, but of the judicial and penal systems.

That noted, the accumulation of information (whether or not it involves a matter that has risen to the level of public concern) can compel the prosecutor to initiate a criminal investigation. In other circumstances the government may initiate an investigation to determine that no criminal behavior is occurring. Thus, in one of the ABSCAM cases, *United States v. Myers*, the court stated:

[there is] no special constitutional rule that requires prior suspicion of criminal activity before [any individual, including members of the legislative branch] may be confronted with a governmentally created opportunity to commit a crime.<sup>80</sup>

Conversely, in the case of a first offender, the nature of the offense may warrant the prosecutor to elect not to pursue a criminal investigation in favor of a non-criminal disposition.<sup>81</sup>

Through these choices, the prosecutor can do enormous good: drive drug dealers off specific street corners by targeting resources of buyers or sellers,<sup>82</sup> lower the homicide rate by taking illegal guns off of the streets,<sup>83</sup> and even lower auto insurance rates, Medicaid costs, or

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80. *United States v. Myers*, 692 F.2d 823, 835 (2d Cir. 1982) (upholding convictions of U.S. congressmen for accepting bribes by undercover government agents). During the late 1970's, the FBI conducted a long-term undercover investigation of public corruption and organized crime, code-named ABSCAM. ABSCAM resulted not only in convictions of congressmen and a senator that were upheld on appeal, but also raised concerns about the conduct of FBI undercover operations outside of drug and racketeering offenses. The Senate investigated the FBI's techniques, see *Law Enforcement Undercover Activities: Hearings Before the Senate Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice*, 97th Cong. 1041 (1982), and partly in response to this investigation, U.S. Attorney General Benjamin Civiletti issued *The Attorney General Guidelines for FBI Undercover Operations* on January 5, 1981. This was the first time that the Attorney General had issued such guidance. The Guidelines set forth a series of specific steps necessary to obtain approval for the conduct of undercover operations. Those guidelines have since been revised and reissued several times over the years.

81. See Standard 2.1(c)(ix).

82. Former New York City mayor Rudolph Giuliani created the Operation Border Crossing Taskforce in 1992, in an effort to reduce the drug trade between New York and New Jersey over the George Washington Bridge. The Taskforce made 41 arrests in Washington Heights in its first two days of operation. See *41 Arrests Made by Narcotics Taskforce*, N.Y. TIMES, Oct. 16, 1992, available at <http://www.nytimes.com/1992/10/16/nyregion/41-arrests-made-by-narcotics-task-force.html>.

83. Operation Ceasefire was a multi-pronged initiative in Boston aimed at reducing youth violence and homicide rates and targeting illegal guns. Within two years, it

construction costs by focusing on fraud rings.<sup>84</sup> Indeed, the prosecutor's investigative choices can spur national and international economic and political debates as did the Department of Justice's Enron investigation.<sup>85</sup>

Investigations may also arise from concern about long-standing criminal behavior previously unaddressed by law enforcement. In establishing the New York City Waterfront Commission in 1953, Governor Thomas Dewey (who had been a federal prosecutor, a special prosecutor, and the Manhattan District Attorney) said, "In establishing this commission we are determined that racketeers, criminals and hoodlums be driven from the docks, together with the evil practices they spawned and on which they thrived."<sup>86</sup>

With this freedom to select priorities comes both responsibility and risk. As then-Attorney General Robert Jackson wrote: "[I]f the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted."<sup>87</sup> Thus, the prosecutor requires a "detached and impartial view" in picking cases.<sup>88</sup> Nonetheless, because of the nature of the criminal activity that is the focus of the investigation, the prosecutor

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had dramatically reduced the homicide rate among youth, with only one gun-related homicide. Mark E. Rushefsky, *Criminal Justice: To Ensure Domestic Tranquility*, in PUBLIC POLICY IN THE UNITED STATES: AT THE DAWN OF THE TWENTY-FIRST CENTURY (M.E. Sharpe, 3d ed. 2002).

84. *Efforts to Combat Health Care Fraud and Abuse: Hearing Before the Subcomm. On Labor, Health and Human Servs., Education, and Related Agencies of the H. Comm. on Appropriations, 111th Cong. (2010)* (statement of William Corr, Deputy Secretary, Dep't of Health and Human Servs.) (discussing joint committee efforts to combat health care fraud, including prosecution), available at <http://www.hhs.gov/asl/testify/2010/03/t20100304a.html>.

85. See John C. Coffee Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW, 1402 (2002); WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY, University of Chicago Press (2006); see also Alan C. Michaels, *Fastow and Arthur Andersen: Some Reflections on Corporate Criminality, Victim Status and Retribution*, 1 OHIO STATE J. OF CRIM. L. 551 (2004) (discussing the possibility that a corporation, in certain circumstances, could be both the perpetrator and the victim of a crime).

86. See Peter B. Levy, *The Waterfront Commission of the Port of New York: A History and Appraisal*, 42 INDUS. & LAB. REL. REV. 508 (July 1989).

87. Jackson, *supra* note 10, at 5.

88. *Id.*

may have an understandable dislike for those who are the subject of the investigation.<sup>89</sup>

### Commentary to Subdivision 26-2.1 (b)

Harm is done not only by improper targeting. Systematic choices *not* to investigate have consequences as well. A prosecutor who declines to investigate political corruption cases because of “complexity” can create a culture of impunity. A prosecutor who declines to investigate prostitution rings because prostitution is a “victimless” crime can end up incentivizing the trafficking of young women and men.<sup>90</sup>

In most circumstances, the public and members of law enforcement support most criminal investigations. However, the prosecutor may face opposition or criticism for undertaking investigations for a variety of reasons.

Historically, there have been failures to investigate in certain areas. For example, spousal abuse has been historically under-investigated because of, among other things, the abused spouse’s fear, and delay in the implementation of adequate intervention programs by states and localities.<sup>91</sup> Police may be reluctant to investigate because of concerns about the potential for police corruption associated with the investigation of certain types of crimes such as prostitution. Local prosecutors may be hesitant to investigate local corruption because of the social mores of the community, or fears for their own political careers. Some crime victims may have little support in the political landscape, yet they are no less worthy of the protection of the law. In the same vein, the

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89. When confronted with the statement by Roy M. Cohn, former counsel to Senator Joseph R. McCarthy, that he was pursuing Mr. Cohn because he did not like him, Manhattan District Attorney Robert Morgenthau stated, “A man is not immune from prosecution just because a United States attorney happens not to like him.” Michael Powell, *Morgenthau Heads for Door, Legacy Assured*, N.Y. TIMES, Feb. 28, 2009, at A1, available at <http://www.nytimes.com/2009/02/28/nyregion/28legacy.html>.

90. Trafficking is often difficult to prosecute due to its clandestine nature, the relative lack of power of its victims, and, in some cases, the involvement of law enforcement in trafficking rings. For a perspective on the importance of state and federal prosecution of trafficking, as well as the anonymity of trafficking victims, see Eileen Overbaugh, *Human Trafficking: The Need for Federal Prosecution of Accused Traffickers*, 39 SETON HALL L. REV. 635, 641-42 (2009).

91. See Juliet Austin and Juergen Dankwort, *A Review of Standards for Batterer Intervention Programs* (Aug. 1998), [http://www.vawnet.org/category/Documents.php?docid=393&category\\_id=483](http://www.vawnet.org/category/Documents.php?docid=393&category_id=483).

prosecutor should not be dissuaded by the stature, wealth, power or position of those who may be the subject or target of the investigation.

In sum, though reasons may exist not to pursue certain investigations, these Standards urge that the prosecutor not be solely dissuaded by obstacles such as those referenced above that may arise in the pursuit of an otherwise worthy investigation.

### **Commentary to Subdivision 26-2.1 (c)**

Seemingly buried within this subsection (at sub-sub-section (viii)) is the admonition that, in deciding whether to commence or continue an investigation, the prosecutor should consider the probability of obtaining sufficient evidence for a successful prosecution of the matter in question, including, if there is a trial, the probability of obtaining a conviction and having the conviction upheld upon appellate review. This statement is similar to the language found in the United States Attorneys' Manual, where it has a similarly humble position.<sup>92</sup> That noted, this stands as what many prosecutors will commonly describe as one of the most critical considerations in determining how to exercise both investigative and prosecutorial discretion. The location of this statement should not, therefore, be seen as a judgment as to its likely central place in the consideration of the several factors described in this Standard.

In addition to the factor noted above, this Standard lists a series of factors that a prudent prosecutor should weigh. Many are classic penal law considerations: the seriousness of the problem, whether there is evidence of wrongdoing at the outset, the need for deterrence or punishment, the need to prevent vigilantism, whether the problem is already being successfully managed by existing enforcement strategies, and whether criminal or civil.<sup>93</sup>

The decision to initiate or continue an investigation entails a number of commitments by both the prosecutor's office and other agencies. Resources are limited, and the decision to pursue one investigation is a decision, tacitly, to not pursue others. The factors in Standard 2.1(c) are offered to assist the prosecutor in deciding which investigations are worthy of initiation and pursuit.

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92. See USAM, *supra* note 54, § 9-27.220.

93. See Ronald Goldstock, *The Prosecutor as Problem Solver*, in HANDBOOK OF ORGANIZED CRIME IN THE UNITED STATES (Robert J. Kelly, et al., eds. 1994).

A separate consideration for the prosecutor to consider is a criminal investigation's potential to damage the lives of all who become involved in or who are subject to the investigation. These considerations should include not only the obvious impacts, but also intangible costs, such as privacy intrusions and the stigma of being the subject of a criminal investigation, as well as impacts on innocent third parties, and the availability of less costly (or less intrusive) investigative steps or non-criminal remedies.<sup>94</sup> Given the limited practical and legal experience of many incoming attorneys in many prosecutors' offices, the tangible and intangible costs of commencing an investigation should be a subject of training and discussion, and is another reason for routine oversight of investigations by those with greater experience and perspective.

Additional considerations in deciding whether to initiate or continue an investigation include a web of interrelated issues, including the economic impact of pervasive criminal activity on a community or business sector, on public health or the environment, and, as noted above, the availability of other tools to address problems (*e.g.*, civil enforcement, drug treatment, legal reform or other problem-solving alternatives).<sup>95</sup>

The goal here is to "compel prosecutors to be explicit and think more broadly in their assumptions, goals, and cost assessments. Public prosecutors should, after all, be considering the costs of their actions to all members of the public they serve."<sup>96</sup>

### Commentary to Subdivision 26-2.1 (d)(i)

The Constitution prohibits investigation and prosecution on the basis of race or religion.<sup>97</sup> The Standards seek to more broadly forbid improper motives as a basis for pursuing investigations, ranging from seeking personal or partisan advantage, to bias and personal animus. Law enforcement decisions made on the basis of race or religion send the destructive message of unequal justice under the law.<sup>98</sup> Such restric-

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94. See Little, *supra* note 17, at 727.

95. See Goldstock, *supra* note 93, at 437-38.

96. See Little, *supra* note 17, at 758-59.

97. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (reaffirming the principle that enforcement of the law based on race is impermissible and that the proper basis for objection is the Equal Protection clause).

98. See *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (holding that Hispanic appearance of drivers was not proper factor to consider in determining whether Border Patrol agents had reasonable suspicion to stop suspects after they

tions would not, of course, prevent the criminal investigation of a street gang, whose members may share a common ethnic heritage, for the purpose of protecting a community or neighborhood being victimized by the gang.

Inserting partisan politics into law enforcement investigations is similarly toxic. Former Manhattan District Attorney Frank Hogan taught: “You can’t play politics with people’s lives.”<sup>99</sup> Indeed, the overt politicization of an investigation would require a prosecutor’s recusal “if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer’s professional judgment . . . will be adversely affected by the lawyer’s own . . . personal interests.”<sup>100</sup>

### Commentary to Subdivision 26-2.1 (e)

The Standard states that prosecutors should document reasons for declining or closing investigations. The Standard addresses two situations involving the issue of declination. In the first, an investigation is terminated prior to the development of a prosecutable case. In the second, even though the investigation has resulted in a prosecutable case, the prosecutor declines to prosecute. Both situations involve the exercise of prosecutorial discretion. The goal of the Standard is to preserve, on the basis of a contemporaneous record, the reason(s) why an

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made U-turns in front of a checkpoint). Notably, following the passage of a law in Arizona (Arizona Senate Bill 1070) that sought to have police determine an individual’s “immigration status” during any lawful stop by the police where there is “reasonable suspicion” that the individual is unlawfully present in the United States, the Department of Justice has filed suit seeking to enjoin enforcement of the law and declaring it to be unconstitutional on the basis of federal preemption of the laws regarding immigration. *See United States v. Arizona*, No. 2:10-cv-01413-NVW (D. Ariz.).

99. Patrice O’Shaughnessy, *Frank Hogan Keeping Things Decent and Proper*, N.Y. DAILY NEWS, Nov. 2, 1999, available at [http://www.nydailynews.com/archives/news/1999/11/02/1999-11-02\\_frank\\_hogan\\_keeping\\_things\\_d.html](http://www.nydailynews.com/archives/news/1999/11/02/1999-11-02_frank_hogan_keeping_things_d.html).

100. N.Y. RULES OF PROF’L CONDUCT R. 1.7. The Model Rules of Professional Conduct set a similar standard, but bar lawyers from representation where a “concurrent conflict of interest” exists, defined as “a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer.” MODEL RULES OF PROF’L CONDUCT R. 1.7; *see also* CALIFORNIA RULES OF PROF’L CONDUCT R. 3-310(B) (4) (stating that a member of the bar should seek written consent if “[t]he member has or had a legal, business, financial, or professional interest in the subject matter of the representation”).

investigation was terminated, or a prosecution not pursued.<sup>101</sup> A declination decision can be recorded in something as simple as a one-page form, although the particular circumstances will determine whether a more comprehensive discussion of the reasons for declining to further pursue an investigation or prosecution is appropriate. The declination record should provide the underlying reasons for the declination, such as the loss of evidence or other factors that may have compromised an otherwise prosecutable case.

## **Standard 26-2.2 Selecting investigative techniques**

**(a) The prosecutor should be familiar with routine investigative techniques and the best practices to be employed in using them.**

**(b) The prosecutor should consider the use of costlier, riskier, or more intrusive means of investigation only if routine investigative techniques would be inappropriate, ineffective, or dangerous, or if their use would impair the ability to take other desirable investigative steps. If non-routine techniques are used, the prosecutor should regularly reevaluate the need for them and whether the use of routine investigative techniques will suffice.**

**(c) The prosecutor should consider, in consultation with police and other law enforcement agents involved in the investigation, the following factors:**

- (i) the likely effectiveness of a particular technique;**
- (ii) whether the investigative means and resources to be utilized are appropriate to the seriousness of the offense;**
- (iii) the risk of physical danger to law enforcement officers and others;**
- (iv) the costs involved with various investigative techniques and the impact such costs may have on other efforts within the prosecutor's office;**

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101. These reasons may include, among others: lack of evidence of criminal intent; lack of evidence of other elements of the offense; referral to or handling of the matter by another jurisdiction; alternative resolution through restitution or civil or administrative sanctions; staleness; statute of limitations; witness problems; the age, health, prior record or other personal circumstances of the offender, or cooperation with the government in other matters.

- (v) the possibility of lost opportunity if an investigative technique is detected and reveals the investigation;
- (vi) means of avoiding unnecessary intrusions or invasions into personal privacy;
- (vii) the potential entrapment of otherwise innocent persons;
- (viii) the risk of property damage, financial loss to persons or businesses, damage to reputation or other harm to persons;
- (ix) interference with privileged or confidential communication;
- (x) interference with or intrusion upon constitutionally protected rights; and
- (xi) the risk of civil liability or other loss to the government.

(d) The prosecutor should consider the views of experienced police and other law enforcement agents about safety and technical and strategic considerations in the use of investigative techniques.

(e) The prosecutor may consider that the use of certain investigative techniques could cause the subject of the investigation to retain legal counsel and thereby limit the use of some otherwise permissible investigative techniques.

(f) The prosecutor should avoid being the sole interviewer of a witness, being alone with a witness, or otherwise becoming an essential witness to any aspect of the investigation.

(g) While the prosecutor may, and sometimes should, seek changes in law and policy, the prosecutor should abide by existing legal restraints, even if the prosecutor believes that they unjustifiably inhibit the effective investigation of criminal conduct.

### *Related Standards*

ABA Criminal Justice Standards: Prosecution Function

Standard 3-3.1 (Investigative Function of Prosecutor)

ABA Model Rules of Professional Conduct

Rule 3.7 (Lawyer as Witness)

### *Commentary*

These Standards provide a list of factors that prosecutors should weigh in deciding what investigative technique to deploy. The factors include those that many experienced prosecutors and investigators will

apply intuitively. They fall into four broad categories: risks to the truth-finding process, risks to law enforcement, risks to vital legal principles, and risks of imposing collateral damage on third parties or suspects.

Once the prosecutor has determined, pursuant to Standard 2.1, to start an investigation, the prosecutor must decide how to proceed. A broad array of tools is available. Some, such as interviewing witnesses, are used in almost every investigation, regardless of size. Others, such as electronic eavesdropping, are used rarely. This Standard sets forth a general analytic framework for choosing appropriate investigative tools. Subsequent sections discuss issues unique to different techniques.

The guiding principle is the common sense notion that one should use tools appropriate to the task. Sometimes this is a matter of law. For example, the law does not permit a court to issue an eavesdropping warrant to investigate minor crimes.<sup>102</sup> Other times, it is a matter of sound judgment. Even if the law did permit obtaining a wire to investigate minor offenses, as a matter of discretion, a petty offense would not justify its extraordinary intrusion on privacy. The Standards direct prosecutors to make this type of assessment in deploying all investigative tools.

### Commentary to Subdivision 26-2.2 (a)

The Standards direct prosecutors to first consider the use of “routine” techniques. Though the Standards do not describe them, routine techniques include interviewing witnesses, gathering physical evidence, visiting the crime scene(s), gathering public documents, “staking out” a location or following a suspect. They are typically steps that require no court order or other legal authority, and at least in that respect they are less intrusive than other tools. Yet even “routine” measures can inflict significant collateral harm. Interviews of third party witnesses can easily cause reputational damage. And physical surveillance can be so intense as to be abusive.<sup>103</sup>

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102. The offenses that may be the predicate for a wire or oral interception order are limited to those set forth in 18 U.S.C. § 2516(1). In the case of electronic communications, a request for interception may be based on any Federal felony. *See* 18 U.S.C. § 2516(3).

103. Felix Bloch, an American diplomat, was suspected in the late 1980s of passing secrets to the Soviet Union. Government officials issued damaging statements about Bloch and the FBI overtly surveilled him, constantly and obviously staking out his home in Washington D.C., and following him to his daughter’s home out of state, where both were greeted with a crowd of reporters. Bloch was never charged with espionage. *An F.B.I. Bloch Party*, N.Y. TIMES, Aug. 2, 1989, <http://www.nytimes.com/1989/08/02/opinion/>

While other techniques may be available and effective, it is the better practice to consider using routine techniques first, and to continue to do so even when more complex measures (such as electronic surveillance or the use of undercover agents) are being utilized.

### Commentary to Subdivisions 26-2.2 (b) - (c)

The language of these provisions is intentionally prescriptive in describing the costs and benefits to be considered. For example, the prosecutor should consider whether an investigative step might distort the truth by posing a danger of entrapping an innocent person on the one hand, or by allowing wrongdoers to hide evidence of their crimes on the other. Reliance on informants, in particular, poses these risks.<sup>104</sup>

As to costs or dangers to law enforcement itself, the prosecutor should weigh the monetary cost of executing a particular investigative step,<sup>105</sup> the physical risk to police officers,<sup>106</sup> and the civil liability of the investigators.<sup>107</sup>

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an-fbi-bloch-party.html; *see also* de la Merced, *supra* note 67 (discussing harassment of AIG executives after public announcement of investigation).

104. *See, e.g.*, Jon Sherman, "A Person Otherwise Innocent": Policing Entrapment in Preventative, Undercover Counterterrorism Investigations, 11 J. CONST. LAW 1475, 1478 (July 2009).

105. I. J. Vasquez & S. A. Kelly, *Management's Commitment to the Undercover Operative: A Contemporary View*, 52 FBI LAW ENFORCEMENT BULLETIN 2: 3-12 (1989) (noting expense of undercover operations); Steven Anderson, *Big Sting: January Stings Set FCPA Precedent*, INSIDE COUNSEL (Mar. 1, 2010), <http://www.insidecounsel.com/Issues/2010/March-2010/Pages/Big-Sting.aspx> (discussing 2.5-year investigation that resulted in arrests of 22 executives for alleged violations of the Foreign Corrupt Practices Act).

106. *Undercover Agent Killed in Drug Operation*, N.Y. TIMES (Mar. 23, 1996), <http://www.nytimes.com/1996/03/23/us/undercover-agent-killed-in-drug-operation.html> (reporting on death of undercover F.B.I. agent trying to buy drugs in Philadelphia).

107. *See, e.g.*, *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244-45 (2012) (discussing the protection of investigators by qualified immunity except where their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known); *Mills v. City of Harrisburg*, 589 F. Supp. 2d 544, 551 (M.D. Pa. 2008) (undercover agents accused of civil rights violations in prostitution sting operation in an African-American community).

As to legal doctrines, the prosecutor should consider the risk of intruding on the constitutional rights of both suspects and third parties,<sup>108</sup> and of potential intrusions into privileged communications.<sup>109</sup>

And, finally, as to collateral consequences, the prosecutor should consider whether the contemplated investigative step would unduly intrude on someone's privacy, or cause financial or reputational damage.

These provisions list factors that may be relevant in complex investigations.

#### **Commentary to Subdivision 26-2.2 (d)**

As many investigators have noted, "lawyers don't know everything." Being trained as a lawyer and becoming a prosecutor is not the same thing as being a trained experienced investigator. The prosecutor, particularly the relatively inexperienced prosecutor, may not have the insights into both criminal activity and community concerns that are available to law enforcement agents, and which serve to guide and inform their views on the selection of investigative methods. However, simply because police and law enforcement agents may have greater experience does not mean that the prosecutor should in all instances defer to their recommendations.<sup>110</sup>

#### **Commentary to Subdivision 26-2.2 (e)**

Once a person has counsel, certain rights attach. However, merely having a lawyer represent someone at all times and for all purposes does not prohibit the use of common investigative techniques. Such a result would frustrate the legitimate ends of the justice system and would serve to further the aims of criminals. Courts have consistently

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108. In *Minnesota v Carter*, the Supreme Court found that defendants, who were guests in home of another when it was searched, and who were arrested on charges of drug possession, had standing to challenge the search as illegal. 525 U.S. 83, 108 (1998) (discussing the danger of limiting standing as an incentive to police to conduct illegal searches).

109. See, e.g., R. Robin McDonald, *Ruling OKs Seizure of Computer Containing Privileged Materials*, FULTON COUNTY DAILY REPORT, Aug. 29, 2007, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1188378153101> (reporting on ruling extending warrant to search computer to documents under attorney-client privilege).

110. See Standard 1.3.

held that the protections afforded represented individuals are limited to the purposes of the representation.<sup>111</sup>

### **Commentary to Subdivision 26-2.2 (f)**

As a rule, the prosecutor should avoid interviewing a potential witness alone or having even casual conversations alone with such potential witnesses. The prosecutor should recognize that failing to have a third person present during an interview (*e.g.*, an investigator, analyst, paralegal or another lawyer not essential to the case) could result in the prosecutor becoming a witness<sup>112</sup> and/or the inability to impeach the witness effectively if the witness subsequently testifies contrary to what occurred in an interview without two witnesses. By utilizing a third person in a witness interview, the prosecutor can minimize the possible need to withdraw from a case in order to present the impeaching testimony.<sup>113</sup>

However, this Standard, while written in absolute terms, was not intended to apply to every witness and every circumstance, such as when the prosecutor is working with an investigator who will also be a government witness.

## **Standard 26-2.3 Use of undercover law enforcement agents and undercover operations**

**(a) For the purpose of these Standards, an “undercover law enforcement agent” is an employee of a government agency working under the direction and control of a government agency in a criminal investigation, whose true identity as a law enforcement agent involved in the investigation is concealed from third parties.**

**(b) For the purpose of these Standards, an “undercover operation” means an investigation in which undercover law enforcement agents or other persons working with law enforcement conceal their**

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111. See MODEL RULES OF PROF'L CONDUCT ANN. R 4.2 ANNOTATION (“Just What ‘Matter’ is the Person Represented In?” and cases cited therein) (2011).

112. See MODEL RULES OF PROF'L CONDUCT R. 3.7 cmt. 1 (noting that combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and the client).

113. See MODEL RULES OF PROF'L CONDUCT ANN. R 3.7 ANNOTATION (noting cases raising “heightened risk of prejudice to the defendant when a prosecutor testifies”).

purpose of detecting crime or obtaining evidence to prosecute those engaged in illegal activities.

(c) In deciding whether to use or to advise the use of undercover law enforcement agents or undercover operations, the prosecutor should consider potential benefits, including:

- (i) the character and quality of evidence likely to be obtained; and
- (ii) the ability to prevent or solve crimes where obtaining reliable and admissible evidence to do so would otherwise be difficult or impossible to obtain.

(d) In deciding whether to use or to advise the use of undercover law enforcement agents or undercover operations, the prosecutor should consider potential risks, including:

- (i) physical injury to law enforcement agents and others;
  - (ii) lost opportunity if the operation is revealed;
  - (iii) unnecessary intrusions or invasions into personal privacy;
  - (iv) entrapment of otherwise innocent persons;
  - (v) property damage, financial loss to persons or businesses, damage to reputation or other harm to persons;
  - (vi) interference with privileged or confidential communications;
  - (vii) interference with or intrusion upon constitutionally protected rights;
  - (viii) civil liability or other adverse impact on the government;
  - (ix) personal liability of the law enforcement agents;
  - (x) involvement in illegal conduct by undercover law enforcement agents or government participation in activity that would be considered unsuitable and highly offensive to public values and that may adversely impact a jury's view of a case; and
  - (xi) the possibility that the undercover operation will unintentionally cause an increase in criminal activity.
- (e) The prosecutor advising an undercover investigation should:
- (i) consult with appropriate police or law enforcement agents on a regular basis about the continued propriety of the operation and the legal sufficiency and quality of the evidence that is being produced by the operation;

- (ii) seek periodic internal review of the investigation to determine whether the operation's benefits continue to outweigh its risks and costs, including the extent to which:
    - (A) the goals of the investigation have been accomplished;
    - (B) there is potential for the acquisition of additional useful and non-duplicative information;
  - (iii) the investigation can continue without exposing the undercover operation; and
  - (iv) continuation of the investigation may cause financial or other injury to innocent parties.
- (f) The prosecutor should seek to avoid or minimize the risks involved in the active participation of undercover police or law enforcement agents in illegal activity, and provide such agents guidance about authorized participation in otherwise criminal conduct.
- (g) Records of funds expended and generated by undercover activity should be retained and accounted for in a manner that facilitates a comprehensive and accurate audit.

### *Related Standards*

- ABA Criminal Justice Standards: Prosecutorial Investigations  
Standard 2-2.5 (Cooperation Agreements and Cooperating  
Individuals and Organizational Witnesses)
- ABA Model Rules of Professional Conduct  
Rule 4.1 (Truthfulness in Statements to Others)

### *Commentary*

In certain types of crimes, there are essentially three ways to investigate: be a participant, obtain the cooperation of a participant, or observe or overhear the participants. This Standard deals with the first of those three options: having a law enforcement officer become what appears to be a participant in the criminal activity of others as part of a ruse—an undercover operation.

Generally an undercover agent pretends to be someone other than a police officer, by utilizing a different name, persona, and background. At other times, an officer may utilize his true identity as an officer but hide

his true aims by pretending, for example, to be corrupt. The Standard is written to address both of these circumstances.

The use of undercover agents has produced some of the most successful and well known criminal investigations in the history of law enforcement, such as FBI agent Joe Pistone's infiltration of the Bonanno Crime family. Pistone operated undercover for six years as a jewel thief expert under the pseudonym, Donnie Brasco. In this time, he gained the trust of Dominick "Sonny Black" Napolitano and Benjamin "Lefty" Ruggiero. Ruggiero in particular provided Pistone with valuable evidence; the two were so close that neither Lefty nor Sonny Black believed the FBI when it informed them that Pistone had been an agent.

Some undercover operations are far shorter, such as typical narcotics "buy and bust" investigations. In those, an undercover police officer buys drugs from a dealer on the street, and a back-up team quickly sweeps in and arrests the dealer.

Where the undercover participant is a law enforcement officer (as opposed to an informant) the investigation may benefit from the greater credibility and lack of difficult background issues that are part of the baggage that come with many informants.

As a general rule, the use of undercover agents implicates the same sets of risks inherent in any investigative tool. But using undercover agents poses some of them at a much higher stakes level. In particular, undercover operations are extraordinarily dangerous. Undercover officers have been killed, wounded, corrupted, turned into drug addicts, or have suffered severe and prolonged emotional injury.<sup>114</sup> A focus on safety and security is paramount.

The decision to use undercover officers necessarily entails involving a police officer in criminality, and a prosecutor should consider when and where to draw the line. This dilemma is exemplified in narcotics investigations in what is colloquially known as a "reverse"—a transaction in which the undercover government agent sells narcotics rather than

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114. See, Mark R. Pogrebin and Eric D. Poole, *Vice Isn't Nice: A Look at the Effects of Working Undercover*, 21 J. OF CRIM. JUST. 383, 388 (1993) (noting the results of an FBI study of undercover agents who, as a result of their work, underwent "profound changes in their value systems, often resulting in over identification with criminals . . ."); Michel Girodo, *Drug Corruption in Undercover Agents: Measuring the Risk*, 9 BEHAVIOR SCIENCES & THE LAW 361 (1991) (finding greater drug and alcohol abuse and disciplinary problems among those who did more undercover work).

buys them.<sup>115</sup> A police officer selling drugs offends basic public values, may cause a temporary increase in criminal activity, and may affect a jury's view of the righteousness of the government's conduct at trial. Nonetheless, the technique has been used repeatedly but selectively over the years to infiltrate large scale drug organizations.<sup>116</sup>

Similarly, undercover operations can also involve police officers in schemes that harm innocent third parties. If an undercover agent participates in a bid-rigging scheme, for example, then he or she may be complicit in denying a contract to an honest bidder. This can have both moral implications and legal ones.

### Commentary to Subdivisions 26-2.3 (e) - (f)

The FBI's undercover standards provide a guide to the central issues in most undercover cases. Because the answers to most issues are likely to lie in the particular facts of each investigation, the FBI standards mostly raise issues, rather than fully answer them. The rules of conduct in these circumstances are not always easy to define. For example, it may be acceptable to participate in the theft of a car to capture a bank robbery gang, but not if doing so results in significant harm to an otherwise uninvolved third party—for example, through carjacking. An officer using

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115. In *Hampton v. United States*, the Supreme Court upheld this practice and affirmed the conviction of a defendant based on government-supplied contraband. 425 U.S. 484, 485 (1976). Justice Powell, joined by Justice Blackmun in concurrence, discussed the standard for police involvement, as well as the rationale behind allowing such action, noting “[p]olice overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction. This would be especially difficult to show with respect to contraband offenses, which are so difficult to detect in the absence of undercover Government involvement.” *Id.* at 495 n.7; see also *United States v. Asencio*, 873 F.2d 639 (2d Cir. 1989) (affirming conviction of narcotics possession where heroin was sold by government agents).

Similar issues can be raised in cases involving firearms. See, e.g., U.S. Department of Justice, Office of the Inspector General, *A Review of ATF's Operation Fast and Furious and Related Matters* at 471 (Nov. 2012) (concluding that a number of agents, prosecutors, and ATF officials “bore a share of responsibility for ATF's knowing failure . . . to interdict firearms illegally destined for Mexico, and for doing so without adequately taking into account the danger to public safety that flowed from this risky strategy”).

116. See, e.g., Mary Catherine Brooks, *Undercover Officers Key to Drug Battle*, THE REGISTER-HERALD (BECKLEY, W. VA.), May 4, 2010, <http://www.register-herald.com/todaysfrontpage/x1036626571/Undercover-officers-key-to-drug-battle> (discussing the role of undercover officials selling drugs, as well as cooperation with federal authorities in tracking multi-state drug busts).

drugs or engaging in sexual conduct is particularly problematic. While unpleasant to consider, these are issues that must be thought through in advance. The prosecutor should anticipate and seek to limit illegal conduct outside the scope or needs of investigation, and consider the likely scope of activity that may take place with the undercover agent's knowledge or in his or her presence.

**Commentary to Subdivisions 26-2.3 (g)**

Unlike most law-abiding people, criminals do not typically use public bidding, RFPs and receipts. Thus, when police infiltrate criminal organizations, the normal means of documenting expenditures are generally unavailable. Nevertheless, a government agency must properly account for the expenditure of public monies. Methods must be devised to record and preserve such expenditures for contemporaneous and post-investigation auditing. Accordingly, prosecutors should seek out witnesses to payments and record conversations of payments being accepted, while maintaining the undercover company's books and records and ensuring they satisfy accepted accounting principles and standards.

**Standard 26-2.4 Use of confidential informants**

(a) As used in these Standards, a "confidential informant" is a person who supplies information to police or law enforcement agents pursuant to an agreement that the police or investigative agency will seek not to disclose the person's identity. The identity of a confidential informant may also be unknown to the prosecutor. A confidential informant may in some instances become a cooperator, and in such circumstances reference should be made to Standard 2.5.

(b) The prosecutor should consider possible benefits from the use of a confidential informant, including whether the confidential informant might enable the government to obtain:

- (i) first-hand, eyewitness accounts of criminal activity;
- (ii) critical background information about the criminal activity or criminal organization under investigation;
- (iii) information necessary to provide a basis for additional investigative techniques or court-ordered means of investigation such as a search warrant; and

- (iv) identification of witnesses or leads to witnesses who can provide direction to further the investigation or valuable testimony to a grand jury or at trial.
- (c) The prosecutor should consider possible risks from the use of a confidential informant. These include risks that the confidential informant will:
- (i) be untruthful, or provide misleading or incomplete information;
  - (ii) compromise the criminal investigation by revealing information to others, including the subjects or targets of the investigation;
  - (iii) engage in behavior constituting entrapment;
  - (iv) commit or continue to commit crimes;
  - (v) be subject, or subject others, to serious risk of physical harm as a result of cooperating with law enforcement; and
  - (vi) interfere with privileged or confidential relationships or communications or violate the rights of the investigation's subject.
- (d) The prosecutor should avoid being alone with a confidential informant, even for a brief period of time.
- (e) Before deciding to rely upon the information provided by a confidential informant for significant investigative steps, the prosecutor should review the following with the police or law enforcement agents:
- (i) the ability of the confidential informant to provide or obtain information relevant to the criminal investigation;
  - (ii) means of corroborating information received from the confidential informant;
  - (iii) the possible motives or biases of the confidential informant, including the motive to gain a competitive advantage over others in either criminal or legitimate enterprises;
  - (iv) the nature of any and all promises made to the prospective confidential informant by other prosecutors, police or law enforcement agents, including promises related to the treatment of associates or relatives of the confidential informant;

- (v) the prior history of the confidential informant , including prior criminal activity and other information, including the informant's true identity if necessary for the prosecutor's review;
  - (vi) whether the prospective confidential informant is represented by an attorney or is party to a joint defense agreement with other targets of the investigation and, if so, how best to address potential legal or ethical issues related to the representation or agreement;
  - (vii) if reasonably available, the experience other prosecutors and law enforcement agents have had with the confidential informant;
  - (viii) whether the proposed compensation or benefits to be received by the confidential informant are reasonable under the circumstances;
  - (ix) the risk that the prospective confidential informant may be an agent of the subjects of the investigation or of other criminal groups and individuals, or may reveal investigative information to them; and
  - (x) the risk that the prospective confidential informant will engage in criminal activity not authorized by the prosecutor, and the seriousness of that unauthorized criminal activity.
- (f) The prosecutor's office should work with police and law enforcement agents to develop best practices and policies for the use of confidential informants that include:
- (i) a rule that investigative information obtained from other sources should not be provided to the confidential informant unless doing so would materially advance the investigation;
  - (ii) prohibitions on making promises of compensation or other benefits that would shock the conscience of a moral society or would risk compromising the credibility of the informant in any proceeding in which the informant's testimony may be important;
  - (iii) prohibitions on making promises that the police or law enforcement agents are unlikely to be able to keep;

- (iv) **routine instructions to confidential informants to refrain from criminal conduct other than as directed by law enforcement; and**
- (v) **the routine use of standard form agreements when such agreements are entered into by law enforcement officers without the involvement of the prosecutor.**

### *Related Standards*

ABA Criminal Justice Standards: Prosecution Function

Standard 3-3.1 (Investigative Function of Prosecutor)

ABA Criminal Justice Standards: Prosecutorial Investigations

Standard 2-2.11 (Consensual Interception, Transmission and Recording of Communications)

ABA Model Rules of Professional Conduct

Rule 4.2 (Communication with Person Represented by Counsel)

Attorney General's Guidelines Regarding the Use of Confidential Informants, United States Dep't of Justice, May 2002

As noted above, this Standard and the accompanying Standards 2.3 and 2.5 should be read and considered as a whole.

### *Commentary*

Investigators often rely on either people involved in crimes, or with direct knowledge of criminal activity, to secretly provide information that advances investigations. The Standards define this category of non-testifying person as "confidential informants." Informants sometimes provide information because they are paid, sometimes because they have been apprehended and have bargained information for freedom, and sometimes to settle scores with enemies or rivals. Of course, others may provide information because they are motivated by a sense of civic duty, but will only be willing to do so if they can remain anonymous.

Investigators use the information in a variety of ways. At times, information provided by informants is used only as intelligence, helping guide investigators as they formulate broad investigative plans. Other times, information is used to make concrete operational choices, such as when to conduct physical surveillances or what other witnesses to interview. And at other times, information from informants is used to help establish probable cause in applications for search warrants or eavesdropping orders.

In some circumstances, the prosecutor may never meet the informant, and, indeed, may not even be told the informant's identity. Typically, informants are "run" by police officers or agents, who act as intermediaries in transmitting relevant information to the prosecutors.

Relying too readily on informant information can lead to injustices, and even to physical harm to others. By definition, informants are either criminals themselves or closely associated with them. Because of this they can have intimate knowledge of ongoing schemes. They are also likely to have few compulsions about lying. If informants are prepared to betray their friends and associates, then investigators must presume that the informants are equally prepared to betray law enforcement. For this reason, the Standards warn explicitly that a prosecutor should never be alone with an informant, even for a brief period; there should always be a police officer or some other witness present.

The Standards consequently set forth factors that prosecutors should have in mind when dealing with these potent, but dangerous, sources. On the benefit side of the ledger, a well-placed informant is an unparalleled source of information. But there are many, many entries in the cost column. An informant may lie or provide misleading information. Many informants will continue to commit crimes while providing information. It is, after all, their presence amongst other criminals that gives them their value. They may finger enemies to gain advantage in their own criminal enterprises or entrap innocents, or may carefully lead law enforcement away from their friends and allies. They may divine the direction of an investigation from an agent's questions, and use that information to warn confederates. And, if discovered by other criminals, they may be killed.<sup>117</sup>

#### **Commentary to Subdivision 26-2.4 (a)**

As defined in these Standards, confidential informants are not expected to testify, unlike undercover officers or cooperating witnesses. Thus, confidential informants do not provide direct evidence (either before a grand jury or in court), but instead are a means to develop sources of direct evidence. The decision to treat someone as a confidential informant may come about for several reasons, including circumstances in

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117. *Drug Informant Killed After Name Leaks*, THE BALTIMORE SUN, June 25, 2010, [http://weblogs.baltimoresun.com/news/crime/blog/2010/06/drug\\_informant\\_killed\\_after\\_na.html](http://weblogs.baltimoresun.com/news/crime/blog/2010/06/drug_informant_killed_after_na.html).

which the confidential informant will not assist law enforcement unless he or she can remain anonymous, or where the confidential informant's value goes beyond a particular case. The government's promise to treat a confidential informant as an anonymous source poses significant risks, including the derailment of investigations or prosecutions that cannot go forward without revealing the identity of the confidential informant due to a court order.

As noted in 2.4(a), the Standards contemplate circumstances in which a confidential informant becomes a cooperating witness. In such circumstances, reference should be made to the Guidance provided in Standard 2.5, below. Notably, in such circumstances, any payments made to the confidential informant may be revealed in a public proceeding.

### **Commentary to Subdivision 26-2.4 (b)**

For the reasons noted above, there are numerous concerns about the ability to corroborate and confirm the accuracy and reliability of a confidential informant's statements. The prosecutor must constantly guard against the potential for a confidential informant to (1) manufacture, misconstrue or mischaracterize statements made by government personnel or (2) take improper advantage of his or her relationship with the government.

With all confidential informants, and notably when a confidential informant is an apprehended criminal, prosecutors must use great caution before the confidential informant's information can be considered credible and reliable, keeping in mind the informant's blatant self-interest, possible bias towards the subjects or targets of the investigation, prior bad acts (especially related to crimes involving false statements, fraud and other crimes relevant to the confidential informant's reliability) or past inconsistent statements that will make him or her unworthy of belief.

Those participating in the investigation should always be alert to the substantial risk that the confidential informant will trade or provide information about the investigation to others outside of law enforcement, including the subjects of the investigation. This Standard provides many of the actions the prosecutor can take to address these concerns.

**Commentary to Subdivisions 26-2.4 (c)**

Prosecutors and police should counsel confidential informants, undercover agents, and private citizens acting under law enforcement direction that they may not stimulate, encourage or induce illegal activity.<sup>118</sup>

Confidential informants engaged in entirely legitimate activities and whose actions as a confidential informant do not involve illegal activity should be able to retain the normal profits (as well as suffer normal losses) from the operation of their businesses.

If the confidential informant is engaged in wholly illegal activity (*i.e.*, running a bookmaking operation), the government must consider whether and to what extent it will subsidize the operation to allow it to continue and how to address the proceeds of the operation. Serving as a confidential informant should not allow someone to either profit from illegal activity or obtain an unfair business advantage over other legitimate businesses because of the confidential informant's relationship with the government.

**Commentary to Subdivision 26-2.4 (e)**

The term "significant step" is used in this Standard to distinguish between the preliminary investigative steps that may be undertaken follow the receipt of information from a confidential informant and the decision to undertake a significant criminal investigation.

Because of the potential risks of injustice, prosecutors must work closely with the police to confirm the reliability of an informant before using the information to make investigative choices. Thus, the Standards require the prosecutor to review with officers a series of factors that relate to the informant's basis of knowledge, motive to lie, track record, compensation, and any promises or payments made to the informant. Each of the questions for police that are set forth in the Standards is self-explanatory, and each must be answered to the satisfaction of the prosecutor before he or she proceeds.

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118. See *Jacobsen v. United States*, 503 U.S. 540 (1992) (reversing child pornography conviction based on government's 26-month campaign of mailings and communications exploring defendant's willingness to break the law, where evidence of criminal predisposition indicated only a generic inclination to act within a broad range, not all of which was criminal).

Thus, subparts (i) - (iii), (v), and (vii) above address steps to assess the reliability and accuracy of the confidential informant's information. Subparts (iv) and (viii) relate to the need to limit the likelihood that the confidential informant will be motivated to create information to obtain the benefits of an agreement. Subparts (vi), (ix) and (x) relate to ethical issues and the risk that the confidential informant may engage in unwanted behavior. If a confidential informant has been a party to a joint defense agreement with other targets of the investigation, the prosecutor must take care not to learn about particulars of any lawful defense strategies or privileged communications learned by the individual or his counsel due to the joint defense agreement.

The prosecutor who uses a foreign national as a confidential informant should be alert to possible coercion of the confidential informant, or the use of the confidential informant by a foreign state or foreign entity to obtain information about U.S. investigative techniques, tools, and methods. The prosecutor in such circumstances should check with the National Security Division of the Department of Justice.

#### **Commentary to Subdivision 26-2.4 (f)**

Prosecutors should work with police and law enforcement agencies to develop best practices for working with confidential informants. The dangers of failing to do so were set forth in detail in a Congressional Report titled "Everything Secret Degenerates: The FBI's Use of Murderers as Informants."<sup>119</sup> The executive summary reported:

Federal law enforcement officials made a decision to use murderers as informants beginning in the 1960s. Known killers were protected from the consequences of their crimes and purposefully kept on the streets. This report discusses some of the disastrous consequences of the use of murderers as informants in New England.<sup>120</sup>

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119. H.R. REP. NO. 108-414 (2003).

120. *Id.* at 1. One of the subjects of the Congressional Report, James Joseph "Whitey" Bulger, Jr., was arrested in Santa Monica, California in June of 2011, after having been at large for more than 16 years. He was subsequently convicted on 31 of 32 counts, including 11 murders. Katharine Q. Seelye, *Bulger Guilty As a Mob Tale Ends in Boston*, N.Y. TIMES, Aug 12, 2013, at A1 ("The verdict delivers long-delayed justice to Mr. Bulger, 83, who disappeared in the mid-1990s after a corrupt agent with the Federal Bureau of Investigation told him he was about to be indicted.")

In the wake of the report, the Director of the FBI put in place procedures to foreclose a reoccurrence.<sup>121</sup> These Standards state that each jurisdiction should put in place best practices to prevent it in the first place.

If a confidential informant is engaged in an otherwise legal enterprise that is enhanced at the government's direction (*e.g.*, paying a bribe to obtain a government contract), care must be taken to address the proceeds of this activity in light of the competing equities of the situation. The government should determine whether it would shock the conscience to allow the confidential informant to keep all such proceeds, and such a decision should be carefully documented.

### **Standard 26-2.5 Cooperation agreements and cooperating individuals and organizational witnesses**

(a) As used in these Standards, “cooperation agreements” are agreements between the prosecutor and otherwise culpable individuals or entities (“cooperators”) who provide the government with assistance useful to an investigation in exchange for benefits. A cooperator may have been a confidential informant earlier in the investigation.

(b) The prosecutor should ordinarily seek to have the cooperator plead guilty to an appropriate criminal charge rather than provide the cooperator immunity for culpable conduct.

(c) In deciding whether to offer a cooperator significant benefits, including a limit on criminal liability, immunity, or a recommendation for reduction of sentence, the prosecutor should consider whether:

- (i) the cooperator is able and willing to provide valuable assistance to the investigation;
- (ii) the cooperator will maintain the confidentiality or secrecy of the investigation;

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121. See *Hearing Before the Subcomm. on Constitution, Civil Rights and Civil Liberties and on Crime, Terrorism and Homeland Sec. of the H. Judiciary Comm.*, 110th Cong. (2007) (statement of Wayne M. Murphy, Assistant Director, Directorate of Intelligence, Federal Bureau of Investigation) (discussing Attorney General's Guidelines entitled *Regarding the Use of FBI Confidential Human Sources*).

- (iii) the cooperator has biases or personal motives that might result in false, incomplete, or misleading information;
  - (iv) leniency or immunity for the criminal activity of the cooperator is warranted by the goals of the investigation and the public interest, including appropriate consideration for victim(s) interests;
  - (v) providing leniency, immunity or other benefits would be seen as offensive by the public or cause a reasonable juror to doubt the veracity of the cooperator's testimony;
  - (vi) information that has been provided (such as through an attorney proffer or by a debriefing of the cooperator) has been corroborated or can otherwise be shown to be accurate;
  - (vii) the culpability of other participants in the criminal activity relative to the cooperator's culpability has been determined as accurately as possible;
  - (viii) there is a likelihood that the cooperator will provide useful information only if given leniency or immunity;
  - (ix) the case could be successfully prosecuted without the cooperator's assistance; and
  - (x) the cooperator could be successfully prosecuted without the admissions of the cooperator made pursuant to the agreement.
- (d) The cooperation agreement should not:
- (i) promise to forego prosecution for future criminal activity, except where such activity is necessary as part of an officially supervised investigative and enforcement program; or
  - (ii) adversely affect third parties' legal rights.
- (e) The prosecutor should:
- (i) be aware that anything said to the cooperator might be repeated to the cooperator's criminal associates or in open court; and
  - (ii) be aware of the disclosure requirements under relevant law if a cooperator ultimately testifies at trial, including disclosure of any and all agreements and promises made to the cooperator and evidence which could impact the cooperator's credibility, including the complete crimi-

nal history of the cooperator. The prosecutor should take steps to assure the preservation of such evidence.

(f) The prosecutor should recognize and respect the role of the cooperator's attorney in the decision to cooperate and in the disposition of significant legal rights.

(g) Ordinarily, a prosecutor who offers leniency in exchange for cooperation should not withdraw or threaten to withdraw the offer because of the potential cooperator's request to consult with counsel prior to deciding whether to accept it. However, if the time required for the potential cooperator to consult with counsel would render the agreement ineffective, the prosecutor may withdraw or threaten to withdraw the offer before there is opportunity for such consultation. In that event, the prosecutor may condition cooperation on an immediate and uncounseled decision to proceed.

(h) The prosecutor should reduce a cooperation agreement to writing as soon as practicable. An agreement should only cover those crimes known to the government at the time it is made, and should specify:

- (i) the specific details of all benefits and obligations agreed upon;
- (ii) the specific activities to be performed by the cooperator;
- (iii) the requirement that the cooperator be truthful in dealing with the government and in all legal proceedings;
- (iv) the prohibition against the cooperator's engaging in any criminal conduct other than as directed by law enforcement;
- (v) the extent of the disposition of the potential criminal and civil claims against the cooperator;
- (vi) a complete list of any other promises, financial benefits or understandings;
- (vii) the limitations of the agreement with respect to the terms it contains and to the identified jurisdiction or jurisdictions; and
- (viii) the remedy in the event the cooperator breaches the agreement.

(i) The prosecutor should avoid being alone with a cooperator even for a brief period of time.

(j) The prosecutor should guard against the cooperator obtaining information from others that invades the attorney-client or

work product privileges or violates the Sixth Amendment right to counsel.

(k) Prior to relying on the cooperator's information in undertaking an investigative step that could cause adverse consequences to the investigation or to a third party, the prosecutor should be satisfied as to the truthfulness of the cooperator.

(l) If an investigative step involves an application to a court or other official body, the prosecutor should make appropriate and required disclosures about the cooperator to the court or other body.

(m) If the prosecutor suspects that the cooperator is not being truthful, the prosecutor should take reasonable steps to address such concerns and seek further corroboration of the cooperator's information.

(n) If the prosecutor determines that a cooperator has knowingly provided false information or otherwise breached the cooperation agreement, the prosecutor should:

- (i) seek guidance from a supervisor;
- (ii) undertake or request the initiation of an investigation into the circumstances;
- (iii) consider the possible prosecution of the cooperator, and;
- (iv) carefully reevaluate the investigation.

### *Related Standards*

ABA Model Rules of Professional Conduct

Rule 4.1 (Truthfulness in Statements to Others)

Rule 4.3 (Dealing with Unrepresented Person)

### *Commentary*

#### **Commentary to Subdivision 26-2.5 (a)**

Under these Standards, a cooperator is someone: (1) who has criminal liability and is receiving leniency in exchange for cooperation; (2) whose identity (and the fact of cooperation) are expected to become public when the ultimate target is charged; and (3) is likely to testify at trial.

These Standards divide those who provide information in the course of a criminal investigation into three categories:

- Section 1.4 refers to witnesses, meaning non-culpable individuals who are available to testify;
- Section 2.4 refers to confidential informants, who may be culpable or not, but will not testify and whose identity will not be revealed; and,
- Section 2.5 refers to cooperators, who are culpable individuals available to testify.

The terms “witness,” “confidential informant,” and “cooperating witness” are defined in a variety of ways in dictionaries, statutes, by law enforcement, and by the public. The term “cooperator,” which, in these Standards, refers solely to a culpable individual, stems from the common use of the phrase “cooperation agreement,” which generally refers to an agreement made between the government and a person with culpability (since in the absence of that culpability no agreement would be needed). The term “witness” is therefore implicitly used to refer to non-culpable persons or entities.

In seeking to differentiate between those who are culpable or not, and those who are available to testify or not, these are useful terms of art. The Standards also recognize that a person’s status may change over the course of the investigation.

The government’s relationship with cooperators creates mixed reactions. For example, in sentencing a cooperator described as “perhaps the most significant Mafia defector in nearly two decades,” the sentencing judge expressed his recognition that making deals with criminals to get other criminals is an unpleasant necessity in some instances:

It is unfortunate that law enforcement must, of necessity, obtain the cooperation of felons to address the pernicious crimes committed by organized crime . . . . But without the benefit of cooperating witnesses like the defendant, the government’s ability to prosecute the secretive and rule-bound world of organized crime would be greatly impaired.<sup>122</sup>

The court noted that while the government may be “dependent on the cooperation of criminals in the prosecution of other criminals[.]

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122. William K. Rashbaum, *Mob Killer and Defector Receives Time Served, and Will Live in Hiding*, N.Y. TIMES, Oct. 30, 2010, at A17, available at <http://www.nytimes.com/2010/10/30/nyregion/30vitale.html>.

[t]his cooperation does not come without a cost."<sup>123</sup> The Court then sentenced the cooperator to time served (he had served seven years) although he had personally participated in 11 murders and had lived a life of crime.<sup>124</sup>

### **Commentary to Subdivision 26-2.5 (b)**

Convictions for culpable individuals, even if punishment is mitigated by their cooperation, are generally preferable to a grant of full immunity. In investigations that proceed to charging and trial, jurors expect that witnesses who have culpability have in some way been held accountable as a measure of the fairness of the criminal justice system, and of the credibility of the witness. However, where the government lacks sufficient evidence to prosecute without information the cooperator has provided, the prosecution may reasonably seek either a reduced criminal charge or sentence, or forgo the general preference for a plea in such circumstances.

### **Commentary to Subdivision 26-2.5 (c)**

The factors in determining whether to enter into a cooperation agreement are similar to those used to determine whether to use a confidential informant. However, unlike a confidential informant, a court, the jury, and the public will all scrutinize a cooperating witness's actions, plea agreement, and relationship with the government. Thus, dealings with a confidential informant must meet not only legal and ethical standards, but also a the judgment of public review and acceptance.

Prosecutors cannot ignore statements of the cooperating witness that appear inconsistent with known facts or lean suspiciously in the cooperating witnesses' favor. The prosecutor must be alert to such circumstances and, when they arise, should not hesitate to seek to address them or obtain guidance as to next steps. Cooperating witnesses may often seek to make a friend or relative appear less culpable, or to protect themselves, or to implicate others whom they wish to harm. While all false statements undermine the credibility of a cooperating witness, the prosecutor needs sufficient information to be able to determine if

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123. *Id.*

124. *Id.*

a cooperating witness is seeking to falsely implicate others due to the issues raised in Standards 2.5(c) (iii) and (iv).

A short-lived decision of the Tenth Circuit, *United States v. Singleton*, initially held that the decision to provide leniency to a cooperating witness was the equivalent of a bribe and ruled that bartered-for testimony in federal criminal court is illegal and inadmissible, and that government attorneys who provided such leniency could be subject to a fine and/or up to 2 years in prison.<sup>125</sup> An *en banc* Tenth Circuit quickly reversed direction, vacated the panel decision, and held that the bribery law did not apply to prosecutors seeking cooperation from culpable individuals, pointing to the long-established body of Anglo-American law that allowed cooperating criminals to testify against their confederates in the hope of receiving leniency.<sup>126</sup> Critics contended that the case left unresolved the long-standing concern that “it is difficult to imagine a greater inducement to lie than the inducement of a reduced sentence.”<sup>127</sup>

Prosecutors involved in criminal investigations should weigh all of the available information when deciding whether to provide a benefit in the form of a cooperation agreement or immunity to a witness, victim, or target in return for cooperation that furthers the goal of the investigation. Additionally, prosecutors should be aware of the substantial requirements for disclosure of information related to the cooperating witness.<sup>128</sup>

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125. See *United States v. Singleton*, 144 F.3d 1343, 1347-48 (10th Cir. 1998), *rev'd*, 165 F.3d 1297 (10th Cir. 1999) (*en banc*).

126. See *Singleton*, 165 F.3d at 1301.

127. See *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987). In determining whether witnesses compensated by fee arrangements with the government should be allowed to testify, the *Cervantes-Pacheco* court adopted the majority view that such witnesses and witnesses promised reduced sentences may testify, despite their potential motivation to lie, if the government’s bargain is fully disclosed such that the jury can evaluate witness credibility. See *id.* See also Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1 (1992).

128. See *United States v. Boyd*, 833 F. Supp. 1277, 1362 (N.D. Ill. 1993) (overturning convictions of 38 members of the notorious Chicago El Rukns gang because the prosecution failed to turn over evidence regarding witness credibility to the defense, and noting that the prosecution’s review of prior criminal history of witnesses should not be limited to convictions but should also include prior investigations, with particular concern for those involving fraud, false statements, and obstruction).

Following the conviction of former U.S. Senator Ted Stevens, revelations regarding the prosecution’s failure to disclose information about cooperating witnesses resulted in dismissal of the case and the instigation of a criminal investigation of the government lawyers. See *United States v. Stevens*, No. 1:08-cr-00231-EGS, 2009 WL 6525926 (D.D.C.

**Commentary to Subdivisions 26-2.5 (d)**

Some cooperating witnesses are career criminals, who make their living through criminal activity, including criminal activity that may not be part of the investigation. A cooperating witness may expect that a cooperation agreement allows criminal activity to continue and that they have, in effect, a “get out of jail free card.” Such an expectation must be addressed and rebutted directly as a part of the cooperation agreement. This limitation is not intended to apply to the criminal activity carried out as a part of the investigation, which should be subject to appropriate controls and guidelines.

Frequently, cooperation agreements must address the status of the cooperating witness after the end of the investigation and any prosecution. This may include providing the cooperating witness with benefits such as drug treatment. In this context, the cooperating witness’ obligations to debtors, family members, and others must be considered, and the cooperation agreement must be prepared in such a way as to eliminate or minimize adverse impacts on the legal rights of third parties. The reference to “third parties’ legal rights” in (d)(ii) refers to those circumstances in which a cooperating witness may seek to have the government intercede on his or her behalf in other legal proceedings or financial matters, such as custody and child-support disputes. Promises to do so should be avoided, although it should be permissible to inform relevant authorities of the witness’s cooperation, upon request of the witness.

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2009) (dismissal of conviction against former Senator Ted Stevens because line prosecutors withheld exculpatory material developed during the investigation); *see also* Neil A. Lewis, *Justice Dept. Moves to Void Stevens Case*, N.Y. TIMES, Apr. 1, 2009, available at <http://www.nytimes.com/2009/04/02/us/politics/02stevens.html>. Following their investigations, both the Special Counsel appointed by the Court to investigate the issue and DOJ’s Office of Professional Responsibility concluded that the prosecutors violated their constitutional obligations to disclose exculpatory information. *See* Notice of Filing of Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court’s Order, dated April 7, 2009, at 39, In Re Special Proceedings (D.D.C. Mar. 15, 2012) (No. 1:09-mc-00198-EGS); OFFICE OF PROF’L RESPONSIBILITY, U.S. DEPARTMENT OF JUSTICE, INVESTIGATION OF ALLEGATIONS OF PROSECUTORIAL MISCONDUCT IN UNITED STATES V. THEODORE F. STEVENS, CRIM. NO. 08-231 (D.D.C. 2009) (EGS) 25-29 (Aug. 15, 2011).

### Commentary to Subdivision 26-2.5 (e)

The prosecutor should always bear in mind that anything said to a cooperator may be repeated to those outside of the investigation. If a stray remark about the course of the investigation is secretly shared with a criminal associate, it could damage an investigation or even cause physical harm. The prosecutor who becomes too comfortable with a cooperator is also bound to provide defense lawyers with grist for cross examination. A good discipline is for prosecutors to imagine that cooperators are tape recording them at all times. Indeed, sometimes, they are.<sup>129</sup>

### Commentary to Subdivision 26-2.5 (f)

Given the unequal bargaining positions between the prosecutor and the cooperator, and in order to protect the prosecutor from subsequent charges of exerting undue influence, the prosecutor should consider advising unrepresented cooperators that they may wish to seek legal counsel, and afford them the opportunity to do so. This is especially so if an agreement includes a commitment to plead guilty to a criminal charge. The prosecutor dealing with an unrepresented cooperator must take great care not to state or imply that the prosecutor is disinterested or is acting on the cooperator's behalf. When discussing the terms and conditions of the cooperation agreement, the prosecutor should be truthful with the cooperator and not take unfair advantage of the fact the cooperator is unrepresented.<sup>130</sup>

### Commentary to Subdivision 26-2.5 (h)

Cooperation agreements should always be in writing. The Constitution requires that promises of leniency made to cooperating witnesses be disclosed to defendants.<sup>131</sup> When agreements are not reduced to writing, there can and will be disputes over what was or was not promised. Indeed, the seminal case on the subject, *Giglio v. United States*,<sup>132</sup> is an object lesson in why to reduce promises to writing. The different ver-

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129. See *Friedman v. Rehal*, 618 F.3d 142 (2d Cir. 2010) (witness's mother secretly videotaped improper and suggestive questioning by detectives).

130. See MODEL RULES OF PROF'L CONDUCT R. 4.3.

131. See *Giglio v. United States*, 405 U.S. 150, 154 (1972).

132. *Id.*

sions of the “promises” made to the cooperator (each version provided by a different government lawyer) ranged from: (1) no promises were made, to (2) the cooperator would have to rely on the “good judgment and conscience” of the government as to whether he would later be prosecuted, to (3) he “would not be . . . indicted.” But more than three decades after this confusion in *Giglio*, some prosecutors are still not reducing agreements to writing, leading to potential prejudice to the defendant being prosecuted, disruption of a trial, and findings of prosecutorial misconduct.<sup>133</sup>

Second, the writing should be made “as soon as practicable.”<sup>134</sup> Practicable does not mean immediate. Often, the moment for fruitful cooperation is precisely at the moment that a potential cooperator is approached or arrested. Delay necessary to reduce an agreement to fully debrief the cooperator and reduce the agreement to writing can sometimes allow the opportunity to be lost, which is beneficial to neither the cooperator nor the government.<sup>135</sup>

The Standards sets forth the issues that should be covered in every cooperation agreement, and things that a prosecutor should never agree to. Thus, a prosecutor should never promise to forgo prosecution of future crimes (exempting, of course, crimes committed at the direction, and under the supervision, of law enforcement as part of the investigation), and the agreement should give leniency only for crimes that have

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133. See *United States v. Casas*, 425 F.3d 23, 44 (1st Cir. 2005) (describing prosecutors’ failure to disclose a verbal cooperation agreement—discovered only as the cooperator was being cross-examined—as “serious” misconduct).

134. See Standard 2.5(h).

135. The special case where an investigative opportunity may pass quickly (and thus an opportunity for a potential cooperator to earn credit) causes a distinctive problem when a cooperator has no lawyer. Under normal circumstances, it is improper under the Standards for a prosecutor to withdraw a cooperation offer simply because a prospective cooperator has asked to consult with counsel before deciding. Indeed, the Standards require the prosecutor to fully respect the role of the defense lawyer in counseling a client whether or not to cooperate. However, if the time it would take to consult a defense lawyer would render the agreement ineffective because the investigative opportunity would pass, then the prosecutor may condition the offer on an immediate uncounseled decision. This could occur, for example, when a suspect is arrested immediately before a narcotics transaction, and is offered a chance to consensually record the impending sale. If the cooperation does not take place right then and there, then the cooperation may be of no or limited value. This is the exception, however, not the rule. In most circumstances, there is more than enough time for engagement and consultation with defense counsel.

been fully disclosed to the government. Implicit in this approach is that the prosecutor should not enter into a cooperation agreement until the potential cooperator has been fully debriefed.<sup>136</sup> This debriefing should take place when the potential cooperator is represented by counsel.<sup>137</sup> And a prosecutor should never agree to impair the rights of a third party—for example, by agreeing that the government will intercede in custody or child-support disputes.

Every agreement must detail the benefits to be conferred on the cooperator (*e.g.*, any promises made with respect to immunity, or a lesser plea, or reduced sentence, or the payment of monies, or leniency offered to another, or the favorable disposition of any civil enforcement or forfeiture actions), the cooperator's obligations (*e.g.*, to testify, to work proactively, to tell the truth, to cooperate with other agencies, to forbear from further criminal activities), who else in the government is or is not bound (*e.g.*, other jurisdictions or civil enforcers), and what the consequences are to the cooperator if he breaches the agreement (*e.g.*, he may be prosecuted for the full amount of his conduct using against him statements made during cooperation or his guilty plea stands but promises of leniency do not).

Confrontation rights are implicated in drafting a cooperation agreement, including properly memorializing the conduct for which the cooperator is being given a break. Prosecutors are constitutionally required to disclose both promises of leniency and cooperators' bad acts.<sup>138</sup> A correctly drafted cooperation agreement—written after a full debriefing of the cooperator—accomplishes this. In any event, the Standards require the prosecutor to know and understand disclosure requirements, and

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136. *But see* discussion at footnote 135, *supra*.

137. *See* Standard 2.5(f). Negotiating a cooperation agreement with an unrepresented defendant implicates a prosecutor's obligations under the professional rules. The prosecutor may not "state or imply" that he or she is "disinterested," and may not give "legal advice" to the putative cooperator "other than the advice to secure counsel." MODEL RULES OF PROF'L CONDUCT R. 4.3 (Dealing with Unrepresented Person). Nor may the prosecutor engage in "conduct involving . . . deceit." *Id.* at R. 8.4 (Misconduct).

138. *See* Giglio, 405 U.S. at 152 (promises); *United States v. Boyd*, 833 F. Supp. 1277, 1362 (N.D. Ill. 1993) (discussed in footnote 124, *supra*); *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986) (noting "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination[.]" and noting that this can include "exposure of a witness' motivation," allowing for effective cross examination of cooperating witnesses) (emphasis in original) (citation omitted).

to preserve evidence of the cooperator's criminal history and any other evidence that impacts on the cooperator's credibility.<sup>139</sup>

A written cooperation agreement avoids questions as to the nature and scope of the agreement between the government and the cooperating witness. Further, since the cooperation agreement may well be subject to consideration by a jury, as noted above, the agreement should make clear that any benefit afforded to a cooperating witness is contingent upon the cooperating witness' truthfulness. If the prosecutor involved in negotiating the agreement will try the case, a cooperation agreement avoids creating a witness/advocate problem for the prosecutor at trial.

Another reason to place a cooperation agreement in writing is the recognition that some cooperating witnesses will breach some terms of the cooperation agreement. The remedies for breach must contemplate both minor breaches, and also appropriate remedies for them, and serious breaches, which should invalidate the agreement in its entirety.

#### Commentary to Subdivision 26-2.5 (j)

The prosecutor must ensure that the cooperator is not intruding into the Sixth Amendment rights of those being investigated. Under the rule of *Massiah v. United States*<sup>140</sup> and *Brewer v. Williams*,<sup>141</sup> the Sixth Amendment bars the government from soliciting incriminating evidence from a defendant once judicial proceedings have been initiated. In *Massiah*, the government turned a co-defendant into a "listening post" by sending the codefendant (who unbeknownst to Massiah was cooperating with federal authorities) to meet with Massiah and gather evidence that was transmitted via electronic surveillance to the authorities.<sup>142</sup> The meeting yielded admissions by Massiah, which were overheard by a federal agent who testified to the statements at trial.<sup>143</sup> The Supreme Court held that Massiah was denied the basic protections of the Sixth Amendment, because he had been indicted and was represented by counsel.<sup>144</sup>

This rule was reinvigorated by the Supreme Court in *Williams*, which relied on *Massiah* in holding that, once adversary proceedings

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139. See Standard 2.5(e)(ii).

140. 377 U.S. 201 (1964).

141. 430 U.S. 387 (1977).

142. See *Massiah*, 377 U.S. at 202-03.

143. See *id.* at 203-04.

144. See *id.* at 206-07.

are commenced, individuals have the right to legal representation under the Sixth and Fourteenth Amendments when the government interrogates them.<sup>145</sup>

In addition, during the course of a criminal investigation, the prosecutor must be aware that a cooperating witness may become privy to information that the relevant jurisdiction considers privileged or otherwise protected and must take steps to prevent the witness from transmitting it to those not involved in the investigation.

### Commentary to Subdivision 26-2.5 (k)

The Standards require that the prosecutor remain skeptical when working with a cooperator. When deciding on an investigative step based on information from the cooperator, the prosecutor should “be satisfied” as to the information’s truthfulness. There is no hard and fast rule as to how to do this, but prosecutors can consider sources of information ranging from hard corroborating evidence to a lack of motive for the cooperator to lie (*e.g.*, that the cooperator is neither exculpating a friend nor inculcating an enemy) to the views of experienced investigators.<sup>146</sup> The level of confidence in the cooperator’s truthfulness becomes more important when the rights of third parties, or the success of the investigation, are at stake.

### Commentary to Subdivision 26-2.5 (n)

The Standards impose an obligation when a prosecutor suspects that a cooperator is being untruthful.<sup>147</sup> When harboring such a suspicion, the prosecutor must take reasonable steps to address his or her concerns. The theory here is simple. Either the prosecutor will allay suspicions about the cooperator, or problems with the cooperator will be revealed. The truth is served in either case.

It is a fact of life that some cooperators breach their agreements. Under the Standards, the first thing that a prosecutor should do when cooperator has done so, is to notify a supervisor. The Standards direct that

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145. See Williams, 430 U.S. at 400.

146. Some would go further: “[N]o truly independent corroboration, no deal. The possibility of perjury, and thus error and injustice, is too high.” Rory Little, *It’s Not My Problem? Wrong: Prosecutors Have an Important Ethical Role to Play*, 7 OHIO ST. J. OF CRIM. L. 685, 692 (2010).

147. See Standard 2.5(m).

line assistants should not make a decision of this magnitude—reacting to the breach—on their own. In entering into a cooperation agreement, the prosecutor’s office has in some respects tied itself to the cooperator. When the cooperator betrays the office, the office must get involved, not just a line assistant.

The office must then take serious steps. It must either undertake or commission an investigation into the breach. It must consider prosecuting the cooperator. And it must reevaluate the investigation. Courts, juries, and potential future cooperators alike must be confident that the prosecutor will simply not countenance a cooperator who is casual with the truth.

This does not, of course, mean that every breach leads to a prosecution, or to an investigation being derailed. Not all breaches warrant remedies that drastic. But every breach warrants some remedy, and the supervisors in the office should be able to calibrate the response.

### **Standard 26-2.6 The decision to arrest during a continuing criminal investigation**

- (a) In making a tactical decision whether, when or where to arrest a subject during a continuing investigation, the prosecutor should consider the potential benefits of the arrest, including:**
- (i) protecting the public from a person known to present an imminent danger;**
  - (ii) reducing the likelihood of flight;**
  - (iii) preventing the destruction of evidence and providing an opportunity to obtain evidence of a crime pursuant to a search incident to arrest;**
  - (iv) stopping or deterring the harassment or coercion of witnesses or other acts of obstruction of justice;**
  - (v) creating an opportunity to ask questions about an unrelated crime;**
  - (vi) encouraging other culpable individuals or witnesses to surrender to law enforcement and to cooperate with the investigation;**
  - (vii) inducing relevant conversation or other communication likely to be intercepted by law enforcement; and**

- (viii) protecting the existence of an undercover agent or confidential informant, a cooperator or an undercover operation.
- (b) In deciding whether, when or where to arrest a subject during a continuing investigation, the prosecutor should consider the potential risks of the arrest, including:
- (i) limiting the continued conduct of a criminal investigation by alerting others involved in continuing criminal activity;
  - (ii) restricting the use of some investigative techniques;
  - (iii) triggering speedy charge and speedy trial rules;
  - (iv) triggering disclosure obligations that have been subject to delayed notice;
  - (v) appearing to be illegitimate or pre-textual and thus adversely affecting community support for police and prosecution efforts; and
  - (vi) causing significant shame, embarrassment or prejudice to the arrestee or innocent third parties and unintended and unfair financial impacts.
- (c) The prosecutor should be aware that Sixth Amendment right to counsel issues raised by the filing of criminal charges may limit the availability of some investigative options, including:
- (i) use of the grand jury as an investigative technique;
  - (ii) soliciting incriminating information from a charged individual; and
  - (iii) contacts with the individuals or entities who have been charged.

### *Related Standards*

ABA Criminal Justice Standards: Pretrial Release (3d ed. 2007).

### *Commentary*

In ordinary street crime, when police see a significant crime being committed they usually make an arrest on the spot. In the course of a complex criminal investigation, the decision to arrest is also complex. Investigators may decide not to arrest in order to gather more evidence, which may allow additional crimes to be committed.

An arrest can result in both benefits and risks (or perhaps a more appropriate term would be “consequences”). Some benefits are obvious (such as taking a dangerous person off the street or minimizing the risk of flight). Others include more nuanced investigative strategies, such as the use of an arrest to “tickle a wire” where ongoing electronic surveillance may be enhanced by anticipated discussions on the meaning of an arrest and its impact on a criminal operation.

An arrest also means that at least one part of the investigation has become overt, and this may cause criminals to better cover their tracks, temporarily suspend activities, or destroy evidence. It also moves the case out of the purely investigative stage into the adversarial system, where discovery (including disclosure of recorded conversations), speedy trial rights, and the right to confrontation of witnesses now govern.

This Standard is designed to help the prosecutor consider not only whether an arrest should occur, but also when and in what manner. A factor that should be fully considered by prosecutors is the collateral damage inflicted by an arrest. The arrest—and the manner in which it is effected—can damage third parties, family members, and businesses.<sup>148</sup> Thus, in some circumstances, an individual should be permitted to surrender rather than be arrested in front of family and friends or coworkers, but this should not occur in circumstances where doing so would be reasonably expected to lead to flight or to the destruction of evidence.

An arrest may be used to try to convince the arrestee to become a cooperating witness or a confidential informant. However, a public arrest coupled with threatening release in a manner suggesting cooperation with law enforcement, thereby exposing someone to a significant risk of serious harm, is simply improper.<sup>149</sup>

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148. See, e.g., *Silor v. Romero*, 868 F.2d 1419 (5th Cir.1989) (reversing in part on a jury instruction on damages, but affirming § 1983 violation leading to false arrest and lost business profits, involving two police officers whose actions, among other things, damaged defendant’s credit); Tom Lowenstein, *Collateral Damage*, THE AMERICAN PROSPECT (Jan. 1, 2001), available at [http://www.prospect.org/cs/articles?article=collateral\\_damage\\_010101](http://www.prospect.org/cs/articles?article=collateral_damage_010101) (describing the effect on children of Florida mother’s arrest for conspiracy to distribute cocaine).

149. Thus, for example, the police procedure manual for the City of Cincinnati, Ohio, instructs officers that before releasing an arrestee they should consider, among other things, “potential physical injury to the individual.” *City of Cincinnati Police Department Procedures Manual*, Section 12.555 (Arrest/Citation: Processing of Adult Misdemeanor and Felony Offenders), available at [http://www.cincinnati-oh.gov/police/downloads/police\\_pdf8501.pdf](http://www.cincinnati-oh.gov/police/downloads/police_pdf8501.pdf).

## **Standard 26-2.7 Use of subpoenas**

(a) As used in these Standards, a “subpoena,” however named or designated, is a written command for a person or entity to provide physical evidence, testimony or documents. A subpoena may be issued by a prosecutor, a court, a grand jury or a law enforcement agency, as provided by the law of the jurisdiction.

(b) In deciding whether to use a subpoena, the prosecutor should consider potential benefits including:

- (i) the conservation of law enforcement resources by requiring others to search for and provide factual information and physical evidence needed for an investigation;
- (ii) the imposition of an obligation on the subject of the subpoena to provide factual information or physical evidence;
- (iii) the fact that no predicate or less of a showing is required to issue a subpoena, as compared to a search warrant;
- (iv) the ability to delay or prevent a third party from voluntarily or compulsorily disclosing information about the subpoena (including the disclosure of either the fact of the subpoena itself or of any information provided in response) as a means to preserve the secrecy of the investigation if authorized by law; and
- (v) voluntary disclosures or cooperation by witnesses and subjects prompted by receipt of the subpoena.

(c) In deciding whether to use a subpoena, the prosecutor should consider the following potential risks and ways to mitigate them:

- (i) that evidence will be destroyed or altered in between receipt and production;
- (ii) that information responsive to the subpoena will be improperly withheld or that the request will be interpreted narrowly; and
- (iii) that knowledge of the subpoena will cause the subjects of the investigation to disguise criminal activity, or take actions to impede or obstruct the investigation.

(d) The prosecutor using a subpoena should:

- (i) seek to limit the scope of the subpoena to the needs of the investigation, avoid overbroad requests, and avoid seeking the production of attorney-client privileged material; and

- (ii) provide reasonable accommodations based on factors such as the size or nature of the request, the impact of the request on legitimate business operations, or the time reasonably needed to perform a review for privileged or other legally protected fact information, unless doing so would be outweighed by the government's interest in avoiding delay.
- (e) The prosecutor should ensure that materials received pursuant to a subpoena are properly stored, logged or indexed, and are readily retrievable.
- (f) The prosecutor should accept copies of documents subject to a subpoena unless there is a specific need for original documents that outweighs the producing party's need and right to retain its original materials.
- (g) The prosecutor should provide copies, or if necessary, reasonable access to copies or original documents to the person or entity who has produced the copies or originals.
- (h) The prosecutor should seek to minimize the cost and dislocation suffered by a person or entity to whom a subpoena is issued and, where applicable, should inform the person or entity of any right to compensation allowed by law.
- (i) The prosecutor should arrange for the return of subpoenaed documents and materials when the purpose for which they were subpoenaed has ended.
- (j) The prosecutor involved in an investigation where police or law enforcement agents have legal authority to issue written requests for various records and data without probable cause or judicial oversight, should provide advice as to whether the proposed use of such authority is consistent with the limits of the applicable law, the Constitution, and the circumstances of the investigation.

### *Related Standards*

- ABA Criminal Justice Standards: Prosecution Function
  - Standard 3-3.1(e) (Investigative Function of Prosecutor)
- ABA Model Rules of Professional Conduct
  - Rule 3.8(e) (Special Responsibilities of a Prosecutor)
- NDAA National Prosecution Standards
  - Standard 41.1 (Subpoena Power)

### Commentary

The need to obtain documents and other evidence from witnesses, victims, or subjects is a routine part of most investigations. There are a variety of ways to accomplish this, such as voluntary requests, subpoenas *duces tecum*, search warrants, or seizures incident to arrest. This Standard addresses the factors a prosecutor should consider in deciding whether to use a subpoena, and the steps the prosecutor should consider to mitigate the burdens on the producing party.

A subpoena *duces tecum* conserves law enforcement resources. As a practical matter, a subpoena shifts the burden of searching for evidence onto the producing party. Issuing subpoenas does not require probable cause, and as a result they may be issued during the early stages of an investigation.<sup>150</sup> Issuing a subpoena can also change the investigative dynamics; a witness who receives one may decide to volunteer information or assistance beyond what the subpoena requires.

Subpoenas *duces tecum*, however, are sometimes unsuitable. Some offenders have little regard for the rule of law, and will destroy records rather than dutifully gather them up for delivery. Issuing a subpoena is also an overt act by the prosecutor. Absent a law or a court order, a subpoenaed witness is free to tell others that he or she received a subpoena, what the subpoena called for, and what was produced. If the investigation was once covert, it is no longer so after a subpoena is issued.

In addition, prosecutors should appropriately consider the costs of responding to a subpoena—including the disruption of the operation of the business receiving it, and the cost of compliance.<sup>151</sup> These types of costs have existed as long as there have been subpoenas, but in the new world of electronic communication and storage, the costs can easily become overwhelming.<sup>152</sup> Thus, the prosecutor should not financially burden a witness for merely being the custodian of a large volume of electronic or paper records that may contain relevant evidence—a wrong that can be exacerbated by writing subpoenas that are overbroad.<sup>153</sup>

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150. See, e.g., *Zurcher v. Stanford Daily*, 436 U.S. 547, 562-63 (1978) (noting distinction between warrant and subpoena in that latter does not require a showing of probable cause).

151. See Standard 2.7(d)(ii), (h).

152. See Cotts, *supra* note 9 (discussing the ballooning costs of e-discovery).

153. Little, *supra* note 17, at 758 (“[C]ases [on overbreadth] indicate that prosecutors can recognize investigative disproportion when it is called to their attention by opposing

A subpoena can cause collateral damage. A person or entity that receives one must spend time and money to respond. Some entities may have a duty to disclose receipt of a subpoena to others, thus informing the world that they are somehow linked to a criminal investigation. When a third party receives a subpoena, it can cause significant reputational harm. As Judge John Gleeson has noted, “The service of a single grand jury subpoena can ruin a person’s livelihood and, on occasion, even jeopardize a person’s life.”<sup>154</sup> The prosecutor must be mindful of these possibilities, and determine whether the expected benefit merits the subpoena’s issuance.

### **Standard 26-2.8 Search warrants**

**(a) As used in these Standards a “search warrant” is a written command issued by a judge or magistrate that permits law enforcement agents to search specified persons or premises and seize specified effects and information.**

**(b) The prosecutor should consider the following potential benefits associated with using a search warrant:**

- (i) securing evidence that might otherwise be removed, hidden, altered or destroyed;**
- (ii) removing contraband from commerce before it is transferred or used;**
- (iii) seeing and documenting the precise location of the items to be seized in their natural or unaltered state or location;**
- (iv) obtaining statements by individuals at the scene of the search that might further the investigation;**
- (v) observing and recording the presence of individuals found together at the scene of the search as evidence of their coordination; and**
- (vi) encouraging other culpable individuals or witnesses to come forward and provide information to the investigation.**

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lawyers or judges. It does not seem overburdensome to ask prosecutors to exercise such discretion in advance rather than in hindsight.”).

154. Hon. John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POLICY 423, 425 (1997).

(c) The prosecutor should consider the following potential costs and risks before applying for a search warrant:

- (i) the extensive utilization of limited government resources during the preparation and execution of a search warrant, as compared with other means of gathering information, such as a subpoena;
- (ii) the intrusive nature of the execution of the warrant and its impact on personal privacy or on legitimate business operations;
- (iii) the impact of execution of the warrant on innocent third parties who may be on the premises at the time the warrant is executed; and
- (iv) the potential danger or harm to third parties.

(d) When the prosecutor is involved in an investigation, the prosecutor should review search warrant applications prior to their submission to a judicial officer. In all other cases, the prosecutor should encourage police and law enforcement agents to seek prosecutorial review and approval of search warrants prior to their submission to a judicial officer.

(e) In jurisdictions that authorize telephonic warrants, the prosecutor should be familiar with the rules governing the use of such warrants and should be available to confer with law enforcement agents about them.

(f) In reviewing a search warrant application, the prosecutor should:

- (i) seek to assure the affidavit is complete, accurate and legally sufficient;
- (ii) seek to determine the veracity of the affiant and the accuracy of the information, especially when the application is based on information from a confidential informant; and
- (iii) seek to ensure that the affidavit is not misleading and does not omit material information which has a significant bearing on probable cause.

(g) The prosecutor involved in the investigation should:

- (i) generally, if time permits, meet in advance with all law enforcement and other personnel who will participate in the execution of the warrant to explain the scope of

the warrant, including the area(s) to be searched and the items to be seized;

- (ii) consistent with the goals of the investigation, provide legitimate business operations and third parties reasonable access to seized records;
- (iii) avoid becoming a necessary percipient witness at the scene of the execution of the warrant but be readily available and accessible to respond to immediate questions or to assist in the preparation of additional warrant applications;
- (iv) seek to ensure that an inventory is filed as required by relevant rules; and
- (v) seek to preserve exculpatory evidence obtained during a search and consider the impact of such evidence on the criminal investigation.

(h) When searching an attorney's office, or any place where attorney-client or other privileged material is likely to be located or is discovered, the prosecutor should arrange for evidence to be recovered in such manner as to prevent or minimize any unauthorized intrusion into confidential relationships or information privileged under law.

(i) The prosecutor should seek to prevent or minimize the disclosure of information to the public which a person or entity may consider private or proprietary.

(j) The prosecutor should consider seeking to delay notice about the execution of a search warrant if such delay is authorized by law and if prompt disclosure of the execution of the warrant could reasonably be expected to result in:

- (i) the endangerment of life or physical safety of an individual;
- (ii) the intimidation of potential witnesses;
- (iii) the flight from prosecution by a target of any investigation;
- (iv) the destruction of or tampering with evidence in any investigation; or
- (v) any other serious jeopardy to an investigation.

(k) The prosecutor should not notify media representatives of a search before it occurs and should advise law enforcement agents acting with the prosecutor in the investigation not to do so.

(I) The prosecutor should consider whether the papers supporting the search warrant should be sealed after the warrant is executed and should make application to do so only when the prosecutor believes that the public's interest in knowing of the warrant is outweighed by the need to maintain secrecy of the investigation or to prevent unfair publicity to the persons or organizations whose premises were searched.

### *Related Standards*

ABA Criminal Justice Standards: Electronic Surveillance of Private Communications

Standard 2-3.1(c) (General Principles)

ABA Criminal Justice Standards: Prosecution Function

Standard 3-3.4(b) (Decision to Charge)

ABA Criminal Justice Section Guidelines for Issuance of Search Warrants (1990)

ABA Criminal Justice Standards: Prosecutorial Investigations

Standard 1.5 (Contacts With the Public During the Investigative Process)

### *Commentary*

This Standard addresses crucial considerations when deciding whether to employ this resource-intensive and intrusive investigative technique. If the decision is made to use a warrant, this Standard describes the steps the prosecutor should take regarding the accuracy of the application and the proper execution of the warrant.

Whereas a subpoena requires a witness to produce evidence to the government, a search warrant permits the government to take it. The Constitution permits the use of a search warrant upon a showing of probable cause.<sup>155</sup> The Standards demand more. Before using the law's powers to enter someone's home or business, the Standard directs the prosecutor to consider whether good judgment and sound discretion also warrant the costs and collateral consequences of seeking and executing a warrant.

After the warrant is executed and evidence is seized, the evidence must be reviewed and analyzed in an effort to find the facts. Here again,

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155. See U.S. CONST. amend. IV.

the prosecutor's professional skepticism must be at work, and the prosecutor should re-evaluate the investigation in light of any exculpatory or incriminating evidence that comes to light.<sup>156</sup>

### **Commentary to Subdivision 26-2.8 (b) - (c)**

A primary reason for seeking a warrant is to prevent the destruction of evidence. While some people and organizations will produce inculpatory evidence pursuant to a subpoena *duces tecum*, others will destroy it. By executing a warrant, the prosecutor seeks to eliminate that risk, and the government's reliance on the good faith of the recipient of the subpoena. Concern about concealment and destruction of evidence should be central to the decision to seek a warrant or, perhaps more importantly, when not to.

There are, of course, other investigative advantages a search warrant provides, including viewing the evidence in its surroundings and obtaining physical evidence (such as samples), as well as identifying and interviewing those present at the scene.

A search warrant also demonstrates to targets, witnesses, and the public that an active criminal investigation is underway. This can both spur witnesses forward and terrify others. A search warrant is a profound intrusion on privacy, and the mere fact of a search warrant can harm legitimate businesses and individuals. By its nature, every warrant also carries an element of physical danger, both to civilians and police officers. These risks do not exist in subpoena practice, and before seeking any warrant, a prosecutor should evaluate whether the evidence to be gathered justifies the resources, impacts, and risks described herein.

### **Commentary to Subdivisions 26-2.8 (d), (f), (g), (h), (i)**

The Standards take the position that a prosecutor should review all search warrant applications before they go to a judge, even if the jurisdiction allows police officers or agents to apply directly. This is no *pro forma* requirement—a prosecutor's review plays a vital role. Where the "good faith" and the "inevitable discovery" doctrines have reduced the effect of the exclusionary rule, the critical eye of an officer of the court is a particularly important safeguard in protecting the rights of the innocent and the admissibility of evidence. Furthermore, the Standards note that

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156. See Standard 2.8(i)(v).

special care is demanded when an affidavit is based on the testimony of a confidential informant, a valuable but potentially unreliable source of information.<sup>157</sup>

Conferring with police and agents regarding the veracity of statements contained in the warrant application should limit the effect of subsequent challenges to the validity of the warrant.<sup>158</sup> In reviewing the application, the prosecutor attempts to assure that it is “complete, accurate, and legally sufficient.”<sup>159</sup> This means probing and testing the affiant, not merely reviewing what has been drafted for facial sufficiency. To avoid the risk of suppression, the prosecutor should make disclosures in the affidavit as to, among other things:

- Favorable treatment promised to an informant or accomplice who has provided information;
- Personal or professional grudges held by a supporting witness;
- The criminal history, or reputation for deceit, of a supporting witness;
- Any other matter that the reviewing magistrate would want to hear about, even if providing the information may delay the issuance of the warrant or raise a question as to probable cause.

The prosecutor’s role only begins when a judge issues a warrant. Before the warrant is executed, and to help avoid the possible suppression of the fruits of a search warrant (because of flawed execution), the prosecutor should, whenever possible, hold a meeting with all those involved in the execution of the warrant. The purpose of such a meet-

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157. The State of Texas passed legislation requiring corroboration of information provided by jailhouse informants, due to the frequency of inaccurate information being obtained from these sources. *See* TEX. CODE CRIM. PROC. art. 38.075 (2010); *Watkins v. State*, No. 10-10-55-CR, 2010 Tex. App. LEXIS 9641, at \*14 (Dec. 1, 2010) (noting that Article 38.075 “was enacted in recognition that incarcerated individuals have an incentive to provide information against other incarcerated individuals and that this testimony should be corroborated”) (citing S. COMM. ON CRIMINAL JUSTICE, BILL ANALYSIS, Tex. S.B. 1681, 81st Leg., R.S. (2009)).

158. *See, e.g., Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) (conviction reversed and remanded for further proceedings to determine whether defendant could establish by preponderance of the evidence that affiant included a false statement knowingly and intentionally, or with reckless disregard for the truth, in the search warrant affidavit, and whether with this false material set aside, the remaining content was sufficient to establish the probable cause necessary to save the warrant and prevent the fruits of the search from being excluded).

159. *See* Standard 2.8(f).

ing is to review with the team members their understanding of the particular places and/or things to be searched, discuss the “chain-of-command” at the search by which law enforcement officers may raise any issues regarding sensitive locations (such as legal or medical offices, libraries or religious locations), and consider the need for “taint teams” for attorney-client privileged material that may be discovered, the rules about “plain view,” when to obtain additional warrants, and the need to preserve exculpatory evidence, any circumstances unique to a particular case, along with answering any other questions. Prosecutors should consider carefully whether or not videotape should be used during the execution of the warrant, including whether or not the recording of sound is necessary or appropriate.

Prosecutors should recognize that their presence at search warrant executions and similar events can have unintended consequences, such as causing the prosecutor to become a witness to disputed issues involving the scope and manner of the execution.<sup>160</sup> Therefore, while presence at the execution of the warrant is discouraged, the prosecutor should be readily available and accessible to provide legal advice regarding matters that may arise, and be available to speak with defense counsel.

Safety, security, and tactics are the province of the police agency executing the warrant. The prosecutor may properly request, however, that the police be mindful of the collateral consequences of operating with too heavy a hand or with too great a display of force. Some warrants can be executed in what police officers sometimes call a “friendly” manner, one that is tactically low key. Depending on the warrant, the executing officers may prefer this approach and suggest it themselves.

All members of the search team should have read and have a copy of (or access to) the warrant which describes what may be taken while conducting the search. Ideally, one member of the team should be familiar with the entire application and be available to approve seizures before they are removed from the premises.

Whether inculpatory or exculpatory, evidence should be handled with confidentiality. Even in later investigative proceedings, the prosecutor should prevent or minimize the disclosure of information to the

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160. See MODEL RULES OF PROF'L CONDUCT R. 3.7 (Lawyer as Witness) (stating that, with few exceptions, a lawyer “shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness”).

public which is private or proprietary.<sup>161</sup> And, to minimize collateral consequences, the prosecutor should facilitate reasonably prompt access to legitimate records that have been seized, so that lawful business and personal affairs are not unnecessarily impeded.

Finally, the executing officers (and prosecutors) are entitled to qualified immunity during the investigative stage of law enforcement efforts—but, as its name suggests, the immunity that is afforded is not absolute. Qualified immunity does not protect officers who, in light of clearly established law, could not have reasonably believed that their actions were lawful.<sup>162</sup> And because this is an objective inquiry, an officer cannot claim ignorance of clearly established law.<sup>163</sup> Accordingly, courts have routinely held that officers are not entitled to qualified immunity where their actions are objectively unreasonable under the Fourth Amendment.<sup>164</sup>

Given the day-to-day realities of their jobs, law enforcement officers cannot be expected to study the latest contours of the law on their own. But that means that executing officers should welcome a prosecutor's involvement. In the absence of such guidance, even a subjectively "innocent" officer may face personal liability for actions that violate clearly established law.<sup>165</sup> The prosecutor can help guard against such liability, while contributing to the effectiveness of police tactics.

### Commentary to Subdivision 26-2.8 (j)

In deciding to seek a delay of any required notice, the prosecutor should be able to show that a delay is justified because notice would

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161. See 18 U.S.C. § 1905, which makes it a crime for any federal government employee or private sector employee working on behalf of the government to disclose confidential or proprietary information.

162. See, e.g., *Saucier v. Katz*, 533 U.S. 194, 206 (2001).

163. See, e.g., *Graham v. Connor*, 490 U.S. 386, 397 (1989) (explaining that the question is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.").

164. See, e.g., *Henry v. Purnell*, 652 F.3d 524, 534 (4th Cir. 2011) (*en banc*).

165. See, e.g., *Henry*, 652 F.3d at 534 (denying qualified immunity to an officer who claims that he meant to draw his taser but instead drew his firearm, because the use of a firearm was objectively unreasonable under the circumstances); see also *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (finding an implied right of action to sue federal law enforcement officers based on an unlawful search and arrest).

result in: (a) a danger to the physical safety of any person, (b) flight from prosecution, (c) destruction of evidence, (d) intimidation of witnesses, or (e) other serious jeopardy to the investigation or trial of a comparable degree. Renewals of the delay period should be granted upon the same showing of necessity.<sup>166</sup>

#### **Commentary to Subdivision 26-2.8 (k)**

The execution of a search warrant should never be conducted so as to create a public spectacle. A warrant is a court authorized intrusion into a constitutionally protected domain. The press has no place in any ride-along role, and should never be notified before or during execution. Even post-execution, the prosecutor should, at most, make limited comment.<sup>167</sup>

### **Standard 26-2.9 Use of the investigative powers of the grand jury**

- (a) In deciding whether to use a grand jury, the prosecutor should consider the potential benefits of the power of the grand jury to compel testimony or elicit other evidence by:**
- (i) conferring immunity upon witnesses;**
  - (ii) obtaining evidence in a confidential forum;**
  - (iii) obtaining evidence from a witness who elects not to speak voluntarily to the police or prosecutor;**
  - (iv) obtaining documentary or testimonial evidence with the added reliability provided by the oath and the secrecy requirements of the grand jury;**
  - (v) obtaining documentary evidence from a third party that may be difficult to obtain from a target; and**

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166. See *In re Thirty-Nine Administrative Subpoenae*, 754 F. Supp. 5, 6-7 (D. Mass. 1990) (denying without prejudice 39 applications made by the government for delayed notice and renewal of delayed notice to bank customers whose records the government was seeking because the applications failed to include sufficient supporting affidavits detailing with reasonable specificity the particular facts illustrating the statutory grounds for which delay existed).

167. See Standard 1.5.

- (vi) preserving witnesses' accounts in the form of sworn testimony where the jurisdiction provides for recording or transcription of the proceedings.
- (b) In deciding whether to use a grand jury, the prosecutor should consider the potential risks including:
- (i) revealing the existence or direction of an investigation;
  - (ii) obtaining evasive or untruthful testimony from witnesses who are loyal to targets or fearful of them;
  - (iii) relying on witnesses to obey the commands of subpoenas directing them to produce documents or physical evidence;
  - (iv) granting immunity to witnesses:
    - (A) who are not believed culpable at the time of the grant but are later found to be culpable; or
    - (B) who are later found to be more culpable than the prosecutor believed at the time of the grant;
  - (v) exposing grand jury witnesses to reputational, economic or physical reprisal; and
  - (vi) exposing grand jury witnesses to collateral consequences such as lost time from employment or family obligations, financial costs of compliance, and potential damage to their reputation from association with a criminal investigation.
- (c) In pursuing an investigation through the grand jury, the prosecutor should:
- (i) only bring a matter before the grand jury with the primary purpose of seeking justice and to be mindful of the ex parte nature of proceedings;
  - (ii) prepare adequately before conducting grand jury examinations;
  - (iii) know and follow the laws of the jurisdiction and the rules, practices, and policies of the prosecutor's office;
  - (iv) pose only legal and proper questions and, if within the knowledge of the prosecutor questioning may elicit a privileged or self-incriminating response, advise the witness of the existence of the applicable privilege; and
  - (v) unless prohibited by the law of the jurisdiction, ensure that grand jury proceedings are recorded.

- (d) The prosecutor should use grand jury processes fairly and should:
- (i) treat grand jurors with courtesy and give them the opportunity to have appropriate questions answered; however, the prosecutor should not allow questions that:
    - (A) elicit facts about the investigation that should not become known to the witness; or
    - (B) call for privileged, prejudicial, misleading or irrelevant evidence;
  - (ii) issue a subpoena ad testificandum only if the prosecutor intends to bring the witness before the grand jury;
  - (iii) refrain from issuing a subpoena that is excessively broad or immaterial to the legitimate scope of the grand jury's inquiry;
  - (iv) make reasonable efforts before a witness appears at the grand jury to determine that the testimony is needed, including offering the witness or witness' counsel a voluntary pre-appearance conference;
  - (v) grant reasonable requests for extensions of dates for appearance and production of documents when doing so does not impede the grand jury's investigation; and
  - (vi) resist dilatory tactics by witnesses that undermine the grand jury's investigation, authority, or credibility.
- (e) The prosecutor should examine witnesses with courtesy and in a manner designed to elicit truthful testimony, and should:
- (i) consider warning a witness suspected of perjury of the obligations to tell the truth;
  - (ii) insist upon definite answers that will:
    - (A) fully inform the members of grand jury; and
    - (B) establish a clear record so that a witness committing perjury or contempt can be held responsible for such actions;
  - (iii) inform grand jury witnesses of their right to consult with their attorneys to the extent provided by the policy, procedure or law of the jurisdiction; and
  - (iv) seek a compulsion order only when the testimony sought is in the public interest, there is no other reasonable way to elicit such testimony, and the witness has

refused to testify or has indicated an intent to invoke the privilege against self-incrimination.

(f) In determining whether obtaining testimony from a culpable witness will outweigh the cost of granting immunity, a prosecutor should consider the following factors:

- (i) the relative culpability of the witness to be immunized as compared with the person against whom the testimony will be offered;
- (ii) the gravity of the crime(s) being investigated;
- (iii) the probability that the testimony would advance the investigation or an eventual prosecution;
- (iv) the gravity of the crime(s) for which the witness would be granted immunity;
- (v) the character and history of the witness being considered for immunity, including how these factors might affect the witness's credibility;
- (vi) the scope of the immunity that the witness would receive;
- (vii) the risk that the immunized witness would lie or feign lack of memory;
- (viii) the risk that the immunized witness would falsely claim responsibility for criminal acts committed by another; and
- (ix) the potential for the grand jury testimony to enhance truthful testimony by hostile or reluctant witnesses at trial or provide evidence to prove perjury if a witness lies at trial.

(g) Ordinarily, the prosecutor should not seek to compel testimony from a close relative of a target of an investigation by threatening prosecution or offering immunity, unless:

- (i) the relative participated criminally in an offense or criminal enterprise with the target and the testimony sought would relate to that enterprise's activities;
- (ii) the testimony sought relates to a crime involving overriding prosecutorial concerns; or
- (iii) comparable testimony is not readily available from other sources.

(h) Ordinarily, the prosecutor should give notice to a target of a grand jury investigation and offer the opportunity for the target to testify without immunity before the grand jury. However, notice

need not be provided if there is a reasonable possibility it will result in flight of the target, endanger other persons, or obstruct justice. Prior to taking a target's testimony, the prosecutor should advise the target of the privilege against self-incrimination and obtain a waiver of that right.

(i) A prosecutor with personal knowledge of non-frivolous evidence that directly negates the guilt of a subject of the investigation should present or otherwise disclose that evidence to the grand jury. If evidence is provided to the prosecutor by the subject or target of the investigation and the prosecutor decides not to provide the evidence to the grand jury, the prosecutor should notify the subject, target or their counsel of that decision without delay, so long as doing so would not jeopardize the investigation or prosecution or endanger others.

### *Related Standards*

ABA Criminal Justice Standards: Prosecution Function

Standard 3-3.5 (Relations with Grand Jury)

Standard 3-3.6 (Quality and Scope of Evidence Before Grand Jury)

Standard 3-3.7 (Quality and Scope of Evidence for Information)

Standard 3-3.8 (Discretion as to Noncriminal Disposition)

ABA Grand Jury Model Act

§ 101 (Prosecutor's Duty to Disclose Exculpatory Evidence to Grand Jury)

§ 102 (Rights of the Target of a Grand Jury Investigation)

§ 103 (Reporting or Recording of Grand Jury Proceedings)

§ 204 (Rights and Duties of Grand Jury and Attorney for Government; subsections 3 & 5)

ABA Grand Jury Principles

Generally

Principle #1 (re counsel in grand jury)

Principle #2 (re self-incrimination; right to counsel)

Principle #3 (re disclosure of evidence negating guilt)

Principle #4 (re recommendation not to indict)

Principle #5 (re target's right to testify)

Principle #10 (re administrative inquiries)

Principle #16 (re non-permissible statements or arguments)

Principle #20 (re multiple representation)

Principle #21 (re unavailability of witness identity)

Principle #26 (re invocation of self-incrimination privilege)  
NDAA National Prosecution Standards: Investigative Function,  
Standard 59.1

### *Commentary*

The history of the grand jury long precedes the founding of the United States. The protections of a grand jury were viewed as so important by the founding fathers that the Bill of Rights guaranteed that no person would be “held to answer” for an “infamous” crime unless the case had been presented to a grand jury.<sup>168</sup> Because of the grand jury’s power to investigate wrongdoing, and its duty to check governmental power, the grand jury has frequently been referred to as both a “sword and a shield.”<sup>169</sup>

The Standards help guide a prosecutor in respecting both aspects of the grand jury’s role: how to honor the grand jury’s role as a shield, and how to appropriately assist the grand jury in wielding its sword. Here, as in other sections, the Standards focus on practices designed to discover the truth, demonstrate proper restraint, and serve justice.

The rules for the use of the grand jury as an investigative technique vary widely among the states, and between the states and the federal government.<sup>170</sup> These differences limit the ability of these Standards to address all of the varied rules and uses of the grand jury. Thus, for example, some states allow counsel to accompany a witness who appears before a state grand jury.<sup>171</sup>

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168. U.S. CONST. amend. V. Not all states require (or even provide for) grand juries, and the grand jury protections in the Bill of Rights have not been incorporated by the 14th Amendment. *See Hurtado v. California*, 110 U.S. 516 (1884) (finding indictment based upon information as opposed to grand jury not a violation of Fifth Amendment rights). Among states that do provide for a grand jury, the laws vary widely.

169. *But see United States v. Cox*, 342 F.2d 167, 186 (5th Cir. 1965) (Wisdom, J., concurring) (noting that the grand jury “earned its place in the Bill of Rights by its shield, not by its sword”).

170. *See WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE* 740 (4th ed. 2004).

171. *See, e.g., FLA. STAT. § 905.17(2)* (“The witness may be represented before the grand jury by one attorney. This provision is permissive only and does not create a right to counsel for the grand jury witness. The attorney for the witness shall not be permitted to address the grand jurors, raise objections, make arguments, or otherwise disrupt proceedings before the grand jury. The attorney for the witness shall be permitted to advise and counsel the witness . . . .”); *MASS. GEN. LAWS ANN. ch. 277 § 14A* (“Any person shall have the right to consult with counsel and to have counsel present at every step of

## The Power to Compel

### *The Right to a Person's Evidence*

The most potent power of a grand jury is its right to a person's evidence, testimony, and documents. A person may choose to walk away from a police officer rather than answer questions, but one may not ignore a legal and proper summons to a grand jury. Thus, perhaps the most powerful investigative aspect of the grand jury is to obtain "evidence from a witness who elects not to speak voluntarily to the police or prosecutor."<sup>172</sup> Many investigations could not progress in a meaningful way without the ability to require witnesses to give evidence.<sup>173</sup>

The grand jury can compel the production of records and the testimony of witnesses, who must testify under oath and whose statements are recorded. It allows witnesses to speak in an environment that is non-adversarial and confidential. Its proceedings are secret, and thus the identity of those who may be the subject of such an inquiry should almost never be revealed unless sufficient evidence is adduced to go forward with a prosecution. The secrecy of the grand jury is, of course, also a valuable tool for the criminal investigation. It can enable the investigation of targets without their full knowledge, and can guard against the destruction of evidence, harm to witnesses, or the risk of flight.

### Risks and Consequences

The grand jury also presents several potential costs or risks to the criminal investigation. The subpoena of documents and witnesses may alert the targets as to the existence and subject of a criminal investigation. This may, in turn, result in the destruction of evidence or threats or risks of harm to potential witnesses.

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any criminal proceeding at which such person is present, including the presentation of evidence, questioning, or examination before the grand jury; provided, however, that such counsel in a proceeding before a grand jury shall make no objections or arguments or otherwise address the grand jury or the district attorney.").

172. See Standard 2.9(a)(iii).

173. See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 93-94 (1964) ("Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies. Such testimony constitutes one of the Government's primary sources of information.") (citation omitted).

### The Collateral Consequences of Demanding a Person's Evidence

There are costs imposed on every witness who is compelled to testify, some of them enormous. A summoned witness may lose time from a job or family obligations, and may bear other financial costs of compliance that range from duplicating voluminous documents to retaining counsel. For other witnesses, there is reputational damage. In the minds of some, to be called before a grand jury as a witness is evidence of an uncomfortably close association with something criminal. And, finally, still other witnesses are justifiably afraid that if they testify truthfully before a grand jury they may face retaliation by the subjects of the investigation. The Standards require the prosecutor to reflect upon these effects and to consider whether their office is acting with proper proportionality in issuing a grand jury subpoena.

When employing grand jury compulsion, there are also costs to the investigation itself. Witnesses are free to disclose their own testimony, and may share the questions and answers with others. Thus, it is unrealistic to believe that the thrust of an investigation will remain secret to others involved in the case once grand juries begin examining witnesses.

The fact of the grand jury investigation, though designed to be confidential, may thus result in irreparable harm to personal and business reputations. The response to subpoenas for records may be so broad as to create excessive cost and time burdens. Litigation over subpoenas can delay the investigation so significantly that the memory of key witnesses and other evidence may be lost through the passage of time.

The grand jury also can create *Jencks* material that would have to be provided to opposing counsel.<sup>174</sup> In jurisdictions where a lawyer may be present during a witness's testimony, there is a risk that information provided by the witness will be provided to other defendants who are party to a joint defense agreement. The secrecy requirements that may follow from use of a grand jury can also limit the government's ability to easily pursue a parallel civil investigation, as it can result in limits on the ability of civil and criminal personnel to communicate fully.<sup>175</sup>

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174. See *Jencks v. United States*, 353 U.S. 657 (1957); Jencks Act, 18 U.S.C. § 3500 (requiring the federal government to produce to defendants documents relied upon by government witnesses who testify at trial, including verbatim transcripts and other notes or documents).

175. See, e.g., FED. R. CRIM. P. 6(e)(C)(i) (requiring a court order before a prosecutor can disclose grand jury testimony to civil government attorneys); see also *In re Grand Jury*

## Granting Immunity

At times, obtaining testimony in the grand jury may require the government to grant immunity to a witness. The Constitution forbids the government from requiring a witness to give evidence against him or herself.<sup>176</sup> This prohibition is removed only upon a grant of immunity.<sup>177</sup> A grant of immunity may well advance an investigation, but it may do so at too high a cost. Thus, the Standards list factors that a prosecutor should consider in deciding whether to immunize a culpable witness, all of which can be summarized as: Will the immunized witness be truthful and, if so, is the evidence worthy of the leniency that the witness is receiving?

The need to provide immunity for some witnesses may result in the premature loss of otherwise appropriate targets of an investigation. Indeed, immunity conferred by the act of producing documents may preclude future prosecution.<sup>178</sup> Witnesses put before a grand jury at an early stage of an investigation may lie, believing they can frustrate the government's efforts, and thus become less useful to the government when they subsequently recant but are subject to cross-examination for their prior inconsistent statements.

## The Obligation to Act as the Grand Jury's Legal Advisor

These Standards are intended to maximize the effective and appropriate use of this significant investigative tool, while maintaining public confidence in the value and integrity of the grand jury process. All pros-

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Proceedings GJ-76-4 & GJ-75-3, 800 F.2d 1293, 1302 (4th Cir. 1986) (requiring a showing of "particularized need" in order to permit disclosure of grand jury material to a parallel civil proceeding); Environment and Natural Resources Division, United States Department of Justice, *Directive 2008-02, Parallel Proceedings Policy*, at 6-8 (discussing grand jury secrecy and the resulting restrictions on the sharing of information between criminal and civil investigators), available at [http://www.justice.gov/enrd/ENRD\\_Assets/Directive\\_No\\_2008-02\\_Parallel\\_Proceedings\\_Policy.pdf](http://www.justice.gov/enrd/ENRD_Assets/Directive_No_2008-02_Parallel_Proceedings_Policy.pdf).

176. U.S. CONST. amend. V.

177. See *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

178. See, e.g., *United States v. Hubbell*, 530 U.S. 27 (2000) (dismissing case where prosecution necessarily depended on evidence derived either directly or indirectly from the testimonial aspects of the defendant's immunized act of producing documents).

ecutors should act in a manner that respects the independence of the grand jury and the protections it affords to those who come before it.<sup>179</sup>

The prosecutor appearing before a grand jury should seek to provide an evenhanded presentation and assist the grand jury in accordance with statutes and local rules by explaining the law and interpreting the legal significance of evidence.

A prosecutor is not required by law to provide the grand jury with exculpatory evidence during the grand jury phase of investigation. Nevertheless, consistent with these Standards, a prosecutor conducting a grand jury inquiry, who is aware of substantial evidence that directly negates the guilt of a subject of the investigation, should present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.<sup>180</sup> Moreover, a prosecutor who is asked about potentially exculpatory evidence may not mislead the grand jury into not considering that evidence's effect on the probable cause determination.<sup>181</sup>

### **The Obligation to be Prepared and to Act Professionally**

The prosecutor's preparation, skill, and professionalism will have a tremendous effect on the quality of the evidence received in the grand jury. Imprecise or incomplete questioning will yield poor evidence and undermine the search for the truth. Before a grand jury examination, a prosecutor must review the facts and the law, and prepare assiduously. During the examination, the prosecutor must pose only proper and legal questions, examine witnesses in a way designed to elicit the truth, and establish a clear record.

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179. See NDAA NATIONAL PROSECUTION STANDARD 4-8.3 ("A prosecutor should take no action and should make no statements that have the potential to improperly undermine the grand jury's independence.").

180. See USAM, *supra* note 54, § 9-11.233 ("[W]hen a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person. While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review.").

181. *United States v. Stevens*, 771 F. Supp. 2d 556, 564-68 (D. Md. 2011) (dismissing an indictment where the prosecutor misled the grand jury into believing that relying on the advice of counsel is an affirmative defense when, in fact, it is relevant to negating the showing of intent that the government must establish).

The prosecutor must also create a fair record before the grand jury. Indeed, the grand jury cannot serve its constitutional role as “shield” unless the prosecutor is acting professionally and ethically. At all times, the prosecutor must be cognizant of the prosecutor’s duty to do justice, and not simply to obtain an indictment. In the *ex parte* forum of a grand jury, deviation from that duty will have a disproportionate effect; there is no judge or defense lawyer to act as a counterweight. The ethic of evenhandedness should inform all of the prosecutor’s dealings with the grand jury.

### Misuse of the Grand Jury’s Authority

The government has been afforded broad discretion in conducting grand jury investigations, but courts have identified some outer limits. For example, a prosecutor must refrain from engaging in “fundamentally unfair tactics” before the grand jury.<sup>182</sup> Thus, a prosecutor may not mislead the grand jury into thinking that it is getting eye-witness testimony from a witness “whereas it is actually getting an account whose hearsay nature is concealed.”<sup>183</sup>

It is also well established that a prosecutor may not use the power of the grand jury “for the sole or dominating purpose of preparing an already pending indictment for trial.”<sup>184</sup> At the same time, “where there [is] some proper dominant purpose for the post indictment subpoena,” evidence obtained through that subpoena may be used at the trial of previously-indicted charges.<sup>185</sup>

Although courts have limited authority to compel prosecutorial behaviors,<sup>186</sup> it is consistent with the essential obligations of the prosecutor that, regardless of any outside rules or supervision, the prosecutor should strive to behave in an ethical and fair manner before the grand jury.<sup>187</sup>

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182. *United States v. Ciambrone*, 601 F.2d 616, 623 (2d Cir. 1979).

183. *United States v. Estepa*, 471 F.2d 1132, 1136 (2d Cir. 1972).

184. *United States v. Dardi*, 330 F.2d 316, 336 (2d Cir. 1964).

185. *United States v. Sasso*, 59 F.3d 341, 352-53 (2d Cir. 1995).

186. *United States v. Williams*, 504 U.S. 36, 47 (1992) (holding that a court may not require the government to disclose exculpatory evidence to the grand jury).

187. *See USAM, supra* note 54, § 9-11.233 (explaining that it is the policy of the Department of Justice to require prosecutors to disclose “substantial evidence that directly negates the guilt of a subject of the investigation” to the grand jury).

Moreover, as a basic matter, a prosecutor should not use the subpoena power of a grand jury to leverage witnesses into participating in an office interview. If the intent is to obtain background information, the prosecutor should simply request such an interview, but should not “compel” one by the use of a subpoena, and then relieve the witness from a grand jury appearance in exchange for an office interview. The prosecutor should only ask the grand jury to issue a subpoena if the prosecutor intends to call that witness before the grand jury, though the prosecutor may request a voluntary pre-testimony interview with a subpoenaed witness<sup>188</sup>

### **Standard 26-2.10 Technologically assisted physical surveillance**

(a) As used in these Standards, “technologically-assisted physical surveillance” includes: video surveillance, tracking devices, illumination devices, telescopic devices, and detection devices.

(b) In deciding whether to use technologically-assisted physical surveillance, the prosecutor should consider the potential benefits, including:

- (i) detecting the criminal possession of objects that are dangerous or difficult to locate; and
- (ii) seeing or tracing criminal activity by means that are minimally intrusive and limiting the risks posed to the public and law enforcement personnel.

(c) In deciding whether to use technologically-assisted physical surveillance, the prosecutor should consider the legal and privacy implications for subjects, victims and third parties. The prosecutor should seek to use such surveillance techniques in proportion to the seriousness of the criminal activity being investigated and the needs of the particular investigation and in a manner designed to be minimally intrusive.

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188. *United States v. DiGilio*, 538 F.2d 972, 985 (3d Cir.1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 733, 50 L.Ed.2d 749 (1977) (“Rule 17 does not, in our view, authorize the use of grand jury subpoenas as a ploy for the facilitation of office interrogation. Neither the FBI nor the Strike Force nor the United States Attorney has been granted subpoena power for office interrogation outside the presence of the grand jury.”)

**(d) In deciding whether to use technologically-assisted physical surveillance, the prosecutor should consider the legal requirements applicable to the technique under consideration, and whether those requirements have been met.**

### *Related Standards*

ABA Standards for Criminal Justice: Technologically Assisted Physical Surveillance

### *Commentary*

This Standard requires that prosecutors use discretion in deploying technologically assisted surveillance. New tools are not to be used simply because they can be, but because the offense or investigation warrants their use as a matter of proportionality.<sup>189</sup>

### **Commentary to Subdivision 26-2.10 (a) - (b)**

Readers are urged to consider the above referenced Technologically Assisted Physical Surveillance Standards (“TAPS”) with regard to any issues arising in this area. The TAPS Standards are the source of the definitions in 2.10(a) and provide an extensive set of guidelines regarding general principles guiding the use, implementation, accountability, control and related issues for a wide range of TAPS, including video surveillance, tracking devices, and detection devices. That noted, this is also an area where the law is undergoing steady change and reconsideration, as our laws affecting criminal investigation and personal privacy seek to keep pace with rapid changes in technology. Thus, reference to the TAPS Standards should serve as the *start* of an inquiry into the state of legal standards in this area.

### **Commentary to Subdivision 2.10 (c)**

Technology changes in the past thirty years have changed how information is obtained, stored, and communicated, and the costs associated with each. Finding court records used to require a trip to the clerk’s office. Now it requires only the click of a mouse. Technology has dramatically reduced privacy as a practical matter. Following a car covertly

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189. See Standard 2.10(c).

used to require a team of police in different vehicles. Now it requires only a cheap GPS device. If privacy is only constitutionally protected to the extent of our reasonable expectations, what happens to that protection when our lives become increasingly public due to the proliferation of new technologies?<sup>190</sup> As Professor Anthony Amsterdam observed in 1974 (*before* GPS, the cell phone and technologically advanced electronic surveillance), there is a risk that such an erosion of privacy expectations will cause “the amount of privacy and freedom remaining to citizens [to] be diminished to a compass inconsistent with the aims of a free and open society.”<sup>191</sup>

Rather than engaging in a constitutional analysis, this Standard seeks to guide prosecutors to use discretion in deploying technologically assisted surveillance. The challenge is to only use a surveillance tool when it is legally permissible to do so *and* where the offense or investigation warrants its use and the resulting invasion of privacy is proportionate to the seriousness of the underlying investigation, and not simply because it is available.

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190. See *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001) (In holding that the use of a thermal imaging device by the police to search a home for the presence of heat lamps used to grow marijuana constituted a search within the meaning of the Fourth Amendment, the Supreme Court observed, “[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.”)

191. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974). See also *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) (“But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court. Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.”). Justice Jackson’s concern is only heightened by the many new ways in which personal privacy can be compromised.

### Commentary to Subdivision 26-2.10 (d)

Sub-section (d) alerts prosecutors about the need to routinely review changing legal requirements in this area. While true generally, this warning is particularly apt in fields involving technologically-assisted physical surveillance, because of rapid changes in the law and technology. Courts are attempting to adapt search and seizure jurisprudence to new technology. For example, in *United States v. Jones*, the Supreme Court grappled with the implications of using GPS tracking technology.<sup>192</sup> The Court largely avoided the overarching technological concerns, relying instead on 18th Century notions based on the government's physical invasion of property in attaching the device.<sup>193</sup> But a concurrence by Justice Sotomayor ventilated some of the relevant concerns:

In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. See, e.g., *People v. Weaver*, 12 N.Y.3d 433, 441-442, 882 N.Y.S.2d 357, 909 N.E.2d 1195, 1199 (2009) ("Disclosed in [GPS] data . . . will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on"). The Government can store such records and efficiently mine them for information years into the future. [*United States v. Pineda-Moreno*, 617 F.3d[1120], 1124 [9th Cir. 2010]] (opinion of Kozinski, C.J.). And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: "limited police resources

192. *United States v. Jones*, 132 S. Ct. 945 (2012).

193. *Id.* at 949-53 (Sotomayor, J., concurring).

and community hostility.” *Illinois v. Lidster*, 540 U.S. 419, 426, (2004).<sup>194</sup>

### **Standard 26-2.11 Consensual interception, transmission and recording of communications**

(a) As used in these Standards “consensual interception” is an electronic, digital, audio or video interception and recording of communications to which one or more but not all participants in the communications has consented.

(b) In deciding whether to use consensual interception, the prosecutor should consider the potential benefits, including obtaining direct, incriminating, and credible evidence that can be used alone or to corroborate other information.

(c) In deciding whether to use consensual interception, the prosecutor should consider the potential risks, including:

- (i) problems of audibility and admissibility;
- (ii) the danger of detection, including physical risk to those participating, and the risk of disclosure of the investigation;
- (iii) selective recording of communications by the cooperating party;
- (iv) the danger of obtaining false, misleading or self-serving statements by a party to the conversation who is aware or suspects that the conversation is being recorded;
- (v) the risk that the consenting individual will conspire with the subject of the investigation to create false or misleading statements; and
- (vi) the risk that the import of a conversation will be distorted by the cooperating party.

(d) To maximize the benefits and to minimize the risks of using consensual interception, the prosecutor should:

- (i) obtain written or recorded consent from the consenting individual; and minimize to the extent practicable recording outside the presence of law enforcement agents and, if such a recording occurs or will occur:

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194. *Id.* at 955-56.

- (A) have law enforcement agents test and activate the recording equipment before the cooperating party meets with the subject; and
- (B) minimize the necessity for the cooperating party to operate the recording equipment and, if it is necessary for the cooperating party to operate the equipment, provide that individual specific directions on how to operate the equipment and strict instruction to be present with it during such operation.

(e) The prosecutor, in consultation with the law enforcement agents, should regularly review all or selected recordings obtained during consensual interceptions.

(f) The prosecutor should take steps to ensure law enforcement agents comply with procedures relating to the acquisition of, custody of, and access to electronic equipment and recording media and to the secure preservation of any recordings produced whether they are obtained by consenting individuals or by law enforcement agents.

### *Related Standards*

ABA Criminal Justice Standards: Electronic Surveillance of Private Communications

Standard 2-5.1 (Intercepting Communications with Consent)

ABA Criminal Justice Standards: Prosecution Function

Standard 3-3.1(f) (Investigative Function of Prosecutor)

ABA Grand Jury Principles

Principle #17 (re when to grant immunity)

Principle #18 (re prosecution motion for immunity)

Principle #19 (re immunity not public record)

Principle #26 (re witness's privilege against self-incrimination)

### *Commentary*

Poorly planned and ill-considered use of consensual electronic recordings has resulted in some of the worst outcomes in criminal investigations: the injury or death of cooperating witnesses, the exculpation of

the guilty, and the inculcation of the innocent by faithless cooperators.<sup>195</sup> The use of consensual electronic recording requires the prosecutor to marry knowledge of the investigative craft, legal ethics, and proportionality as a guide to using these tools wisely.

### Commentary to Subdivision 26-2.11 (a)

The federal electronic surveillance statutes, commonly referred to collectively as “Title III,” are codified at 18 U.S.C. §§ 2510-2522 (2006). Section 2511(2)(c) provides that “[i]t shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.”<sup>196</sup> In 1971, in *United States v. White*, the Supreme Court examined the implications of the Fourth Amendment’s prohibition on unreasonable searches and seizures with regard to “consensual interception.”<sup>197</sup> In *White*, the Court held that the testimony of government agents regarding conversations overheard via electronic surveillance between the defendant and an undercover informant did not violate the Fourth Amendment despite the informant’s unavailability at trial.<sup>198</sup> The Court explained that the defendant was not entitled to “a justifiable and constitutionally protected expectation that a person

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195. See *United States v. Argencourt*, 996 F.2d 1300 (1st Cir. 1993) (testimony indicated that defendant had shot informant who had worn a wire); *United States v. Smith*, No. 07-cr-433, 2009 WL 136020, at \*4 (E.D. Va. Jan. 20, 2009) (testimony indicated that victim was killed because she was wearing a wire); *United States v. Lecco*, No. 05-cr-107, 2007 WL 4224724, at \*7 (S.D. W. Va. Nov. 27, 2007) (same); *United States v. Lopez-de la Cruz*, 431 F. Supp. 2d 200 (D.P.R. 2006) (defendant, together with co-defendants, allegedly beat and threatened to kill a Drug Enforcement Agency (DEA) confidential informant after discovering he was wearing a wire during an alleged drug transaction); *United States v. Torres-Aviles*, 427 F. Supp. 2d 46 (D.P.R. 2006) (informant told DEA agents that after finding out he was cooperating with authorities, defendant punched him in the face; photographs of informant reflected significant trauma to his face, and recording from wire worn by informant revealed that defendant told someone to go get defendant’s pistol and defendant twice threatened to kill informant).

196. State wiretapping laws and rules vary on how many parties need to consent to the recording of a phone call or conversation in order to make it lawful. State laws also vary on the whether (and under what circumstances) it is lawful to record government proceedings.

197. *United States v. White*, 401 U.S. 745 (1971).

198. See *id.* at 754.

with whom he is conversing will not then or later reveal the conversation to the police.”<sup>199</sup> Further, an informant may write down records of conversations with a defendant and later testify regarding the conversations without a warrant, and for constitutional purposes, no different result is required if the agent records the conversations electronically.<sup>200</sup>

Other federal laws also authorize the use of consensual interception. The USAM states that “[t]he Fourth Amendment to the U.S. Constitution, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986 (18 U.S.C. §§ 2510, *et seq.*), and the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. §§ 1801, *et seq.*) permit government agents, acting with the consent of a party to a communication, to engage in warrantless interceptions of telephone communications, as well as oral and electronic communications.”<sup>201</sup>

### Commentary to Subdivision 2.11 (b)

The caliber of evidence that can be gathered through consensual recordings can be very high. The chances of mishearing, misremembering, misconstruing or simple fabrication are greatly reduced when recordings are either aural or visual. When clearly audible, voices on a tape allow finders of fact to judge the meaning and intent of a conversation for themselves, and removes the uncertainty present when the only evidence of a conversation is a witness’s recollection. Similarly, when clearly visible, images on video allow finders of fact to identify participants and judge the meaning and intent of their actions as well as any audible conversations.

Video surveillance<sup>202</sup> of a person or a place is not covered by Title III. Its use is governed by the Fourth Amendment and, therefore, when a reasonable expectation of privacy exists, a search warrant should be sought pursuant to Federal Rule of Criminal Procedure 41 and the All

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199. *Id.* at 749 (The Fourth Amendment provides no protection to a “‘wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.’”) (quoting *Hoffa v. United States*, 385 U.S. 293, 385 (1966)).

200. *Id.* at 750.

201. USAM, *supra* note 54, § 9-7.301.

202. The USAM defines video surveillance as “the use of closed-circuit television (CCTV) to conduct a visual surveillance of a person or a place.” *See id.*, CRIMINAL RESOURCE MANUAL 32.

Writs Act, 28 U.S.C. § 1651. Six circuits, while recognizing that Title III does not govern video surveillance, require that search warrants for video surveillance meet the standards required under Title III.<sup>203</sup>

### Commentary to Subdivision 2.11 (c)

There are significant risks in the use of consensual recordings. Cooperators or police officers wearing “wires” can be “made,” leading to the unfortunate consequences noted above, and there is no shortage of cases memorializing the violent reprisals.<sup>204</sup> Consequently, subsection (c)(ii) directs prosecutors to consider, among other risks, the danger of physical harm to the person recording the conversation, as well as the risk of disclosing the investigation.

In addition, when a cooperating witness is doing the recording, the risks are multiplied. A faithless cooperator may attempt to inculcate another through selective recording of conversations or attempt to falsely exonerate an ally by tipping him or her off before the taping. Either of these tactics can then be amplified if the cooperator later dishonestly interprets a cryptic or ambiguous conversation for investigators.

One obvious legal risk in the use of consensual recordings can occur if a recording device is placed in a briefcase or other package, and becomes physically separated from the cooperating witness. A recording device left behind, or located outside the presence of the cooperator, creates the risk that the recording device will become an illegal eavesdropping device.<sup>205</sup> Where circumstances require the use of such devices, the cooperator must clearly understand this danger before the operation begins.

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203. See *id.* (citing *United States v. Falls*, 34 F.3d 674 (8th Cir. 1994); *United States v. Koyomejian*, 970 F.2d 536 (9th Cir. 1992); *United States v. Mesa-Rincon*, 911 F.2d 1433 (10th Cir. 1990); *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987); *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984)).

204. See discussion at footnote 195, *supra*.

205. See *United States v. Yonn*, 702 F.2d 1341, 1347 (11th Cir.), *cert. denied*, 464 U.S. 917 (1983) (rejecting the First Circuit’s holding in *United States v. Padilla*, 520 F.2d 526 (1st Cir. 1975), and approving use of fixed monitoring devices that are activated only when the consenting party is present). *But see* *United States v. Shabazz*, 883 F. Supp. 422, 425 (D. Minn. 1995) (Court rejected holding in *Yonn* and followed *Padilla*, suppressing recordings where government sought to conduct a consent-based audio and video surveillance of the hotel room in which defendant was staying via continuously operable devices. The court, although finding that recordings were made only when the government informant was present in the hotel room, suppressed because the government was free to surveil at

### Commentary to Subdivision 26-2.11 (d)

Some of the risks noted above can be mitigated by good investigative techniques. First, of course, the prosecutor needs to heed the general warnings concerning cooperating witnesses set forth in Standard 2.5.<sup>206</sup> Some simple steps, such as putting the police, rather than the cooperating witness, in charge of activating the recording device, can guard against many evils. Similarly, problems with audibility or machine failure (both of which can be exploited by a dishonest witness) can often be avoided by the simple steps of testing equipment before operations, and choosing meeting locales that are conducive to audible recordings.<sup>207</sup> Recordings should also be properly secured and preserved. Leaving a recording in the sole custody of a cooperating witness creates an unnecessary risk that can not only impact the ability to use the recording, but can also cast unwanted doubts on the integrity of the investigation itself.

### Commentary to Subdivision 26-2.11 (e)

For the prosecutor involved in such an investigation, one of the simplest and most effective practices is to listen to some of the recordings throughout the investigation. The prosecutor who is involved in an investigation using these techniques should not rely solely on summaries provided by agents, and certainly not those provided by the cooperator. In the messy, gray reality of most criminal investigations,

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will and was not constricted when the informant was gone, except by the investigator's presumed discretion.)

206. Dealings with a cooperating witness must meet not only legal and ethical standards, but also a higher standard of public review and acceptance. Prosecutors must not ignore statements of cooperating witnesses that are inconsistent with known facts or lean suspiciously in the cooperating witness's favor. Cooperating witnesses may also seek to make a friend or relative appear less culpable, protect themselves, or implicate others whom they wish to harm. *See* Standard 2.5.

207. *See* *United States v. Britton*, 68 F.3d 262, 264 (8th Cir. 1995) (defendant was provided tape recordings before trial and had an opportunity to prepare his own transcript); *United States v. Nicholson*, 815 F.2d 61, 63 (8th Cir. 1987) (both parties had the opportunity to argue to the jury their versions of what was contained on the inaudible portions of certain audio tapes); *United States v. Bell*, 651 F.2d 1255, 1259 (8th Cir. 1981) (both parties were given the opportunity to submit transcripts of their respective versions of the tapes to the jury to read while the tapes were being played, and the court permitted the defendant to present to the jury "any version in the event the wording might be ambiguous from the hearing of the tapes").

recorded communications often contain a mix of inculpatory, ambiguous, irrelevant, and exculpatory conversations. Though this work is time intensive, there is no substitute for having direct knowledge of these communications if the prosecutor is to make fair, defensible, and prudent investigative or charging decisions or recommendations.

### **Standard 26-2.12 Non-consensual electronic surveillance**

(a) As used in these Standards “non-consensual electronic surveillance” is the court-ordered interception of communications, actions, or events.

(b) In deciding whether to request a court order for non-consensual electronic surveillance, the prosecutor should consider the potential benefit of obtaining direct, incriminating, and credible evidence that can be used alone or to corroborate other information.

(c) In deciding whether to request a court order for non-consensual electronic surveillance, the prosecutor should consider the potential costs and risks, including:

- (i) whether the suspected criminal activity being investigated is sufficiently serious and persistent to justify:
  - (A) the significant intrusion on the privacy interests of targets and innocent third parties;
  - (B) the need to obtain periodic reauthorization for electronic surveillance; and
  - (C) the financial and resource costs associated with such surveillance.

(ii) whether all requirements of the law are met.

(d) The prosecutor, including an applicant, should be aware of the reporting requirements under federal and state law and heightened obligations and accountability to the court in connection with the application and use of non-consensual electronic surveillance.

(e) Prior to the initiation of non-consensual electronic surveillance, the prosecutor should review the following with the law enforcement agents and contract personnel such as interpreters who will assist in the execution of the order:

- (i) the scope of the order;
- (ii) obligations of the monitoring law enforcement agents and monitoring personnel to minimize the interception of privileged conversations and other conversations

- outside the scope of the order and to alert the prosecutor promptly when recording evidence of new crimes;
- (iii) the prohibition on listening without recording;
  - (iv) rules related to protecting the integrity and chain of custody of recordings;
  - (v) instructions to contact the prosecutor whenever a noteworthy event occurs, or there is a question regarding the execution of the order; and
  - (vi) the need to adhere to non-disclosure requirements.
- (f) The prosecutor should stay informed of actions of law enforcement agents and contract personnel throughout the use of non-consensual electronic surveillance and should take appropriate steps to determine whether the required procedures are being followed by those carrying out the surveillance.

### *Related Standards*

ABA Criminal Justice Standards: Discovery

Standard 11-2.1(c) (Prosecutorial Disclosure)

ABA Criminal Justice Standards: Electronic Surveillance of Private Communications,

Part IV (Court-Ordered Electronic Surveillance)

### *Commentary*

Congress has created limits on who may apply to use electronic surveillance and when these investigative tools are appropriate. First, the law limits those who may apply for an electronic surveillance warrant. While a police officer may apply for a search warrant and a line assistant may issue a subpoena on behalf of grand jury, only a high-level member of the Justice Department or the principal prosecutor in a state or local jurisdiction may apply for an electronic surveillance warrant.<sup>208</sup>

Similarly, an eavesdropping application may not be the first investigative tool that law enforcement deploys. Before seeking a warrant, investigators must make a showing that conventional means of inves-

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208. See 18 U.S.C. § 2516.

tigation have not or could not succeed in achieving the objective of the investigation.<sup>209</sup>

In short, the statutory regime governing electronic surveillance requires consideration of issues that these Standards recommend as good practice in evaluating the use of all types of investigative techniques: consideration of the use of less intrusive investigative means as a first step; oversight by senior members of the prosecutor's office before undertaking intrusive investigative steps; constant monitoring of the progress of the investigation; and periodic reconsideration of whether continuing investigation is warranted. (That is not to say that all investigative steps should be governed by the formalistic requirements of electronic surveillance; they should not be. But the principles embedded in the statute can broadly inform prudent decisions in criminal investigations.)

#### **Commentary to Subdivision 26-2.12 (b)**

Eavesdropping is a uniquely powerful investigative tool. There is little evidence more powerful than unguarded words spoken in what is believed to be a private moment. There are few tools better equipped to penetrate the hierarchical structures of sophisticated criminal organizations, overcoming the barriers of insulation that the criminal command structure provides.

#### **Commentary to Subdivision 26-2.12 (c)**

The prosecutor should consider the significant intrusion on privacy from the use of electronic surveillance. Eavesdropping is not warranted for every case in which the legal requirements are met, and the very

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209. See 18 U.S.C. § 2518(1)(c) (requiring prosecutors to include in their search warrant affidavit applications "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous..."); see also *United States v. De La Cruz Suarez*, 601 F.3d 1202, 1214 (11th Cir. 2010) ("The affidavit in support of a search warrant 'must simply explain the retroactive or prospective failure of several investigative techniques that reasonably suggest themselves.' However, a comprehensive exhaustion of all possible investigative techniques is not necessary before applying for a wiretap.") (citations omitted); *United States v. Dickerson*, 651 F. Supp. 2d 739, 741 (N.D. Ohio 2009) ("[T]he government need not prove that it has exhausted every conceivable conventional investigative method. What matters is that the government inform 'the issuing judge of the difficulties involved in the use of conventional techniques.'" (citations omitted).

significant practical costs to obtain and execute such warrants in compliance with the law should force prosecutorial offices to determine whether the suspected crime warrants eavesdropping.

#### **Commentary to Subdivision 26-2.12 (d)**

Once a warrant has been issued, both the prosecutor and the judge who issued the warrant are obliged to supervise its execution on a periodic basis. Among other things, it is the obligation of those executing and overseeing the warrant to “minimize” the interception of conversations on subjects not described in the warrant—that is, to ensure that reasonable efforts are made to cease intercepting non-pertinent information.<sup>210</sup> Recordings of conversations must be sealed pursuant to strict procedures.<sup>211</sup> Even with all of these safeguards, no warrant may last for more than 30 days without being extended by a court order.<sup>212</sup> Because of the nature of the intrusion on privacy, many courts have enforced these requirements in exacting ways.<sup>213</sup>

#### **Commentary to Subdivision 26-2.12 (e)**

This subdivision discusses the so-called “minimization meeting.” Typically, it takes a team of investigators monitoring electronic surveillance to comply with the legal, technical, and practical requirements

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210. 18 U.S.C. § 2518(5) (“Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter ...”).

211. 18 U.S.C. § 2518(8)(a) (“[U]pon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions.”).

212. 18 U.S.C. § 2518(5) (“No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. ... Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section.”).

213. *See, e.g.*, United States v. Simels, No. 08-cr-640, 2009 WL 1924746, at \*13 (E.D.N.Y. July 2, 2009) (excluding evidence gained from electronic surveillance where the court order contained a minimization provision that permitted the initial recording of any non-pertinent and privileged conversations); United States v. DePalma, 461 F. Supp. 800 (S.D.N.Y. 1978) (holding five days of hearings on the issue of whether the government properly minimized electronic interceptions, ultimately finding that several conversations should be suppressed).

for listening and recording devices and to comply with the terms of the warrant. Indeed, those requirements are sufficiently demanding that the Standards require a prosecutor to hold a review session with the investigative team before the electronic surveillance begins.

**Commentary to Subdivision 26-2.12 (f)**

The prosecutor's obligations continue throughout the period of interception. The prosecutor should be available at all times to field legal questions or respond to fast-breaking investigative developments, to assure that the required procedures are being followed, and, above all, to be constantly aware of the heightened requirements and enhanced obligations to the court that exist throughout and after the use of electronic eavesdropping.

**Standard 26-2.13 Conducting parallel civil and criminal investigations**

(a) In deciding whether to conduct a criminal investigation and throughout any such investigation that is undertaken, the prosecutor should consider whether society's interest in the matter might be better or equally vindicated by available civil, regulatory, administrative, or private remedies.

(b) When doing so would not compromise a proper prosecutorial interest, and to the degree permitted by law, the prosecutor should cooperate with other governmental authorities regarding their investigations for the purpose of instituting remedial actions that are of legitimate concern to such entities. In the course of such cooperation, the prosecutor:

- (i) should retain sole control of the criminal investigation and maintain independent judgment at all times;
- (ii) should be aware of rules that prohibit or restrict the sharing or disclosure of information or material gathered through certain criminal investigative techniques;
- (iii) should not be a party to nor allow the continuation of efforts by civil investigative agencies or attorneys to use the criminal process for the purpose of obtaining a civil settlement; and

(iv) may, in order to preserve the integrity of a criminal investigation or prosecution, ask a civil investigative agency to refrain from taking an investigative step or bringing an action but, in considering whether to do so, should consider the detriment to the public that may result from such forbearance.

(c) A prosecutor should consider the appropriateness of non-criminal or global (civil and criminal resolutions) dispositions suggested by subjects or targets, whether or not they choose to cooperate, and may consider proposals by them to include civil or regulatory sanctions as part of a disposition or cooperation agreement.

### *Commentary*

#### **Commentary to Subdivision 26-2.13 (a)**

In confronting activity that violates legal requirements, there are many ways that the public's interest can be vindicated other than through criminal prosecutions. In deciding what activities are worthy to investigate for possible criminal sanctions, a prosecutor should consider not only whether a matter violates a legal constraint, including whether there is sufficient evidence that would constitute proof beyond a reasonable doubt of the necessary state of mind, but also whether a criminal prosecution is the appropriate remedy. In other words, the prosecutor should consider whether a matter can be better and more justly resolved through an administrative investigation conducted by another branch of government, or by a civil disposition between the government and the actors, or even left to a resolution between private parties. Along the same lines, the Standards also encourage the prosecutor to consider terminating an investigation when the target proposes an acceptable non-criminal disposition.

#### **Commentary to Subdivision 26-2.13 (b)**

There are times when it is appropriate for both criminal and administrative investigations to advance together. In those cases, the Standards direct that the prosecutor should consider whether there are appropriate ways to cooperate with the civil enforcement agency. Thus, the Standards reject the view that the criminal case—and only the criminal case—matters. Other agencies have valid remedial and preventative goals that

can be as important and effective as a criminal conviction. Therefore, the Standards adopt the view that agencies of government should work together to find the best method to advance the public interest.<sup>214</sup>

There are, however, proper limits to that cooperation. First, certain tools are, by design of the legislature, available only to prosecutors investigating crimes. For example, the ability to compel witnesses to testify in grand jury proceedings and the ability to intercept private conversations are reserved for criminal investigations.<sup>215</sup> Secrecy laws governing these legal tools must be observed scrupulously during a parallel investigation.<sup>216</sup>

Second, the prosecutor must not delegate control of the criminal investigation to civil authorities, and must maintain independent judgment at all times.<sup>217</sup> Of course it can be necessary for a prosecutor to depend on the expertise of sister agencies, and to solicit the advice of agencies that are participating in an investigation.<sup>218</sup> But mutual respect and collegiality should not be mistaken for authority, and the assisting agencies should not be mistaken for a “client.”<sup>219</sup>

Finally, a prosecutor’s office may not allow the existence of a criminal investigation itself to be used to extract a civil settlement. Coordinated civil and criminal investigations force difficult choices on subjects of the investigations. It may be virtually impossible to mount an effective civil or administrative defense if defending oneself in a criminal matter

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214. See Matthew L. Wald, *Fear of Prosecution Hinders Crash Inquiries, Some Say*, N.Y. TIMES, Apr. 17, 2000, available at <http://www.nytimes.com/2000/04/17/us/fear-of-prosecution-hinders-crash-inquiries-some-say.html?scp=16&sq=matthew+wald+safety+criminal+investigations&st=nyt>.

215. FED. R. CRIM. P. 6 (grand jury procedures); 18 U.S.C. §§ 2510 et seq. (electronic surveillance).

216. See FED. R. CRIM. P. 6(e) (grand jury secrecy).

217. In the context of a parallel civil investigation, the prosecutor must also consider what, if any, disclosures regarding the existence of the criminal investigation must be made to witnesses in the context of the civil investigation. See, e.g., W. Warren Hamel and Danette R. Edwards, *Pay No Attention to the Man Behind the Curtain: United States v. Stringer and the Government’s Obligation to Disclose*, WHITE COLLAR CRIME REPORT (May 23, 2008) (discussing the potential impact of *United States v. Stringer* 521 F.3d 499 (9th Cir. 2008), and whether the holding in the case provides an improper license to allow government attorneys to conceal the existence of a criminal investigation from individuals or organizations who are involved in defending a parallel civil investigation).

218. See Standard 1.3.

219. See Standard 1.2(b).

counsels invocation of the right against self-incrimination, resulting in an adverse inference in a parallel civil matter.<sup>220</sup> A prosecutor should not use the threat of a criminal investigation as a lever to extract a settlement on behalf of the civil case.<sup>221</sup>

Although these Standards reject the assumption that criminal investigations should necessarily trump all other civil or administrative actions, they nonetheless expect prosecutors to take steps to protect the integrity of their investigations. Consequently, the Standards make it entirely appropriate for a prosecutor to ask other government agencies to forbear taking actions that may impair the integrity of a criminal investigation. Discovery rights in a civil case typically vastly exceed those in a criminal case, and the possibility, for example, of civil depositions of government witnesses in a criminal case is daunting to prosecutors. Thus, it may be appropriate to ask sister agencies to stay their hands.

In doing so, however, prosecutors must consider the possible detriments to the public. The needs of the public, writ large, can be in tension with what is “good” for a criminal investigation. For example, in an investigation into a bid-rigging ring in public construction projects, a potential criminal case would get stronger, and more defendants would be implicated, if the ring were permitted to “win” a number of bids. However, the cost (in money and construction time) to taxpayers of awarding—and then canceling—a large number of contracts could be substantial. Before asking the agency to forebear in bringing civil actions to bar those involved in bid rigging, the prosecutor should fully consider the costs to the system as a whole, and consider whether there is some alternate approach. Similar problems would be raised by a prosecutor who asks an environmental agency to forbear from enjoining an ongoing discharge of pollution so that an investigation could proceed (moreover, allowing such conduct to continue—a problem which also arises in criminal investigations by themselves—undermines the gov-

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220. See, e.g., *Securities & Exch. Comm’n v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998) (in civil case, court may draw adverse inference from witness’s invocation of Fifth Amendment privilege against self-incrimination); *LiButti v. United States*, 107 F.3d 110, 121 (2d Cir. 1997) (adverse inference may be drawn even where government is party to civil case and will benefit from the drawing of the inference).

221. See, e.g., Environment and Natural Resources Division, United States Department of Justice, *Directive 2008-02, Parallel Proceedings Policy* (“Criminal prosecution shall not be used as a threat to obtain civil settlement.”), available at [http://www.justice.gov/enrd/ENRD\\_Assets/Directive\\_No\\_2008-02\\_Parallel\\_Proceedings\\_Policy.pdf](http://www.justice.gov/enrd/ENRD_Assets/Directive_No_2008-02_Parallel_Proceedings_Policy.pdf).

ernment's ability to argue as to the gravity of the violation at issue). On the other hand, it may well be more reasonable to ask an agency not to commence disciplinary proceedings against employees being investigated for wrongdoing.<sup>222</sup>

Finally, it is generally settled law that the imposition of administrative or civil penalties will only rarely result in a defense of double jeopardy. Only if the fines are "grossly disproportional" to the damages is a court likely to conclude that any criminal penalty would be "double punishment" sufficient to raise a double jeopardy bar.<sup>223</sup> However, the Eighth Amendment to the U.S. Constitution proscribes the imposition of excessive fines. The Supreme Court has held that any fine imposed by the government must be proportionally related to the nature of the offense, and a potential fine's excess is measured with regard to the facts of the particular case, the character of the defendant, and the harm caused by the offense.<sup>224</sup>

### **Standard 26-2.14 Terminating the investigation, retention of evidence and post-investigation analysis**

- (a) The prosecutor should diligently pursue the timely conclusion of criminal investigations.**
- (b) The prosecutor's office should periodically review matters under investigation in the office and determine whether the interests of justice would be served by terminating the investigation.**

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222. See, e.g., *People v. Feerick*, 714 N.E.2d 851, 853 n.1 (N.Y. 1999) (discussing need for *Kastigar* hearing to ensure statements made by police officer during disciplinary hearing in which testimony is compelled under penalty of dismissal are not used in subsequent criminal proceedings against the police officer) (citing *Kastigar v. United States*, 406 U.S. 441 (1972)).

223. See *Hudson v. United States*, 522 U.S. 93, 95-96 (1997) (monetary penalties and debarment imposed on bank officers for violation of federal banking statutes were not so punitive in form as to render them criminal and, thus, the Double Jeopardy Clause did not bar criminal prosecution for essentially same conduct).

224. See *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (holding that fine of \$357,144 for a criminal defendant charged with violating federal reporting requirements regarding the transportation of more than \$10,000 in currency out of the country, was grossly disproportionate to the gravity of defendant's offense).

(c) The prosecutor should determine whether information obtained in investigations should be made available for civil enforcement purposes, administrative remedies, or for other purposes consistent with law and the public interest.

(d) To the extent feasible, the prosecutor and members of the investigative agencies should analyze investigations retrospectively, to evaluate techniques and steps that worked well or that proved to be deficient.

(e) Post-investigation analysis by the prosecutor's office should include seeking to identify ways other than prosecution to prevent, minimize or deter similar crimes from occurring in the future.

(f) Prosecutors should be aware of the requirements and office practices regarding the preservation of investigative records and of their compliance obligations with regard to information access and privacy law provisions.

(g) To the extent practicable, the prosecutor should, upon request, provide notice of termination of the investigation to subjects who became aware of the investigation.

(h) Upon termination of the investigation and related proceedings, physical evidence other than contraband should be returned promptly to the person from whom it was obtained, absent an agreement, court order or requirement of law to the contrary.

### *Related Standards*

ABA Criminal Justice Standards: Prosecutorial Investigations

Standard 1.4 (Victims, Potential Witnesses, and Targets During the Investigative Process)

Standard 2.14 (Terminating the Investigation)

ABA Criminal Justice Standards: Speedy Trial and Timely Resolution of Criminal Cases

Standard 3.1 (The Public's Interest in Timely Case Resolution)

### *Commentary*

This Standard combines two separate but related issues in criminal investigations: first, the need to regularly assess the utility of continuing a particular investigation, and second, the need to properly maintain the government's records of an investigation for future review and analysis as circumstances (and legal obligations) may warrant.

**Commentary to Subdivisions 26-2.14 (a) - (b)**

Prosecutors and the defense bar both know the phenomenon of an investigation that drags on longer than it should. This is not good for the public; as it is a rare case that improves with undue age. Nor is it fair to the targets, subjects and witnesses; an open investigation imposes reputational, financial, and emotional costs, and can undermine the right of an accused to a speedy trial.<sup>225</sup> Thus an investigation should take as long as it needs, but should not linger because of prosecutorial inattentiveness or a lack of will to formally close it.<sup>226</sup>

Towards that end, the purpose of these provisions is to encourage a meaningful, routine review of investigations to determine whether continuing to investigate a particular matter serves the broader interests of justice that the office of the prosecutor is obliged to pursue. An investigation should not be continued simply because doing so might lead to a guilty plea or conviction.<sup>227</sup> Meeting this Standard requires that the prosecutor maintain a certain intellectual distance from the investigation, and avoid being swayed by the effort or resources that have already been expended in a particular investigation. In further support of this concept, other Standards urge the prosecutor to seek guidance and the perspective of those not directly involved in the investigation.<sup>228</sup>

While timely termination of an investigation supports the effective use of limited enforcement resources, existing government policies and practices for investigations may not provide explicit support for this standard. But absent such guidance, a means for evaluating whether to continue an investigation can be found in policies setting forth standards for instigating investigations in the first place.<sup>229</sup>

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225. See Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525 (1975).

226. See Standard 2.14(a). Investigations should also not be continued simply because it might lead to a guilty plea or conviction. See ABA CRIMINAL JUSTICE SECTION, AD HOC INNOCENCE COMM., *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY* (Paul Giannelli & Myrna Raeder, eds. Mar. 2006).

227. See *ACHIEVING JUSTICE*, *supra* note 12, at 11-15.

228. See generally Standard 1.3 (working with police and other law enforcement agents); Standard 2.4 (use of confidential informants; experience of other law enforcement agents with the informant); Standard 2.13 (conducting parallel civil and criminal investigations; communication with other agencies).

229. See, e.g., Memorandum from the United States Environmental Protection Agency, Office of Criminal Enforcement, Office of Enforcement Assurance on The Exercise of

### Commentary to Subdivision 26-2.14 (c)

Consistent with the legal and policy restrictions described in connection with Standard 2.13 (Conducting Parallel Civil and Criminal Investigation), the prosecutor should routinely assess whether civil or other remedies would more usefully vindicate the government's interests in a particular case, and if so, consider appropriate steps to transfer the government's efforts from the criminal to the civil or administrative arena. Such an assessment should not turn on the issue of whether a civil or criminal resolution will be credited to the prosecutor or to some other agency. Of course, information may be shared with other agencies only as permitted by law. Eavesdropping and grand jury materials, in particular, carry heightened (and legally required) secrecy obligations.<sup>230</sup>

### Commentary to Subdivision 26-2.14 (d)

It is a common practice in the private sector to analyze past efforts, searching for the root cause of both successes and failures.<sup>231</sup> Similarly, some government agencies, such as the FAA, routinely assess the causes of "near misses" where no untoward outcome occurred, but only as a result of good fortune or luck.<sup>232</sup> In this regard, to paraphrase George Santayana, those who do not discuss and recall the failures of past criminal investigations may be condemned to repeat them. Progress, Santayana observed, does not consist of change by itself, but rather in the ability to retain experiences and thereby discern the direction where improvement is to be found.<sup>233</sup> The investment of time and energy for even a limited review is likely to earn significant dividends in the future. Moreover, as a matter of good government, such reviews should increasingly become an expected part of a well-run office, otherwise repeated failures, or "near misses," go unaddressed and rise to the level

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Investigative Discretion (Jan. 12, 1994). Also known as "The Devaney Memo," for author and then-Director Earl Devaney, this document sets out clear guidance to investigators as to what cases are worthy of consideration as criminal matters.

230. See Standard 2.12 and cmt. (electronic surveillance); Standard 2.9 and cmt. (grand jury materials).

231. See MAX AMMERMAN, *THE ROOT CAUSE ANALYSIS HANDBOOK: A SIMPLIFIED APPROACH TO IDENTIFYING, CORRECTING, AND REPORTING WORKPLACE ERRORS* 3 (1998).

232. FED. AVIATION ADMIN., *3900.19B Chapter 7: Mishap Reporting and Investigation, in SAFETY MANAGEMENT INFORMATION SYSTEM (SMIS)* (2001).

233. GEORGE SANTAYANA, *REASON IN COMMON SENSE* 88 (Dover ed. 1980) (1905).

of significant, and public, concern. Similarly, successful cases should be considered for review to consider what they may reveal about the existence of particularly successful investigative techniques, or the presence of persistent criminal conduct.<sup>234</sup>

### Commentary to Subdivision 26-2.14 (e)

Sometimes crime prospers because of unintended failings in law and public policy.<sup>235</sup> Prosecutors are uniquely positioned to observe the failures of the legal rules and institutions of our society. Prosecutors should not be satisfied to investigate and prosecute the same criminal activity repeatedly, but should instead find ways to use their unique perspective to develop means to reduce the opportunities for such crimes to persist. While criminal sanctions can reduce criminal activity by removing a criminal from society, and through specific and general deterrence, the prosecutor's office should also consider the potential for civil, legislative, and structural reforms that can reduce the persistence and prevalence of various types of criminal behavior.<sup>236</sup> The lesson of successful organized crime control has been that successive but unrelated investigations and prosecutions may not be able to eliminate organized crime influence or control over legitimate business operations.<sup>237</sup> The lesson of some successful efforts to limit persistent criminal behavior strongly suggests the value of prosecutors working with experts from various disciplines (*e.g.*, economists, labor relations experts, loss prevention analysts, com-

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234. See Goldstock, *supra* note 93.

235. In 1990, the New York State Organized Crime Task Force published a study of corruption and racketeering in the New York City construction industry. The report drew on years of investigations and prosecutions of organized crime, infiltration of construction unions, and corruption and racketeering in the construction business to identify, among other things, that laws intended to improve New York City's construction contracting processes had instead created a perfect environment for organized crime control of the industry. RONALD GOLDSTOCK, ET AL., CORRUPTION AND RACKETEERING IN THE NEW YORK CITY CONSTRUCTION INDUSTRY: THE FINAL REPORT OF THE NEW YORK STATE ORGANIZED CRIME TASK FORCE (1990) [hereinafter CORRUPTION AND RACKETEERING REPORT].

236. Stephanie Francis Ward, *Charles J. Hynes: Jail Breaker*, ABA JOURNAL'S LEGAL REBELS, Sept. 28, 2009, available at [http://www.legalrebels.com/posts/charles\\_j.\\_hynes\\_jail\\_breaker](http://www.legalrebels.com/posts/charles_j._hynes_jail_breaker) (describing efforts by the Brooklyn District Attorney to find innovative ways of reducing recidivism and fighting crime, such as offering nonviolent offenders alternatives to jail time, including mental health services, rehabilitation programs and other diversion programs).

237. See CORRUPTION AND RACKETEERING REPORT, *supra* note 235, at 2.

munity policing, and industry experts) to develop control strategies to prevent crime or reduce the attractiveness of a particular industry or community to criminal behavior.<sup>238</sup>

#### **Commentary to Subdivision 26-2.14 (f)**

There are numerous records generated during a criminal investigation, many of which are preserved for “after action” reviews, trial and appeal, retrial following an appeal, or later investigations. The prosecutor and the prosecutors’ office should know and obey the laws and rules governing the preservation of public records.<sup>239</sup> The prosecutor’s office should provide the prosecutor with clear direction during and at the close of an investigation (or prosecution) as to what records should be preserved, and provide a routine method for prosecutors and other personnel to do so, and to retrieve records when necessary.<sup>240</sup>

#### **Commentary to Subdivision 26-2.14 (g)**

There is a premium on confidentiality in criminal investigations for reasons that need not be detailed here. It should suffice to note that the practical needs of the investigation, the preservation of the presumption of innocence, and the collateral consequences to those touched by a criminal investigation, support the general rule of secrecy as to the existence and status of criminal investigations.

Thus, there is a default assumption that the government need not confirm, deny or describe the status of a criminal investigation, including one that has, at least for the present time, concluded. However, there are circumstances when confirming the termination of a criminal investigation may be warranted. For example, where the government has declined to prosecute a publicly-traded corporation, which may have been required to inform the public, shareholders, investors and busi-

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238. *See id.*; *see generally* JAMES B. JACOBS, *GOTHAM UNBOUND: HOW NEW YORK CITY WAS LIBERATED FROM THE GRIP OF ORGANIZED CRIME* (New York University Press 1999).

239. This issue presents a growing logistical and legal issue for federal, state and local agencies. The federal government is far from meeting the record keeping requirements of federal law. *See, e.g., Hearing Before the Subcomm. on Information, Policy, Census and Nat’l Archives of the H. Comm. on Oversight and Government Reform, 110th Cong. (2008)* (statement of Linda Koontz Director, Information Management Issues, General Accounting Office) (stating that for about half of the senior officials of the four agencies reviewed, “email records were not being appropriately identified and preserved....”).

240. *See* ACHIEVING JUSTICE, *supra* note 12, at 105-07.

ness partners of a criminal investigation, the ability to note that such an investigation has terminated may be critical to the continued viability of the company's business and investment relationships. Similarly, for an individual, knowledge of the termination of an investigation may be a necessary component of the ability to retain or change employment, and for an otherwise legitimate, privately-held organization, a criminal investigation can profoundly impact the viability of the organization, including its ability to obtain credit or compete for public contracts. The prosecutor must weigh these real and significant impacts with whatever continuing interests the government may have in the confidentiality of the status of the investigation.<sup>241</sup>

### **Standard 26-2.15 Guidance and training for line prosecutors**

- (a) A prosecutor's office should be organized in a manner to provide line prosecutors guidance consistent with these Standards.**
- (b) To guide the exercise of discretion, a prosecutor's office should:**
  - (i) encourage consultation and collaboration among prosecutors;**
  - (ii) appoint supervisors with appropriate experience, strong skills and a commitment to justice and ethical behavior;**
  - (iii) require consultation and approval at appropriate supervisory levels for investigative methods of different levels of intrusiveness, risk and costs;**
  - (iv) provide regular supervisory review throughout the course of investigations;**
  - (v) regularly review investigative techniques and promote best practices to reflect changes in law and policy;**
  - (vi) create and implement internal policies, procedures, and standard practices that teach and reinforce standards of excellence in performance, professionalism, and ethics;**
  - (vii) create and implement policies and procedures that protect against practices that could result in unfair hardships, the pursuit of baseless investigations, and the bringing of charges against the innocent;**

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241. See Standard 1.5.

- (viii) develop and support practices designed to prevent and to rectify conviction of the innocent.
  - (ix) determine what types of investigative steps require formal supervisory approval, and at what supervisory level, and
  - (x) require line attorneys to consult with supervisors or experienced colleagues when making significant investigative decisions absent exigent circumstances.
- (c) A prosecutor's office should provide guidance and training by:
- (i) strongly encouraging consultation and collaboration among line assistants;
  - (ii) appointing supervisors with appropriate experience and strong commitments to justice, and fostering close working relationships between supervisors and those they supervise;
  - (iii) providing formal training programs on investigative techniques and the ethical choices implicated in using them; and
  - (iv) creating internal policies and standard practices regarding investigations that memorialize and reinforce standards of excellence, professionalism, and ethics. In doing so:
    - (A) policy and practice materials should be regularly reviewed and updated and should allow flexibility for the exercise of prosecutorial discretion, and
    - (B) written policies and procedures should not be a substitute for regular training for all office members and a commitment to mentoring less-experienced attorneys.
- (d) When a line prosecutor believes the needs of an investigation or some extraordinary circumstance require actions that are contrary to or outside of existing policies, the prosecutor should seek prior approval before taking such actions.
- (e) A prosecutor's office should develop policies and procedures that address the initiation and implementation of the investigative tools discussed in these Standards in advance of the specific needs of an investigation.

### *Related Standards*

ABA Criminal Justice Standards: Prosecution Function

Standard 3-2.5 (Prosecutor's Handbook; Policy Guidelines and Procedures)

Standard 3-2.6 (Training Programs)

### *Commentary*

One of the fundamental principles of these Standards is that prosecutors are not lone wolves. Every prosecutor is a part of an office, a history, and a tradition. Every prosecutor has an obligation not to win, but to do justice, and to do so without fear or favor. The judgment that a prosecutor must bring to bear in every case is not innate. It must be learned. Poor supervision and inadequate training is a virtual guarantee of injustice.<sup>242</sup>

This Standard describes the ways that a prosecutor's office can be structured to help instill sound judgment and appropriate discretion in prosecutors; how to govern and guide prosecutors as they learn to exercise the vast powers and discretion of their office in a just and measured way. Specifically, the Standards focus on four ways of doing so: peer-to-peer teaching, strong day-to-day supervision, formal training, and policies and practices.

One of the great dangers in any investigation is that a prosecutor can become a captive of a premature theory of a case. The first line of defense is peer consultation (section (b)(i), (c)(i)). In an office with a strong culture of sharing and collaboration, the wisdom of colleagues who are guided by experience can help prevent a rush to judgment or an instance of overreaching. Guided by their own experience and training, one prosecutor often has advice to offer another.

That said, the single most important governing mechanism is the leadership of the prosecutor's office. Supervisors must be experienced,

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242. The prosecutor's office should consider its own management procedures in light of the standards used to evaluate private sector compliance efforts as set forth in the United States Sentencing Guidelines, § 8B2.1, particularly Sections 8B2.1(a)(2) (promoting a culture of ethical conduct and compliance); 8B2.1(b) (training); and 8B2.1(b)(5) (self-evaluation). See ETHICS RESOURCE CENTER, THE FEDERAL SENTENCING GUIDELINES FOR ORGANIZATIONS AT TWENTY YEARS: A CALL TO ACTION FOR MORE EFFECTIVE PROMOTION AND RECOGNITION OF EFFECTIVE COMPLIANCE AND ETHICS PROGRAMS at 94 (Recommendation 3.2, recommending that federal government agencies develop and implement their own compliance and ethics programs) (2012).

skilled, and dedicated to justice. A good office fosters (and requires) intensive, ongoing interaction between supervisors and line associates, and a process for approvals for significant investigative steps (sections (b)(ii)-(b)(iv), (b)(x)).

This constant hands-on supervision should be supplemented by formal training. Training is invaluable in creating an office that is consistent in its actions, and that remains current as to changes in the law and policy, as well as advances in technology and the means and methods used by criminals.

The office should create policies and practices that reinforce standards of excellence. These should include obvious standards, but standards nevertheless worth of mention, such as: (a) avoiding charging the innocent, pursuing baseless investigations, or imposing unfair hardships in investigations; (b) identifying the investigative steps or responses to exigent circumstances that require supervisory approval; and (c) supporting practices that rectify the conviction of the innocent.

The goal of this Standard is to support the efforts of government lawyers to administer justice—to take the somewhat vague notion of the prosecutor’s role as doing “justice” and provide ways to support the sound exercise of discretion and judgment. No amount of age and experience guarantees wisdom. This Standard, and others that promote consultation, training, and coordination, are not intended to stifle the concerns of junior prosecutors who believe that they have been asked to proceed in a manner that is unfair, inappropriate, or even unethical or illegal. At bottom, all prosecutors are lawyers with an independent ethical obligation to uphold the law, and government lawyers acting in any capacity have a higher obligation to do more than just satisfy the demands of supervisors; they must also satisfy the broader and far more difficult demands of their role as a public servant.<sup>243</sup>

### **Standard 26-2.16 Special prosecutors, independent counsel and special prosecution units**

**(a) As used in these Standards, a “special prosecutor” or an “independent counsel” is a prosecutor serving independently from the general prosecution office under a particularized appointment**

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243. See Little, *supra* note 17, at 729, 746-49.

and whose service in that role typically ends after the purpose of the appointment is completed. A “special prosecution unit” is typically a unit that focuses on a particular type of crime, criminal activity, or victim.

(b) Although the special prosecutor and the special prosecution unit are removed from the responsibilities of a general prosecution office, a prosecutor in this role should:

- (i) be bound by the same policies and procedures as regular prosecutors in their jurisdiction, unless to do so would be incompatible with their duties;
- (ii) base judgments about the merits of pursuing a particular investigation upon the same factors that should guide a regular prosecutor, including the seriousness of the offense, the harm to the public, and the expenditure of public resources; and
- (iii) in choosing matters to investigate, consider the danger that the narrow focus or limited jurisdiction of the prosecutor or the unit will lead to the pursuit of what would, in a general prosecution office, be considered an insubstantial violation, or one more appropriately resolved by civil or administrative actions.

### *Commentary*

Special prosecutors can be essential in matters where a prosecutor’s office has a conflict of interest, or where the disinterestedness of the office is called into question. Special prosecution *units* can be particularly effective as a matter of public policy when the government decides that an area is being underprosecuted, either because of a lack of resources or a lack of special expertise.

But special prosecutors and special units carry a significant risk. When one works on a single case (or in only one subject area), there is a natural inclination to elevate the importance of a single case and treat it differently than the mass of other cases in the system. A tunnel-vision focus on one target or one subject area has the potential to undermine the fundamental legal principle that like cases should be treated alike.<sup>244</sup>

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244. CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION, *REPORT NO. 1 ON REAUTHORIZATION OF THE INDEPENDENT COUNSEL ACT*, ANNUAL REPORT OF THE ABA 330, 331 (1999).

Similarly, the special prosecutor should base a decision about whether and how to conduct an investigation on the same factor that guide regular prosecutors, seriousness of the offense, the alleged harm inflicted, and the cost to the public of pursuing the matter.

Finally, the Standard require special prosecutors and units to look at enforcement broadly, and not just from the narrow perspective of their case.<sup>245</sup> A prosecutor or office must ask itself whether it is pursuing what in the broader world would be considered “insubstantial” or better resolved non-criminally. It is critical for the prosecutor to determine that an investigation is justified in light of these factors or other jurisdiction-specific considerations, not solely because the special prosecutor or unit has no other tasks at hand. This demands a level of experience and judgment in a special prosecutor equivalent that found in offices of general jurisdiction, as well as the courage to decline to go forward on something that is petty.

#### **Commentary to Subdivision 26-2.16 (b)**

The overall goal of these Standards is to maintain the independence of the prosecutor. Prosecutors in specialized prosecution offices should be required to subject their investigations to a regular review by experienced attorneys who are not involved in the particular investigation at issue. Specialized prosecution offices should also have a regular internal review process to determine whether, as an overall matter, the particular office is maintaining appropriate independence and perspective in determining the selection, conduct, and course of criminal investigations. As Justice Robert Jackson wrote:

Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case . . . it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or

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245. See Standard 2-2.16(b)(iii).

desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.<sup>246</sup>

The concept of equal justice under the law encompasses the view that prosecutors should generally treat like cases alike. It is critical that the subjects of these investigations fare neither worse nor better than the subject of any other criminal investigation and that decisions about the use of public resources in such cases be made in a balanced and dispassionate fashion.

### **Standard 26-2.17 Use of information, money, or resources provided by non-governmental sources**

(a) The prosecutor may use information provided by non-governmental sources that is pertinent to a potential or existing criminal investigation. However, consistent with the principles in Standard 2.1, the prosecutor should make an independent evaluation of the information and make an independent decision as to whether to allocate or continue to allocate resources to investigating the matter.

(b) If the law of the jurisdiction permits the acceptance of financial or resource assistance from non-governmental sources, the decision to accept such assistance should be made with caution by the chief public prosecutor or an accountable designee after careful consideration of:

- (i) the extent to which the law of the jurisdiction permits the acceptance of financial or resource assistance;
- (ii) the extent to which the offer is in the public interest, as opposed to an effort to achieve the limited private interests of the non-governmental sources;
- (iii) the extent to which acceptance may result in forgoing other cases;
- (iv) the potential adverse impact on the equal administration of the criminal law;
- (v) the extent to which the character and magnitude of the assistance might unduly influence the pros-

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246. Jackson, *supra* note 10, at 3.

- ecutor's subsequent exercise of investigative and prosecutorial discretion;
- (vi) the likelihood that the community may view accepting the assistance as inconsistent with the fair and equal administration of criminal justice;
  - (vii) the likelihood that accepting assistance from private sources may create an appearance of undue influence over law enforcement; and
  - (viii) the extent to which financial or resource assistance would enhance or enable the investigation of criminal activity;
- (c) The prosecutor should consider the risk that encouraging information gathering by non-governmental sources may lead to abusive, dangerous or even criminal actions by private parties.
- (d) The office of the prosecutor should have procedures designed to protect the independent exercise of investigative discretion from being influenced by the receipt of outside financial or resource assistance, including careful accounting and recordkeeping of the amounts and terms of such assistance and clear disclosure that providing assistance will not guide the exercise of investigative or prosecutorial discretion.
- (e) The prosecutor, consistent with the law of the jurisdiction, should disclose significant non-governmental assistance to relevant legislative or public bodies having oversight over the prosecutor's office and, when appropriate, the public.
- (f) Non-governmental assistance should be disclosed to affected parties as part of the discovery process.

### *Related Standards*

NDA National Prosecution Standards  
Standard 36.1 (Necessary Resources)

### *Commentary*

Prosecutors have limited resources. At times, private persons or entities offer to subsidize certain types of investigations. Department stores have hired police officers to detect shoplifters,<sup>247</sup> designers have hired

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<sup>247</sup> Morris v. Dillard Dep't Stores Inc., 277 F.3d 743 (5th Cir. 2001) (off-duty police officer serving as private guard at department store).

lawyers to help prosecute counterfeiting cases,<sup>248</sup> and corporations have contributed money and hired experts to help prosecutors investigate the theft of their trade secrets.<sup>249</sup>

There is an obvious social good when private parties contribute to investigations. Prosecutors are able to investigate more crime than their budgets would otherwise allow. But there is a substantial downside as well. When private parties underwrite investigations, they can badly skew the enforcement priorities of the prosecutor and undermine the legislature's proper role as the arbiters of government expenditures.<sup>250</sup>

In balancing these concerns, the Standards take the position that prosecutors' offices may accept financial assistance or resources from private parties, but only "with caution," and only with the approval of a high-ranking person in the prosecutor's office.

### Commentary to Subdivision 26-2.17(a)

The government may possess and utilize evidence about alleged criminal activity that arises from extra-governmental sources. Indeed, a host of programs exist to encourage public reporting on criminal activity, ranging from "McGruff the Crime Dog"<sup>251</sup> to numerous other public and private programs.<sup>252</sup> Moreover, the government has created

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248. In *Young v. United States ex rel. Vuitton et Fils S.A.*, private attorneys for Louis Vuitton who brought an action alleging trademark infringement had been appointed as special prosecutors by the District Court to prosecute criminal contempt charges stemming from the civil action. 481 U.S. 787 (1987). On appeal from the District Court, the Second Circuit had upheld defendant's contempt conviction. See *United States ex rel. Vuitton et Fils S.A.*, 780 F.2d 179 (2d Cir. 1985). Ultimately, the Supreme Court reversed, rejecting appellant's argument that the trial court lacked authority to appoint special prosecutors, but finding that the situation created "the potential for private interest to influence the discharge of public duty." 481 U.S. at 790.

249. See, e.g., U.S. DEP'T OF JUSTICE, PROSECUTING IP CRIMES MANUAL § X.C.1.b.ii, <http://www.justice.gov/criminal/cybercrime/ipmanual/10ipma.html#X.C.1.b.ii> (noting the regular use of private investigators by corporations in assisting prosecutors).

250. The Appropriations Clause of the U.S. Constitution sets particular limits on the executive branch by giving Congress the power to provide (or withhold) money from the executive agencies. U.S. CONST. art. I, § 9.

251. See <http://www.mcgruff.org>.

252. The website for the United States CrimeStoppers program states that its program has resulted in more than a half million arrests. See <http://www.crimestopusa.com/>. In recent years, the U.S. Environmental Protection Agency has created its own crime stopper website. See <http://www.epa.gov/tips>.

incentives to report crime in certain circumstances, by building bounty provisions into the criminal sanctions of certain statutes.<sup>253</sup> However the government comes into the possession of such information, the government retains the obligation to consider the value of the information, and of the potential underlying case, with the careful consideration set forth in Standard 2.1.

Furthermore, if the government comes into possession of information from a third party, the government must not neglect the principles of *Brady v. Maryland*<sup>254</sup> and its progeny regarding the obligation to provide exculpatory information. Thus:

Where the government has exculpatory evidence and fails to disclose it, both society's notion of a fair trial and the trial's truth-finding function are offended . . . It is quite another matter when both the government and the defendants are the victims of an interested private third-party . . . withholding information . . . [O]nly the evidence that the defendants have shown was actually known to the government is subject to the *Brady* standard.<sup>255</sup>

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253. For example, a bounty provision in the Act to Prevent Pollution from Ships allows courts to award up to one half of the criminal fine to those who provide information leading to a conviction. 33 U.S.C. § 1908(a). *See, e.g.*, United States v. Polembros Shipping Ltd., No. 09-252 (E.D. La. Dec. 9, 2009) (nine whistleblowers awarded total of \$540,000 of \$2.7 million criminal fine paid by Greek ship management company for failure to maintain accurate oil record book); United States v. Kassian Maritime Navigation Agency, Ltd., No. 3:07-CR-48 (M.D. Fla. Aug. 17, 2007) (ship's wiper and cook each awarded \$230,000 and two third engineers each awarded \$20,000 of \$1 million criminal fine paid by Greek shipping company for dumping oily bilge and waste into ocean and falsifying records); United States v. Accord Ship Management, No. 07-CR-00390 (D.P.R. plea entered Sep. 20, 2007) (five whistleblowers each awarded \$50,000 of \$1.75 million criminal fine paid by India-based shipping company for dumping oily sludge and bilge waste into ocean); United States v. Irika Maritime S.A., No. 06-CR-5661 (W.D. Wash. Jan. 23, 2007) (whistleblower awarded one half of \$500,000 criminal fine paid by Panamanian-flagged bulk carrier for bypassing ship's pollution prevention equipment and discharging oily waste into ocean).

254. *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material to guilt or punishment, irrespective of good or bad faith of prosecution).

255. *United States v. Joselyn*, 206 F.3d 144, 153-54 (1st Cir. 2000) (in prosecution of corporate executives in fraud and kickback scheme, corporation's knowledge was not attributable to government, for *Brady* purposes, even though corporation and government portrayed themselves as partners in the criminal prosecution and corporation cooperated

**Commentary to Subdivision 26-2.17 (b) - (d)**

There are numerous circumstances where government resources appear inadequate to meet public needs. This is as true for public prosecutors as it is for Parks Departments, libraries, schools, and other government entities. However, as reflected in this Standard, special concerns attend when the efforts of the public prosecutor are supplemented by private resources.

In considering this issue, it is useful to reflect on the office of the public prosecutor itself. Today we accept the existence of the public prosecutor as an unremarkable aspect of our criminal justice system. It is therefore important to recall the history by which the public prosecutor gradually emerged as the primary person who could invoke the sanctions of the penal law, replacing an earlier system in which private prosecutors could utilize the provisions of criminal law.

The participation of private prosecutors in criminal proceedings, still allowed by statute to varying degrees in a number of states, has its genesis in the common law.<sup>256</sup> Although states such as Virginia established public prosecutorial and attorneys general systems far in advance of the English Crown (Virginia in 1643, with a fully developed county prosecutor system in 1711; England in 1879), the common law concept of providing for private attorney participation in criminal matters continues by statutory codification in many states.<sup>257</sup>

The growth of the public prosecutor stems, in part, from the belief that a disinterested party should be the one to assess whether a case warrants the application of criminal punishment. Thus, the public provides funds for the work of the public prosecutor, and expects that the prosecutor will determine how to best use those funds in the broad public interest,

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with the government to produce evidence to prosecute executives, because government did not have access to evidence at issue, did not suppress it willfully or inadvertently, and since corporation was possible target of investigation, it had an interest in not disclosing the material to the government). After several high profile cases in which federal courts found that the Department of Justice had failed to fully adhere to the requirements of *Brady*, in January 2010, the Department issued a policy entitled *Guidance for Prosecutors Regarding Discovery*. See USAM, *supra* note 54, CRIMINAL RESOURCE MANUAL § 165.

256. See Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 359 (1986); see also John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 512-13 (1994); Matthew S. Nichols, *No One Can Serve Two Masters: Arguments Against Private Prosecutors*, 13 CAP. DEF. J. 279, 279-89 (2001).

257. See Bessler, *supra* note 256, at 512-13; see also Nichols, *supra* note 256, at 279-84.

or risk being held to account, either through direct electoral means, or through the election of an executive with authority over the office of the prosecutor. Having funded the office of the prosecutor, the public should be able to presume that only the broad interests of the public, and not those of a segment of the public with particular needs or concerns, are driving the exercise of investigative discretion.

This expectation of the independence of the publicly-funded prosecutor is challenged when the prosecutor's office accepts resources from a non-governmental third party with an interest in the outcome of the investigation. Private funding of investigations or other criminal justice functions raises serious questions of bias and about the potential for an allocation of public monies in the service of the private concerns of those willing to pay for greater attention to their problems.<sup>258</sup> As these Standards state repeatedly, the prosecutor's special duty is to seek justice, not merely to convict—a duty that distinguishes the prosecutor's role as an advocate from that of a privately-funded attorney. Furthermore, as a representative of a sovereign, a public prosecutor has an obligation to third parties, including those who may be the subject of an investigation, to not allow individual parties' interests to drive the decision making process in a criminal investigation.<sup>259</sup>

Moreover, the prosecutor faces the risk of recusal if it is found that the outside assistance created a reasonable possibility that the prosecutor may not act in an evenhanded manner in determining how best to use the additional resources.<sup>260</sup> Rather than accept such resources, the pros-

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258. In addition, private funding does not cover the universe of costs associated with a criminal investigation and subsequent prosecution. Private parties may be willing to fund costs of investigation or even prosecutors, but they are not able to fund the additional costs that would result from the expansion of the judicial and correctional capacity needed to deal with the privately-funded cases.

259. MODEL RULES OF PROF'L CONDUCT R. 3.8, cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.").

260. See *People v. Eubanks*, 927 P.2d 310 (Cal. 1997) (corporate victim's contributions of about \$13,000 toward costs of district attorney's investigation of defendants' alleged theft of trade secrets created conflict of interest of sufficient gravity with respect to likelihood of fair treatment of defendants to warrant disqualification of district attorney's office, where largest payment was for debt already incurred by DA which victim paid in response to direct request from the office). See also Steven P. Solow, *Private Funding for*

ecutor may consider reporting to the legislature, or other public funding authority, the area of concern and the need for additional public funds. If the public is unwilling to subsidize such efforts, it may complain of the prosecutor's failure to control the criminal behavior that may ensue, but it must do so while ignoring its own role in tying the prosecutor's hands.

### **Standard 26-2.18 Use of sensitive, classified or other information implicating investigative privileges**

(a) The prosecutor should be alert to the need to balance the government's legitimate interests in protecting certain information from disclosure, and the legitimate interests and Constitutional rights of the public and of defendants favoring disclosure.

(b) When appropriate, the prosecutor should request court orders designed to protect the disclosure of law enforcement means and methods, informant identities, observation posts, and such other information that might jeopardize future investigations or the safety or reputation of persons directly or indirectly involved in an investigation.

(c) In investigations believed to have the potential to include classified or sensitive information, prosecutors should seek to obtain the relevant information and consult laws, regulations and other requirements for handling such information before making any charging decisions.

#### *Commentary*

Complex legal standards and policies attend to the use of classified information in criminal cases.<sup>261</sup> Significant questions have arisen regarding both the collection and expanded use of such information in a range of criminal matters.<sup>262</sup>

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*Public Prosecution in Complex Cases Poses Ethical Conundrum, Potential Conflict of Interest*, BNA WHITE COLLAR CRIME REPORT, Feb. 6, 2006.

261. See 18 U.S.C. § app. 3 (Classified Information Procedures Act); USAM, *supra* note 54, Chapter 9-90.000 (National Security) and CRIMINAL RESOURCE MANUAL 2054 (Synopsis of Classified Information Procedures Act).

262. See Ellen Yaroshesky, *Secret Evidence is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, 34 HOFSTRA L. REV. 1063 (2006).

These Standards serve primarily to put the prosecutor on notice that there are special rules and considerations involved when certain sensitive categories of information, and information gathering techniques, arise in a criminal investigation. It is not the function of these Standards to consider or address all of the legal issues that have arisen in this area. It is, however, important to note that, as in prior times of conflict and crisis, the actions of prosecutors will be crucial in protecting both the security of our nation from harm, and the rights and liberties that are at the core of our democratic values.

Speaking to this issue in April 1940, as the specter of world war loomed over Washington, D.C., the then United States Attorney General, Robert Jackson, addressed a gathering of U.S. Attorneys. In his speech, referenced throughout these standards, Attorney General Jackson observed that in times when fear of others and fear for the safety of the country is prominent in the minds of all, prosecutors should not allow the criminal laws to be used to stifle dissent, news or opinions and that “only by extreme care can we protect the spirit as well as the letter of our civil liberties, and to do so is the responsibility of the federal prosecutor.”<sup>263</sup>

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263. See Jackson, *supra* note 10, at 5-6.



### **PART III. PROSECUTOR'S ROLE IN RESOLVING INVESTIGATION PROBLEMS**

#### **Standard 26-3.1 Prosecutor's role in addressing suspected law enforcement misconduct**

(a) If the prosecutor has reason to suspect misconduct or unauthorized illegal activity at any level of the prosecutor's office or in any agency or department engaged in a criminal investigation, the prosecutor should promptly report the suspicion and the reason for it to appropriate supervisory personnel in the prosecutor's office who have authority to address the problem, or to the appropriate inspector general's office, or similar agency, if reporting within the prosecutor's own office is problematic. Reporting may also be required to comply with requirements of the applicable rules of professional conduct, the Model Rules and the law of the jurisdiction.

(b) If the prosecutor has reason to believe that a criminal investigation or prosecution is, or is likely to be, adversely affected by incompetence, lack of skilled personnel or inadequate resources in the prosecutor's office or in any other relevant agency or department, the prosecutor should promptly report that belief and the reason for it to supervisory personnel in the prosecutor's office.

(c) A supervisory prosecutor who receives an allegation of misconduct, unauthorized illegal conduct, or who receives an allegation of incompetence, inadequate resources, or lack of skilled personnel that is, or is likely to, adversely affect a criminal investigation, should undertake a prompt and objective review of the facts and circumstances or refer the matter to an appropriate agency or component responsible for addressing such allegations. When practicable, the line prosecutor making any such allegations should not be involved in subsequent investigation(s) relating to the allegation(s).

(d) If the prosecutor's office concludes that there is a reasonable belief that personnel in any agency or department have engaged in unauthorized illegal conduct, the prosecutor's office should initiate

a criminal investigation into the conduct or seek the initiation of such an investigation by an appropriate outside agency or office.

(e) If the prosecutor's office concludes that there was not unauthorized illegal conduct, but concludes that there was incompetence or non-criminal misconduct, the prosecutor's office should take appropriate action to notify the relevant agency or department, and if within the prosecutor's own office, to impose sanctions for the conduct.

(f) Decisions on how to respond to allegations of unauthorized illegal conduct, misconduct, or significant incompetence should generally be made without regard to adverse consequences on pending cases or investigations.

### *Related Standards*

ABA Criminal Justice Standards: Prosecution Function  
Standard 3-1.5 (Duty to Respond to Misconduct)

### *Commentary*

A strong bond often develops among those working together in criminal investigations. The prosecutors, police, and other investigators often devote considerable time and effort to the demands of the investigation, often at the expense of personal and family matters. Many police and other government investigators take extraordinary safety risks in their work. All involved operate under the particular pressure of knowing that, unlike in civil cases, the Constitutional dimensions of a criminal case can turn mistakes and errors of judgment into problems that can undermine not only the case itself, but the professional futures of those involved.<sup>264</sup>

In this environment, information about potential misconduct by an investigator or fellow prosecutor raises a significant challenge to all involved. There may be a tendency to diminish the significance of, or to demand extraordinary proof about, information concerning potential misconduct as a way to avoid its impact on the matter at hand, and on personal and institutional relationships.

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264. See Jeffrey Toobin, *Casualties of Justice*, THE NEW YORKER, Jan. 3, 2011, at 39-47 (describing the investigation of the prosecutors who handled the failed case against the late Senator Ted Stevens, including the death by suicide of one of the prosecutors).

The driving principle of this particular Standard is that the responsibility to investigate and act on misconduct by law enforcement should be removed from the hands of the line assistant. The Standard presumes that a line assistant should not be asked to judge the gravity of such suspected misconduct, and entrusts that task instead to supervisors in the office. Consequently, if a line prosecutor has “reason to suspect” misconduct or “reason to believe” that poor staffing or incompetence is harming an investigation, the prosecutor should notify supervisors.

Junior lawyers may require particular encouragement to do so. The relatively inexperienced prosecutor may simply be in doubt as to the issues at hand, and it is a critical part of the education of a prosecutor to learn to distinguish and draw lines in some of the more difficult areas of criminal investigation, such as the handling of informants and the proper manner in which to handle communications with a cooperating witness.

A supervisor who receives information about such a concern must promptly evaluate and act upon it.<sup>265</sup> The supervisor has wide discretion to determine the appropriate response. However, if upon completion of a review, there is evidence of misconduct, the supervisory prosecutor must act promptly to address the issue.

Such decisions should generally be made without regard to adverse consequences on pending cases or investigations. The seriousness of any misconduct should be an important factor in deciding whether to handle a matter internally. In determining whether the misconduct is deserving of a criminal investigation the supervisor should consider the Standard on initiating an investigation.<sup>266</sup>

### **Standard 26-3.2 Prosecutor’s role in addressing suspected judicial misconduct**

**(a) Although judges are not exempt from criminal investigation, the prosecutor’s office should protect against the use of false allegations as a means of harassment or abuse that may impact the independence of the judiciary.**

**(b) If a line prosecutor has reason to believe that there is significant misconduct or illegal activity by a member of the judiciary, the**

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265. See also MODEL RULES OF PROF’L CONDUCT R. 5.1(c) (describing the responsibilities of partners, managers, and supervisory lawyers).

266. See Standard 2.1.

line prosecutor should promptly report that belief and the reasons for it to supervisory personnel in the prosecutor's office.

(c) Upon receiving from a line prosecutor, or from any source, an allegation of significant misconduct or illegal conduct by a member of the judiciary, a supervisory prosecutor should undertake a prompt and objective review of the facts and circumstances.

(d) If the prosecutor's office has a reasonable belief that a member of the judiciary has engaged in criminal conduct, the prosecutor's office should initiate, or seek the initiation of, a criminal investigation.

(e) If the prosecutor's office concludes that a member of the judiciary has not engaged in illegal conduct, but has engaged in non-criminal misconduct, the prosecutor's office should take appropriate action to inform the relevant officer of the judicial authorities. Reporting may also be required to comply with requirements of the applicable rules of professional conduct, the Model Rules and the law of the jurisdiction.

(f) The prosecutor's office should take reasonable steps to assure the independence of any investigation of a judge before whom the prosecutor's office practices. In some instances, this may require the appointment of a "pro tem" or "special" prosecutor or use of a "fire-wall" within the prosecutor's office.

### *Related Standards*

ABA Model Rules of Professional Conduct

Rule 8.3 (Reporting Professional Misconduct)

Rule 8.4 (Misconduct)

ABA Model Code of Judicial Conduct

### *Commentary*

Some of the most difficult problems the criminal justice system faces arise when a prosecutor is asked to investigate judges. One of the axioms of these Standards is that investigation, in and of itself, inflicts harm on the person being investigated. In cases in which the subjects of the investigation are judges, there is a risk of also undermining the independence of the judiciary.

### Commentary to Subdivision 3.2 (a)

Disgruntled or frustrated litigants have been known to make frivolous allegations against the judges in their cases.<sup>267</sup> While the prosecutor should be appropriately skeptical regarding the claims of such persons, it is critical that such claims also be given appropriate consideration, even when presented by a party with an ax to grind. Preserving the integrity and the independence of the judiciary is not only critical to the legitimacy of the criminal justice system, it is the keystone upon which our system of government depends.<sup>268</sup> Sadly, there are significant examples of judges who have failed to protect the integrity of their office.<sup>269</sup>

Investigations, as noted elsewhere, can inflict harm on the person being investigated. Further, even where an investigation is justified, there is the potential for abuse, which is why the integrity of the criminal justice system depends upon prosecutors exercising discretion. In cases in which the subjects of the investigation are judges, the crucial role of the judiciary in the justice system amplifies the potential for harm and creates a special risk; the risk that the power to investigate will undermine the independence of the judiciary.

### Commentary to Subdivision 26-3.2 (b)

Here again, the Standards emphasize that decisions about major investigative steps should not be made solely by the prosecutor involved in the investigation, but should include consultation and over-

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267. See, e.g., *Sassower v. Abrams*, 833 F. Supp. 253 (S.D.N.Y. 1993) (dismissing as frivolous five lawsuits brought against numerous federal and state judges); *Liptak v. Banner*, No. 01-cv-0953, 2002 WL 378454, at \*5 (N.D. Tex. Mar. 7, 2002) (“The defendants have presented evidence of a pattern of frivolous lawsuits brought by the plaintiff against various judges....”).

268. See THE FEDERALIST No. 78 (Alexander Hamilton) (J. & A. McLean ed., 1788) (“[T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter . . . so long as the judiciary remains truly distinct from both the legislature and the Executive.”), available at [http://thomas.loc.gov/home/histdox/fed\\_78.html](http://thomas.loc.gov/home/histdox/fed_78.html).

269. There has been no shortage of judicial corruption cases. See, e.g., *Bracey v. Gramley*, 520 U.S. 899, 901 (1997) (noting that Chicago’s Honorable Thomas J. Maloney was one of many “dishonest judges exposed and convicted through ‘Operation Greylord,’ a labyrinthine federal investigation of judicial corruption in Chicago”); *United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995) (affirming the conviction of Maloney for fixing cases including three murder cases).

sight by appropriate individuals in the office of the prosecutor. Thus, for example, when a prosecutor receives a complaint or otherwise becomes aware of possible judicial misconduct, the prosecutor should promptly report the concern to supervisors and confer as to what additional steps, if any, should be taken.

#### **Commentary to Subdivision 26-3.2 (c)**

Because of the special concerns involved in investigating a judge, the Standards state that a supervisor in the office, rather than a line prosecutor, should evaluate the allegations and existing evidence to determine how to proceed. The many issues and impacts associated with investigating a sitting judge are of a different nature from those in other cases, and the greater experience and judgment of a supervisor are needed. Moreover, it is unfair to the line prosecutor to bear the burden (and potential professional risks) of such a decision, rather than the leadership of the prosecutor's office. While all cases should be investigated with due speed, the assessment of how to proceed in cases of potential judicial misconduct should be addressed particularly promptly.

#### **Commentary to Subdivisions 26-3.2 (d) - (e)**

Taken together, subsections (d) and (e) contemplate three possible logical outcomes: (1) a decision not to investigate an allegation at all; (2) a decision that the prosecutor investigate the allegation criminally or refer it to another prosecutor to do so; or (3) a decision to refer the matter to a judicial misconduct or a disciplinary committee.

The prosecutor's office may decide that the allegation lacks sufficient credibility even to proceed with a criminal investigation. Indeed, because of the risk of damage to the criminal justice system as a whole, this is one of the few places in which these Standards recommend that the prosecutor have an investigative predicate before commencing an investigation: the Standard requires that the prosecutor have a "reasonable belief" that the judge has engaged in criminal conduct before opening an investigation. "Reasonable belief" here is not intended to be a formal legal standard such as probable cause. It is, however, intended to signal that the normal rule for investigations—that no predicate is necessary—does not apply in this sphere. Any decision *not* to investigate should also be properly documented.

A decision not to proceed with a *criminal* investigation should be coupled with a decision as to whether to refer the matter to a judicial misconduct or disciplinary committee as provided in subsection (e).<sup>270</sup>

Finally, if the necessary predicate exists, a criminal investigation should be initiated per subsection (d). This may either be through action by the prosecutor's office, or a request that another office act. By seeking the initiation of a criminal investigation by another office, particularly one that does not practice before the judge in question, the prosecutor's office may further the independence of the investigation, as provided in subsection (f).

### **Commentary to Subdivision 26-3.2 (f)**

Investigation of judges or judicial actions is one of the few places in which the Standards specifically recommend considering a special prosecutor. Indeed, the prospect of a prosecutor investigating a judge adjudicating cases in which the prosecutor is a party raises appearance issues that are self-apparent.

A Special Prosecutor, however, is not a silver bullet. As observed elsewhere in these Standards, there is always a danger that the narrow focus of a special prosecutor may lead to overly harsh enforcement of insubstantial violations.<sup>271</sup> Thus, in the end, the Standards do not mandate a request for a special prosecutor. It is one of the alternatives that may be considered, along with referral of the case to another office or the erection of a fire-wall within the prosecutor's office.

### **Standard 26-3.3 Prosecutor's role in addressing suspected misconduct by defense counsel**

**(a) Although defense counsel are not exempt from criminal investigation, the prosecutor's office should protect against the use of false allegations as a means of harassment or abuse that may impact the independence of the defense counsel or the Constitutionally protected right to counsel.**

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270. See also MODEL RULES OF PROF'L CONDUCT R. 3.8 (regarding special responsibilities of a prosecutor).

271. See Standard 2.16(b)(iii).

(b) If a line prosecutor has reason to believe that defense counsel is engaging in criminal conduct, is violating the duty to protect a client, or is engaging in unethical behavior or misconduct, the prosecutor should promptly report that belief and the reasons for it to supervisory personnel in the prosecutor's office.

(c) Upon receiving from a line prosecutor, or from any source, an allegation of misconduct or illegal conduct by defense counsel, a supervisory prosecutor should undertake a prompt and objective review of the facts and circumstances.

(d) If the prosecutor's office has a reasonable belief that defense counsel has engaged in illegal conduct, the prosecutor's office should initiate, or seek the initiation of, an investigation into the conduct.

(e) If the prosecutor's office concludes that defense counsel has not engaged in illegal conduct, but has engaged in non-criminal misconduct as defined by the governing ethical code and the rules of the jurisdiction, the prosecutor's office should take appropriate action to inform the appropriate disciplinary authority.

(f) The prosecutor's office should take reasonable steps to assure the independence of any investigation of a defense counsel including, if appropriate, the appointment of a pro tem or special prosecutor or use of a "fire-wall" within the prosecutor's office. At a minimum, an investigation of defense counsel's conduct should be conducted by a prosecutor who has not been involved in the initial matter or in ongoing matters with that defense counsel.

(g) The prosecutor investigating defense counsel should consider whether information regarding conduct by defense counsel should be provided to a judicial officer involved in overseeing aspects of the investigation in which the misconduct occurred.

(h) The prosecutor investigating defense counsel who is representing a client in a criminal matter under the jurisdiction of the prosecutor's office ordinarily should notify the attorney and the court in a timely manner about the possibility that potential charges against the attorney may create a conflict of interest.

### *Related Standards*

ABA Model Rules of Professional Conduct

Rule 8.3 (Reporting Professional Misconduct)

Rule 8.4 (Misconduct)

## Commentary

Investigating defense lawyers raises the serious danger of the government undercutting the constitutional right to counsel and invading the sanctum of the attorney-client privilege. As the Second Circuit has written, “the right to counsel in an adversarial legal system would mean little if defense counsel could be controlled by the government or vetoed without good reason.”<sup>272</sup> Launching an investigation against a defense lawyer can be just such a veto.

Thus, the safeguards to be deployed in cases involving alleged judicial misconduct should also be observed here, including a predicate for investigation, involvement of supervisory personnel, and a prompt internal review of the facts.<sup>273</sup> In addition to whatever brakes are imposed by legislatures and courts,<sup>274</sup> prosecutors must strictly govern their own conduct. Indeed, the Standards demand that prosecutors “protect against” abusive use of investigations.

The Standards also recommend that the prosecutor who finds a basis to investigate a defense lawyer consider a special prosecutor or the use of firewalls in the prosecutor’s office. Absent some extraordinary situation, a prosecutor with ongoing cases involving a particular defense lawyer should not participate in the investigation of the defense lawyer.<sup>275</sup> The obvious risk of abuse (or, of the appearance of abuse) is simply not acceptable.

Finally, for the protection of the defense lawyer’s clients, the Standards impose disclosure obligations on prosecutors. Thus subsection (h) requires that prosecutors should “ordinarily” notify both the attorney

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272. *United States v. Stein*, 541 F.3d 130, 154 (2d Cir. 2008).

273. See Standard 3.2 cmt.

274. In *United States v. Velez*, the government indicted a well known Miami defense attorney, alleging that, among other things, he had engaged in money laundering when he wrote an opinion letter stating that legal fees from an accused drug kingpin to his attorney were not the fruits of illegal activities. No. 05-cr-20770, 2008 U.S. Dist. LEXIS 103085, at \*3-6 (S.D. Fla. Dec. 22, 2008). The case sparked widespread allegations that the government’s ulterior motive was to deter defense attorneys from representing high-level drug defendants. The Court dismissed the money laundering count on Sixth Amendment grounds. *Id.* at \*21. Ultimately, the government dismissed all charges against the attorney, noting that dismissal was “in the interests of justice.” Gov’t’s Mot to Dismiss Third Superseding Indictment with Prejudice at 1, *United States v. Velez*, No. 05-cr-20770 (Nov. 25, 2009).

275. See Standard 3.3(f).

under investigation and (where appropriate) the court in a “timely manner” that the investigation may be creating a conflict of interest between the defense attorney and the client. This obligation necessarily restricts investigative options that may be available in other types of cases. Indeed, a growing body of case law suggests that failure to make prompt notification may result in an unwaivable conflict that can invalidate any subsequent conviction of the lawyer’s clients.<sup>276</sup>

### **Standard 26-3.4 Prosecutor’s role in addressing suspected misconduct by witnesses, informants or jurors**

(a) If a line prosecutor has reason to believe that there has been illegal conduct or non-criminal misconduct by witnesses, informants, or jurors, the prosecutor should seek supervisory review of the matter.

(b) Upon receiving an allegation of unauthorized illegal conduct or non-criminal misconduct by witnesses, informants or jurors, the prosecutor’s office should undertake a prompt and objective review. If there is a reasonable belief that there has been illegal conduct or non-criminal misconduct, the prosecutor’s office should initiate an investigation into the conduct. All relevant evidence should be preserved in the event it must be disclosed if criminal charges are filed against the individual alleged to have engaged in the conduct.

(c) If the misconduct relates to the official duties of a juror or witness, it must also be reported to an appropriate judicial officer.

#### *Related Standards*

ABA Model Rules of Professional Conduct

Rule 3.8 (Special Responsibilities of a Prosecutor)

ABA Principles Relating to Jurors and Jury Trials

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276. See *United States v. Schwartz*, 283 F.3d 76 (2d Cir. 2002) (In prosecution for conspiracy to violate, and the violation of, the civil rights of a police detainee, defendant police officer’s counsel suffered conflict of interest because the representation conflicted with his ethical obligation to another client, the police union, adversely affecting defendant’s representation and creating an unwaivable conflict requiring vacation of conviction.).

Principle 19 (Appropriate Inquiries into Allegations of Juror  
Misconduct Should Be Promptly Undertaken by the  
Trial Court)

**Commentary**

This Standard is required by the general principle that a prosecutor is not an ordinary party to a controversy. Indeed, the standard imposes upon the prosecutor an obligation to investigate witnesses, informants, and even jurors when the prosecutor has a reasonable belief that there has been criminal or non-criminal misconduct.<sup>277</sup> This includes instances where the prosecutor has succeeded in obtaining a conviction and subsequently learns of potential misconduct that calls the conviction into question.<sup>278</sup> As in other sensitive areas, the Standard requires the full involvement of supervisory personnel within the office.

This Standard is also intended to prevent government witnesses from enjoying a de facto immunity for misconduct simply because it may be expedient for prosecutors to turn a blind eye in order to preserve a desired outcome in the underlying matter.

**Standard 26-3.5 Illegally obtained evidence**

**(a) If a prosecutor reasonably believes that evidence has been illegally obtained, the prosecutor should consider whether there are potential criminal acts that should be investigated or misconduct that should be addressed or reported. The prosecutor should be familiar with the laws of his or her jurisdiction regarding the admissibility of illegally obtained evidence.**

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277. The prosecutor's duty under this Standard is broader than what is required of all lawyers under Rule 3.3 of the Model Rules of Professional Conduct. For example, under Rule 3.3, a lawyer who "knows" of fraudulent conduct related to the proceeding must take "reasonable remedial measures." MODEL RULES OF PROF'L CONDUCT R. 3.3. Under this Standard, a prosecutor who "reasonably believes" that misconduct has occurred should undertake an investigation. *Id.*

278. See JOSEPH HILDORFER AND ROBERT DUGONI, *THE CYANIDE CANARY* at 258-59 (Free Press, New York 2004) (describing the decision of prosecutors, after obtaining a conviction following a multi-week trial, to bring to the court's attention a defendant's passing remark to a juror in a hallway outside of the courtroom).

**(b) The prosecutor should take appropriate steps to limit the taint, if any, from the illegally obtained evidence and determine if the evidence may still be lawfully used.**

**(c) The prosecutor should notify the parties affected by the illegal conduct at the earliest time that will not compromise the investigation or subsequent investigation(s), or at an earlier time if required by law.**

### *Related Standards*

ABA Criminal Justice Standards on Prosecution Function

Standard 3-3.1(c)

ABA Model Rules of Professional Conduct

Rule 3.8 (Special Responsibilities of a Prosecutor)

### *Commentary*

Under this Standard, prosecutors who discover that evidence has been illegally obtained have two responsibilities: (1) to determine whether someone involved in obtaining the evidence should be reported for misconduct or investigated for committing a crime; and (2) to minimize the risk that the illegally obtained evidence will taint the underlying investigation.

As to whether misconduct has taken place, it is not sufficient under the Standard for a prosecutor to conclude, for example, that the fact that evidence has been suppressed is a sufficient sanction with respect to the officer who unlawfully seized it. Instead, the prosecutor should determine whether some further action is required by the prosecutor's office, without regard to whether a civil remedy is being sought.<sup>279</sup>

At times, the decision to investigate and prosecute will be clear, as when police officers ransacked apartments and wrote threatening mes-

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279. The federal and State governments provide a variety of civil remedies should officers violate constitutional and statutory rights. For example, a Reconstruction Era statute, 42 U.S.C. § 1983, allows an individual to bring a claim against state law enforcement officers who violate rights secured under the Constitution and laws of the federal government. Moreover, the Supreme Court has extended this remedy, in certain situations, to federal officers who engage in misconduct. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (finding an implied right of action to sue federal law enforcement officers based on an unlawful search and arrest).

sages on subjects' walls when they seized narcotics as part of a campaign of breaking and entering designed to recover a lost police radio.<sup>280</sup>

At other times, it will be equally clear that no further investigation is warranted. Courts routinely disagree as to what is, or is not, a legal search, and often analyze in many pages an interaction that took only seconds on the street. In cases involving a close suppression call, where different levels of courts disagree (or when members of the same appellate panel cannot find common ground), it is difficult to conclude that a police officer has done something sufficiently blameworthy to warrant being investigated criminally.<sup>281</sup>

Obliging prosecutors to investigate potential criminal activity that resulted in the obtained evidence is, in part, a statement by the ABA that the remedies to vindicate citizens' privacy rights have been diminished. Developments in doctrines, such as "inevitable discovery," have limited the exclusionary rule's function of deterring activities that compromise citizens' rights.<sup>282</sup> Limiting the application of the exclusionary rule requires that citizens' rights be protected in other ways, including through the investigation and prosecution of government agents who intentionally violate those rights.<sup>283</sup> Thus, the prosecutor faced with egregious police conduct that may previously have been viewed as a suppression issue must now also consider whether the conduct is a predicate for a criminal investigation pursuant to subsection (a).

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280. See *People v. Feerick*, 714 N.E.2d 851, 853-54, 860 (N.Y. 1999) (upholding official misconduct conviction stemming from such acts).

281. Courts have recognized the difference between a split-second analysis on the streets and a reasoned judicial conclusion. See, e.g., *People v. Chestnut*, 418 N.Y.S.2d 390, 392 (N.Y. App. Div. 1979) ("Immutable legal abstracts easily enunciated in an atmosphere conducive to research, reflection and deliberation are applied, less facilely, to the infinite vagaries of human activity, oft-times carried out in a caldron of emotion.').

282. See *Nix v. Williams*, 467 U.S. 431, 444 (1984) (holding that evidence of a victim's body was admissible even though the body was discovered as a result of defendant's statements to police (made in the absence of an attorney and without a *Miranda* warning) because the "inevitable discovery doctrine" applied as volunteer search teams would have discovered the body even absent defendant's statements); but see *United States v. Johnson*, 380 F.3d 1013 (7th Cir. 2004) (limiting the inevitable discovery exception, holding that if it was the impermissible search of a third party that made the discovery of evidence against the defendant inevitable, the evidence is inadmissible).

283. See also *Hudson v. Michigan*, 547 U.S. 586, 598-99 (2006) (discussing role of civil rights lawsuits and internal police disciplinary proceedings where exclusionary rule is not applied).

Illegally obtained evidence may, however, be useful in proving a crime in the underlying investigation in which it was seized. The prosecutor's obligation to do justice in that case dictates, pursuant to subsection (b), that he or she take appropriate steps to limit the taint of the illegally obtained evidence (through the use of a firewall or taint team, for example) and determine whether the evidence can lawfully be used in court. Consideration should be given to calling upon another prosecutor without knowledge of the illegally obtained evidence to pursue the investigation.

Finally, subsection (c) of the Standard requires prosecutors to notify affected parties of unlawfully obtained evidence as promptly as the investigation permits (or as required by law).<sup>284</sup> It is the position of the Standards that illegal measures to obtain evidence are not excused, and should be disclosed, whether or not charges are brought.

### **Standard 26-3.6 Responding to political pressure and consideration of the impact of criminal investigations on the political process**

(a) The prosecutor should resist political pressure intended to influence the conduct, focus, duration or outcome of a criminal investigation.

(b) The prosecutor should generally not make decisions related to a criminal investigation based upon their impact on the political process.

(c) When, due to the nature of the investigation or the identity of investigative targets, any decision will have some impact on the political process (such as an impending election), the prosecutor should make decisions and use discretion in a principled manner and in a manner designed to limit the political impact without regard to the prosecutor's personal political beliefs or affiliations.

(d) The prosecutor should carefully consider the language in Standard 1.5 ("Contacts with the Public During the Investigative Process") when making any statements or reports regarding a deci-

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284. See also American Bar Association, *Standards for Criminal Justice: Prosecution and Defense Function* § 3-1.1 (3d ed. 1993).

sion to prosecute, or to decline to prosecute, in a matter that may have some impact on the political process.

### *Related Standards*

ABA Criminal Justice Standards: Prosecution Function  
Standard 3-1.3(f) (Conflicts of Interest)

### *Commentary*

This Standard deals with two distinct issues. The first is the obligation of the prosecutor to resist efforts to allow partisan politics to drive the decisions associated with a criminal investigation. The second concerns the potential impact of the criminal investigation on the political process itself.

As to political pressure, the Standard takes an absolutist stance. It commands the prosecutor to proceed without allowing political pressure to influence the initiation and conduct of a criminal investigation. This subject has received considerable attention in recent years, particularly in the aftermath of reports following the firing of several United States Attorneys suggesting that some of the firings were related to the decisions of those individuals to investigate, or not, cases that were of political interest to members of both the executive and legislative branches.<sup>285</sup>

As to the second issue, regarding how a criminal investigation can impact the political process, this Standard calls for a careful, honest and frank consideration of the facts of each particular situation, with the recognition that there is often no way to know in advance how best to proceed. The goal is seemingly straightforward: a prosecutor should not make an investigative decision with the goal of having an impact on the political process. But the path can be difficult to determine. Thus, the prosecutor who delays a criminal investigation or prosecution until the completion of an election risks the election of a candidate who may then be summarily removed from office, significantly disrupt-

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285. U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, at 3572 (Sept. 2006), *available at* <http://www.usdoj.gov/oig/special/s0809a/final.pdf> (finding that David Iglesias was removed from his position as United States Attorney for the District of New Mexico "because of complaints to the Department and the White House by Senator Domenici and other New Mexico Republican political officials and party activists about Iglesias's handling of voter fraud and public corruption cases in New Mexico").

ing the electoral process, and may subject the office of the prosecutor to criticism for depriving the electorate of crucial information. On the other hand, a prosecutor who proceeds without regard to the election cycle may undermine the chances of a candidate who may ultimately be found innocent of any wrongdoing. Thus, the Standards urge an approach in such cases that is neutral, principled, and undertaken with a good faith intent to limit the impact of criminal investigations on the political process.

Faced with these types of problems, prosecutors must put aside their personal political views and take the investigative decision on a principled and transparent basis. In addition, the prosecutor must strive to reduce the impact of the choice on the political process. This may mean even more care than usual in any statements made to the public.<sup>286</sup>

### **Standard 26-3.7 Review and oversight of criminal investigations by government agencies and officials**

(a) Prosecutors' offices should attempt to respond in a timely, open, and candid manner to requests from public officials for general information about the enforcement of laws under their jurisdiction or about law reform matters. However, if public officials seek information about ongoing or impending investigations, the prosecutors' offices should consider the potential negative impact of providing such information and should inform public officials about such concerns.

(b) Generally, responses to public officials should be made by high-ranking officials in the prosecutor's office who have policy-making authority. Prosecutors' offices should resist allowing line-attorneys to respond to requests for information by public officials.

(c) Generally, responses to information requests by public officials should be through testimony or by providing pertinent statistics and descriptive and analytical reports, and not by providing information about particular matters. Prosecutors' offices should resist requests for materials that are subject to deliberative process or work product privileges related to pending criminal investiga-

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286. See, Standard 1.5 and cmt. (Contacts with the public).

tions or closed investigations whose materials have not otherwise been made public, and should oppose disclosure of information that would adversely affect a person or entity.

(d) Prosecutor's offices may respond to requests about the handling of fully adjudicated cases. Absent unusual circumstances, information about adjudicated cases should be provided by high-ranking officials with policy-making authority, and not by line attorneys.

(e) The Prosecutor's office should establish clear and consistent policies to address its responsibilities under public disclosure laws and with regard to the public's potential access to closed matters. The Prosecutor's office should provide sufficient resources to make prompt and appropriate replies to any public disclosure requests.

### *Commentary*

Prosecutors are subject to legislative oversight. The legislature must allocate public resources, assure that public monies are being well spent, and see that the laws and resources are in place both to protect public safety and important rights. Prosecutors must, in a timely, open, and candid manner, provide appropriate information about their offices when the legislature seeks it.

The power to engage in oversight, like the power to engage in a criminal investigation, runs the risk of having a perverse effect: instead of vindicating the public interest in an effective and fair criminal justice system, a politically-minded inquiry can rob both the legislature and the executive of public confidence, wrongly malign both individuals and the institutions of justice, chill the proper vigor of the prosecutor's office, and actually harm the ability of the prosecutor's office to fulfill its function.<sup>287</sup>

One danger is that legislative oversight that is too intrusive will blur the separate constitutional roles, and will pressure prosecutors "to

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287. See generally *United States v. Poindexter*, 951 F.2d 369, 390 (D.C. Cir. 1991); see also David Johnston, *Poindexter Wins Iran-Contra Case in Appeals Court*, N.Y. TIMES, Nov. 16, 1991, available at <http://www.nytimes.com/books/97/06/29/reviews/iran-poindexter.html> (noting that the "initial focus of the inquiry on Reagan White House officials has collapsed with the Poindexter decision and the recent dismissal of charges against Oliver L. North, the former staff member on the National Security Council").

avoid making unpopular discretionary decisions.”<sup>288</sup> Thus the ABA has previously observed:

In our constitutional system, prosecuting attorneys at all levels of government are and must be vested with broad discretion in deciding whether to prosecute and what to charge. . . . If other branches of government were permitted to interfere in these decisions or attempt to punish or otherwise harass prosecutors for their decisions to charge or decline prosecution – the efforts by our founders to diminish the threat of tyranny through separation of powers would be irreparably damaged.<sup>289</sup>

Consistent with these observations, certain rules of conduct should be observed. This Standard notes that, where possible, prosecutors should decline to provide information about individual cases, information about ongoing cases, information that has not been made public, information that would adversely affect some witness, victim or subject, and privileged materials such as work-product or deliberative process materials. There are sound reasons that a prosecutor is required to keep investigative and grand jury material secret.<sup>290</sup> These rules should not be undermined upon a simple request from a different branch of government.

The prospect that a prosecutor may be called upon by a legislature to provide information about the decision whether to prosecute a particular case has the potential to influence prosecutorial decision-making by encouraging the prosecutor either to indict a case he or she otherwise may not, or to decline to prosecute a case he or she otherwise would prosecute.

The Standard notes that prosecutors should avoid disclosing to the legislature materials which are subject to the deliberative process or work product privileges. The prospect of public disclosure of such materials could influence the types of written records prosecutors create and the types of communications they have or memorialize in writing. As a result, supervising prosecutors may receive less frank or complete

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288. *Resolution of the Criminal Justice Section Council of the ABA: Legislative Oversight of Prosecutorial Agencies*, ANNUAL REPORT OF ABA 269 (1996).

289. *Id.* at 268.

290. *See* Fed. R. Crim. Proc. 6(e).

accounts of cases they review in order to make decisions about whether particular cases should be pursued.

Finally, the Standard anticipates that the disclosure of information about particular cases could result in adverse treatment of a person or entity. For example, disclosure of the investigation of a person who was not ultimately prosecuted could result in vilification of the person with no recourse.





