National District Attorneys Association
National Prosecution Standards
Third Edition
with Revised Commentary

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Introduction

These standards are intended to be an aspirational guide to professional conduct in the performance of the prosecutorial function. Unless otherwise indicated, they are intended to apply to the chief prosecutor (by whatever title) in any office, as well as to deputy and assistant prosecutors.

These standards are intended to supplement rather than replace the existing rules of ethical conduct that apply in a jurisdiction. Generally, these standards should be construed in such a way that they are consistent with existing law and applicable rules of ethical conduct. These standards are intended to be guides for prosecutors in the day-to-day performance of the prosecution function, but the problems of professionalism and ethics are too varied to be subject to unvarying rules. Thus, the decision whether or not to follow one or more of these standards may or may not constitute an unacceptable lack of professionalism, depending on the attendant circumstances. These standards are not intended to: (a) be used by the judiciary in determining whether a prosecutor committed error or engaged in improper conduct; (b) be used by disciplinary agencies when passing upon allegations of violations of rules of ethical conduct; (c) create any right of action in any person; or (d) alter existing law in any respect.

The accompanying commentary is intended to help prosecutors understand and interpret these standards, but is not an official part of the standards. If the commentary appears inconsistent with the text of the standard, the text should guide the prosecutor’s actions.

Definitions

“Jurisdiction”—Means the political area over which the prosecutor’s authority extends. However, in the context of applicable laws and rules of ethical conduct, “jurisdiction” includes a state as well.

“Knows,” “Has Knowledge,” or “Within the Knowledge of”—Means actual knowledge.

“Misconduct”—Conduct defined as misconduct by the relevant Rules of Ethical Conduct.

“Prosecutor”—Unless otherwise specifically indicated, means any person performing the prosecution function.
“Rules of Ethical Conduct”—Refers to rules of professional conduct, rules of attorney conduct, rules of professional responsibility, or codes of attorney conduct as adopted by the various states or jurisdictions to regulate attorney conduct. The term does not refer to the ABA Model Rules of Professional Conduct.

“Special Prosecutor”—Means any person who performs the prosecution function in a jurisdiction who is not the chief prosecutor elected or appointed in the jurisdiction, or an assistant or deputy prosecutor in the jurisdiction.

Part I. General Standards

1. The Prosecutor’s Responsibilities
2. Professionalism
3. Conflicts of Interest
4. Selection, Compensation, and Removal
5. Staffing and Training
6. Prosecutorial Immunity

1. The Prosecutor’s Responsibilities

1-1.1 Primary Responsibility
The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected.

1-1.2 Societal and Individual Rights and Interests
A prosecutor should zealously protect the rights of individuals, but without representing any individual as a client. A prosecutor should put the rights and interests of society in a paramount position in exercising prosecutorial discretion in individual cases. A prosecutor should seek to reform criminal laws whenever it is appropriate and necessary to do so. Societal interests rather than individual or group interests should also be paramount in a prosecutor’s efforts to seek reform of criminal laws.

1-1.3 Full-Time/Part-Time
The chief prosecutor in a jurisdiction should be a full-time position. A full-time prosecutor, whether the chief prosecutor or otherwise, should neither maintain nor profit from a private legal practice. A chief prosecutor may serve part-time in those jurisdictions that are unable or unwilling to fund a full-time prosecutor, but while serving as a part-time prosecutor may not engage in professional conduct that is inconsistent with the need for prosecutorial independence.
1-1.4 Rules of Conduct
A prosecutor shall abide by all applicable provisions of the rules of ethical conduct in his or her jurisdiction.

1-1.5 Inconsistency in Rules of Conduct
To the extent prosecutors are bound by his or her jurisdiction’s rules of ethical conduct that are inconsistent with these standards, they shall comply with the rules but endeavor to seek modification of those rules to make them consistent with these standards.

1-1.6 Duty to Respond to Misconduct
A prosecutor is obligated to respond to professional misconduct that has, will, or has the potential to interfere with the proper administration of justice:
  a. Where the prosecutor knows that another person associated with the prosecutor’s office has engaged, or intends to engage in professional misconduct that could interfere with the proper administration of justice, the prosecutor should address the matter in accordance with internal office procedures.
  b. If the office lacks adequate internal procedures to address allegations of professional misconduct, a prosecutor who learns of the misconduct may, in the first instance, request that the person desist from engaging in the misconduct. If such a request is, or is likely to be, futile or if the misconduct is of a sufficiently serious nature, a prosecutor should report the misconduct to a higher authority within the prosecutor’s office.
  c. If, despite a prosecutor’s best efforts, no action is taken in accordance with the prior procedures to remedy the misconduct, a prosecutor should report the misconduct to appropriate officials outside the prosecutor’s office (to the extent permitted by the law and rules of ethical conduct of the state).
  d. A prosecutor’s failure to report known misconduct may itself constitute a violation of the prosecutor’s professional duties.

Commentary

A prosecutor is the only one in a criminal action who is responsible for the presentation of the truth. Justice is not complete without the truth always being the primary goal in all criminal proceedings. A prosecutor is not a mere advocate and unlike other lawyers, a prosecutor does not represent individuals or entities, but society as a whole. In that capacity, a prosecutor must exercise independent judgment in reaching decisions while taking into account the interest of victims, witnesses, law enforcement officers, suspects, defendants and those members of society who have no direct interest in a particular case, but who are nonetheless affected by its outcome.

As a representative of society as a whole, a prosecutor should take an active role in the legislative process when proposals dealing with the criminal justice system are being considered. In that role, the prosecutor once again should exercise his or her independent judgment in supporting legislation in the best interest of society.
A full-time chief prosecutor confers many advantages on his or her jurisdiction. Among other advantages, the prosecutor is not distracted by a private law practice; is readily available for consultation with law enforcement officers; is more accountable to society for his or her decisions and performance; and, is not vulnerable to the various potential conflicts of interest that can plague a part-time prosecutor.

Despite those advantages, there are many part-time prosecutors in the United States. This situation is generally created by the societal preference for local accountability and control in locations where the sparse population, geographic size of the jurisdiction, budget and caseload do not warrant that the position be approached as a full-time one. The position of the standard is that the office be approached on a full-time basis insofar as that is possible in any given jurisdiction.

Whether full-time or part-time, the position should be approached as a career and not as a steppingstone or sideline. This means that the prosecutor is prepared to bring to his public duties an orientation of primacy. No matter what other activities the prosecutor is involved in, his public duties come first. Part-time prosecutors should not represent persons in criminal matters in other jurisdictions. This is because of the potential for conflicts with his or her duties as a prosecutor and because of the perception that such representation would decrease his or her dedication to the performance of prosecutorial functions.

Nearly all jurisdictions have now adopted, in some form, the ABA Model Rules of Professional Conduct. While these and other rules adopted by a minority of states have not fully addressed the special concerns of prosecutors in carrying out their public responsibilities, they are the law and rules prosecutors must follow. Therefore, it is important for prosecutors to become involved in the rule making process and to be involved in local jurisdiction processes in adopting the rules.

Using appropriate procedures and in appropriate fora, a prosecutor may challenge such code provisions believed in good faith to be unjust or inapplicable. The existence of a code or rule does not eliminate the duty of the prosecutor to seek justice and serve the public interest. In this sense, the role of the prosecutor is not always the same as other members of the bar. If a prosecutor chooses to disregard a code or rule because of a belief that his or her duty to seek justice requires the same, it should be done with the awareness that the licensing authority in the jurisdiction may well disagree with that determination.

Because the responsibility to seek justice is one borne by each individual prosecutor, one cannot turn a blind eye or a deaf ear to misconduct by another prosecutor that will or has the potential to interfere with that responsibility. To prepare for such a situation, a chief prosecutor should establish an internal office procedure to be used when necessary. In the absence of such a procedure, a prosecutor should report the misconduct to a higher authority inside the prosecutor’s office.

If, despite a prosecutor’s best efforts, no action is taken in accordance with the prior procedures to address the misconduct, a prosecutor should report the misconduct to
appropriate officials outside the prosecutor’s office to the extent permitted by the law and rules of ethical conduct of the state. In the event that the prosecutor believes that action taken by a higher authority in the office is inadequate, the prosecutor should consider discussing the matter with a designated ethical advisor or a statewide ethical adviser before deciding what other action should be taken.

2. Professionalism

1-2.1 Standard of Conduct
A prosecutor should conduct himself or herself with a high level of dignity and integrity in all professional relationships, both in and out of court. Appropriate behavior includes, but is not limited to, the following:

a. A prosecutor should act with candor, good faith, and courtesy in all professional relations.
b. A prosecutor should act with integrity in all communications, interactions, and agreements with opposing counsel. A prosecutor should not express personal animosity toward opposing counsel, regardless of personal opinion.
c. A prosecutor should at all times display proper respect and consideration for the judiciary, without foregoing the right to justifiably criticize individual members of the judiciary at appropriate times and in appropriate circumstances.
d. A prosecutor should be punctual for all court appearances. When absence or tardiness is unavoidable, prompt notice should be given to the court and opposing counsel.
e. A prosecutor should conduct himself or herself with proper restraint and dignity throughout the course of proceedings. Disruptive conduct or excessive argument is always improper.
f. A prosecutor should treat witnesses fairly and professionally and with due consideration. In questioning the testimony of a witness, a prosecutor should not engage in a line of questioning intended solely to abuse, insult or degrade the witness. Examination of a witness’s credibility should be limited to legally permitted impeachment techniques.
g. A prosecutor should avoid obstructive and improper tactics. Examples of such tactics include, but are not limited to, knowingly:
   • Making frivolous objections, or making objections for the sole purpose of disrupting opposing counsel;
   • Attempting to proceed in a manner that is obviously inconsistent with a prior ruling by the court;
   • Attempting to ask clearly improper questions or to introduce clearly inadmissible evidence;
   • Engaging in dilatory actions or tactics; and
   • Creating or taking unlawful advantage of prejudicial or inflammatory arguments or publicity.
Commentary

A prosecutor's obligation to comply with the rules of ethical conduct of his or her jurisdiction is a fundamental and minimal requirement. When a prosecutor falls below that standard, he or she may expect sanctions impacting on a particular case or on the individual prosecutor.

The dignity and honor of the profession call for compliance with a higher standard of conduct—one of professionalism. This standard requires the prosecutor to bring integrity, fairness, and courtesy into all interactions, whether they are with victims, witnesses, law enforcement officers, opposing counsel, the court, jurors, or defendants.

This standard follows the lead of many state and local bar associations that have created codes of professionalism. It should used to inspire and invigorate all prosecutors, from the recently admitted to the very experienced, as all can be affected by the stress of the situations encountered by prosecutors. This especially applies in litigation, where emotions run highest, and the adversary setting generates a competitive orientation. While professionalism is a word of elusive definition, the standard lists a number of types of conduct that must be considered. It is strongly recommended that wherever prosecution adopts and abides by a code of professionalism, the defense bar should reciprocate.

3. Conflicts of Interest

1-3.1 Conflict Avoidance
A prosecutor should not hold an interest or engage in activities, financial or otherwise, that conflict, have a significant potential to conflict, or are likely to create a reasonable appearance of conflict with the duties and responsibilities of the prosecutor's office.

1-3.2 Conflicts with Private Practice
In jurisdictions that do not prohibit private practice by a prosecutor:
   a. The prosecutor in his private practice should not represent clients in any criminal or quasi-criminal related matters, regardless of the jurisdiction where the case is pending;
   b. The prosecutor should avoid representing to private clients or prospective clients that the status of a prosecutor could be an advantage in the private representation;
   c. The prosecutor should not indicate his or her status as a prosecutor on any letterhead, announcement, advertising, or other communication involved in the private practice, and should not in any manner use the resources of the prosecutor's office for the purpose of such non-prosecutorial activities;
   d. The prosecutor should excuse himself or herself from the investigation and prosecution of any current client of the prosecutor and should withdraw from any further representation of that client.
1-3.3 Specific Conflicts
In all jurisdictions, including those prohibiting private practice by prosecutors:

a. The prosecutor should excuse himself or herself from the investigation and prosecution of any former client involving or substantially related to the subject matter of the former representation, unless, after full disclosure, the former client gives informed written consent permitting the prosecutor’s involvement in the investigation or prosecution.

b. The prosecutor should excuse himself or herself from the investigation and prosecution of any matter where information known to the prosecutor by virtue of a prior representation and subject to the attorney-client privilege would be pertinent to the criminal matter, unless, after full disclosure, the former client gives informed written consent permitting the prosecutor’s involvement in the investigation or prosecution.

c. The prosecutor should excuse himself or herself from the investigation and prosecution of any person who is represented by a lawyer related to the prosecutor as a parent, child, sibling, spouse, or domestic partner, or who has a significant financial relationship with the prosecutor.

d. The prosecutor should excuse himself or herself from any investigation, prosecution, or other matter where personal interests of the prosecutor would cause a fair-minded, objective observer to conclude that the prosecutor’s neutrality, judgment, or ability to administer the law in an objective manner may be compromised.

e. If an assistant or deputy prosecutor learns of the potential of a specific conflict, he or she should immediately report the matter to the chief prosecutor or a designee thereof.

1-3.4 Conflict Handling
Each prosecutor’s office should establish procedures for handling actual or potential conflicts of interest. These procedures should include, but are not limited to:

a. The creation of firewalls and taint or filter teams to ensure that prosecutors with a conflict are not improperly exposed to information or improperly disclose information; and

b. Methods to accurately document the manner in which conflicts were handled to ensure public trust and confidence in the prosecutor’s office.

1-3.5 Special Prosecutors
Where an actual or potential conflict of interest exists that would prevent the prosecutor’s office from investigating or prosecuting a criminal matter, the prosecutor’s office should appoint, or seek the appointment of a “special prosecutor,” or refer the matter to the appropriate governmental authority as required by law. Under those circumstances where a special prosecutor is appointed:

a. The special prosecutor should be a member of the state bar in good standing, with appropriate experience in the subject matter of the appointment, and should be perceived as having sufficient detachment from the prosecutor’s office so as not to be influenced by any actual or potential conflict;
b. The special prosecutor should have the authority only over the case or cases for which he or she is appointed; and

c. Subject to the need to avoid the appearance of a conflict, a chief prosecutor and his or her assistants and staff should give all appropriate assistance, cooperation, and support to a special prosecutor.

**Commentary**

There are few topics of ethical orientation more pervasive than conflicts of interest. Conflicts may arise not only from relationships with current or former clients, but also with a prosecutor's other activities—financial or otherwise.

Conflicts of interest problems are founded on the premise of the inability to serve two masters with foreseeable different interests that compete or contend.

Conflicts present themselves differently to the prosecutor, compared to the private practitioner, because the prosecutor does not initially select those subject to prosecution. Nor is there usually a choice of which prosecution office should proceed.

The standards recognize potential conflicts in all jurisdictions involving former clients or information obtained by virtue of former representation, and allow the prosecutor to proceed on the case only if the individual makes a counseled waiver permitting the prosecutor's involvement.

The extent to which firewalls and filters may be used depend upon the size of the office and jurisdiction, the media coverage of the matter, the type of matter concerned, and the position of the conflicted prosecutor in the office. If such methods are or are likely to be ineffective, the chief prosecutor should seek a qualified special prosecutor and offer appropriate assistance.

4. **Selection, Compensation, and Removal**

1-4.1 **Qualifications**

At the time of filing for election, appointment, or hiring, and for the duration of the term of office or employment, a prosecutor shall be a member in good standing of the state's bar, except as otherwise provided by law. Chief prosecutors should be residents of the jurisdiction that they serve.

1-4.2 **Compensation; Responsibilities of the Chief Prosecutor**

Chief prosecutors should be compensated commensurate with their responsibilities. The salary of the full-time chief prosecutor should be at least that of the salary of the chief judge of general trial jurisdiction in the chief prosecutor's district and should not be lowered during a term of office. Factors that should be considered in determining compensation include, but are not limited to:

a. The benefits to the jurisdiction of encouraging highly competent people to seek a position of prosecutor with a career orientation; and
b. The level of compensation of people with analogous responsibilities in the private practice of law, in private industry, and in public service.

1-4.3 Compensation of Assistant and Deputy Prosecutors
The compensation of the chief prosecutor should not serve as a basis for the highest compensation of assistant prosecutors. Factors that should be considered in determining compensation include, but are not limited to:
   a. The benefits to the jurisdiction of encouraging highly competent people to seek a position of prosecutor with a career orientation; and
   b. The level of compensation of people with analogous responsibilities in the private practice of law, in private industry, and in public service.

In addition, factors that may not be considered in setting compensation include, but are not limited to:
   a. Characteristics of the prosecutor that are irrelevant to their ability to perform the job and historically have been the basis of invidious discrimination, including race, gender, religion, national origin, and sexual orientation;
   b. Partisan political affiliation or activity; and
   c. Revenues generated by the prosecution function—such as asset forfeitures or collection of fees.

1-4.4 Benefits
A chief prosecutor should seek to ensure that all assistant attorneys have access to a benefits program commensurate with their responsibilities. These benefits should include indemnification or insurance to pay all costs of defense against, and judgments rendered in, civil lawsuits arising from the prosecutor’s performance of his or her official duties.

1-4.5 Workload
Except in extraordinary circumstances, a prosecutor should not maintain, and should not be asked to maintain, a workload that is inconsistent with the prosecutor’s duty to ensure that justice is done in each case.

1-4.6 Removal
A chief prosecutor shall hold office during his or her term of office and shall only be removed by procedures consistent with due process and governing law. Factors that may not be taken into account in the removal of a prosecutor include, but are not limited to, the following:
   a. Characteristics of the prosecutor that are irrelevant to his or her ability to perform the job and historically have been the basis of invidious discrimination, including race, gender, religion, national origin, and sexual orientation.
   b. Partisan activities that are legal and ethical unless those activities interfere with the efficient administration of the office.
   c. The refusal to participate in partisan activities.
1-4.7 Discharge of Assistant and Deputy Prosecutors
Assistant and deputy prosecutors are subject to removal according to the laws of their jurisdictions and the procedures in their offices. Factors that may not be taken into account in the removal of a prosecutor include, but are not limited to, the following:
   a. Characteristics of the prosecutor that are irrelevant to his or her ability to perform the job and historically have been the basis of invidious discrimination, including race, gender, religion, national origin, and sexual orientation.
   b. Partisan activities that are legal and ethical unless those activities interfere with the efficient administration of the office.
   c. The refusal to participate in partisan activities.

Commentary

Given the preference for involvement with the represented community, the need to be available for consultation with law enforcement personnel, and the need to be available in the event of an emergency or unusual situation, the chief prosecutor should be a resident of his or her jurisdiction. Even though, in some jurisdictions, disbarment of the prosecutor would not disqualify him or her from holding the office, the public interest would dictate resignation in that situation.

Provision of an adequate salary is an absolute necessity if the office of prosecutor is to function at maximum efficiency. An adequate salary is essential for attracting capable candidates to the position of prosecutor. Without such compensation, capable persons who might otherwise be attracted to the prosecutor’s office are diverted to private practice of law or other endeavors.

The salary provided the prosecutor should be at least that of the salary of the judge of general trial jurisdiction in the district of the prosecutor. As noted by the National Advisory Commission on Criminal Justice Standards and Goals, Courts 230 (1973):
   For purposes of salary, the prosecutor should be considered to be on the same level as the chief judge of the highest trial court of the local criminal justice system. Both positions require the exercise of broad professional discretion in the discharge of the duties of the offices. It is therefore reasonable that the compensation for the holders of these offices have the same base.

Provision for an adequate salary level is also essential to reduce the rapid turnover of local prosecutors. The skills and judgment required by a prosecutor are developed with time and experience. To retain the best representatives of the people, the salary and benefits exchanged for services must be commensurate with the salary and benefits available in other areas for the expertise developed. Without the ability to earn a salary sufficient to justify remaining in the prosecutor’s office, the office becomes a training ground for private practitioners and the people are denied the best representation.

A prosecutor has the responsibility to seek justice in every case. Ensuring that a matter has been properly investigated and evaluating how it should be handled are time
consuming. In those cases that go to trial, the preparation required to proceed effectively is filled, in many instances, with education regarding experts in various fields and creation of technological presentations and exhibits which are increasingly necessary to effectively explain the prosecution’s theory of the case.

Because of the need to thoroughly investigate, evaluate, prepare and try a variety of cases, prosecutors should not be overwhelmed by large numbers of cases needing disposition. If they are, the quality of representation afforded the people suffers and the difficulty in retaining good, experienced prosecutors increases.

Without addressing specific reasons for the removal from office of the chief prosecutor or assistant prosecutors, the standard requires that such actions be subject to procedural due process. Equally important is the necessity that such removals not be undertaken because of prejudice against the prosecutor’s race, gender, religion, national origin or sexual orientation.

Engaging in partisan political activities, or the refusal to engage in the same should not be a basis for removal unless the activity interferes with the efficient operation of the office.

Prosecutors should be mindful of their responsibility to seek justice. Should a prosecutor find himself or herself in a situation in which the public trust in the office has diminished to the extent that he or she can no longer fulfill that primary responsibility, resignation should be considered.

Given the litigious nature of some persons involved in the criminal justice system, a program providing indemnification or insurance to pay all costs incurred by the prosecutor in defending against civil lawsuits and in paying judgments arising from the performance of his or her official duties is essential. That benefit will enable a prosecutor to seek justice despite the threats of civil litigation that, even if totally unfounded, can consume time and resources to defend.

5. Staffing and Training

1-5.1 Transitional Cooperation
When an individual has been elected or appointed prosecutor, the incumbent prosecutor should, when practicable, fully cooperate in an in-house orientation of the incoming prosecutor to allow for an effective transition consistent with the principles of professional courtesy. This cooperation may include, when possible, designating the incoming prosecutor a special assistant prior to the time the incoming prosecutor assumes office, so that the incoming prosecutor may be briefed on significant ongoing proceedings and deliberations within the office, including grand jury or other investigations.
TO: Arkansas Independent Citizens Commission  
The Hon. Larry Ross, Chairman  
The Hon. Chuck Banks, Vice-Chairman  
The Hon. Barbara Graves  
The Hon. Stuart Hill  
The Hon. Brenda James  
The Hon. Stephen Tipton  
The Hon. Mitch Berry

FROM: Larry Jegley, President, Arkansas Prosecuting Attorneys Association

RE: Prosecuting Attorneys

DATE: April 21, 2015

Thank you all for your kind attention and questions at your April 16, 2015 meeting. My colleagues and I were so glad for the opportunity to visit with you. Commissioner Berry asked a question regarding tenure of the Elected Prosecuting Attorneys. A tenure summary sheet is attached for your information. As I noted on April 15, eight of our number are new to the office as of this past January 1; the other twenty began new, 4-year terms on that date.

We would welcome any questions you may have. Thank you so much.
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*denotes 2015 first elected year

+denotes new terms began on 1/1/15