Alameda County
District Attorney's Office
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PRIDE & PROFESSIONALISM

Alameda County District Attorney's Office
Attorney Handbook

INTRODUCTION

The prosecutor is uniquely situated in the criminal justice system in that he or she does not represent the victim of a crime, the police or any individual. Instead, the prosecutor represents the community as a whole. It is the prosecutor's job to find the truth, decide who should be charged and hold the perpetrator of a given crime accountable. Accordingly, the first, best and most effective shield against injustice in the criminal justice system is the integrity of the prosecutor.[iii]

The goal of the prosecutor is truth and the achievement of a just result. We seek the truth, tell the truth, and let the chips fall where they may. We serve the People's interest where we leave no stone unturned in our search for the truth, and when the jury's verdict reflects the available evidence. When we win, we can sleep at night because the outcome is the product of our best effort and the fairest system humans have devised. When we lose, we can sleep at night for the same reason.[iv]

In our search for the truth we must keep an open mind. Not every person who is a suspect should be arrested, not every suspect who is arrested should be prosecuted, and not every case should be tried. Just as we have a duty to diligently prepare our cases and argue the truth of the charges, we also have an ethical duty *not* to bring a case to trial unless we have diligently sought the truth and are convinced of the defendant's guilt.[v]

As the United States Supreme Court stated in *Berger v. US* (1935) 295 U.S. 78, 88, a seminal case on prosecutorial ethics, "While a prosecutor may strike hard blows, [we] are not at liberty to strike foul ones. It is as much [our] duty to refrain from improper methods calculated to produce wrongful convictions as it is to use every legitimate means to bring about a just one."

Recognizing that we work in an adversarial system with opponents who often despise our role and may act out against us personally as a result, or who may feel justified in skirting the rules to assist their clients, the standards laid out in this handbook are intended to be an aspirational guide to professional conduct in the performance of our prosecutorial function. While our opponents may not always act in accordance with the professional guidelines governing all attorneys, we as prosecutors are held to a higher standard of conduct; we must be, given that the decisions we make have the power to drastically impact people's lives and liberty. Therefore, even when our opponents resort to rude or questionable behavior, we must maintain our professionalism.

These guidelines are meant to ensure that while we vigorously fight for justice, we are always striving to do the right thing in our role as District Attorneys in Alameda County.

1 The Prosecutor's Responsibilities

1.1 Primary Responsibility

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.

1.2 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.

2 Professionalism

2.1 Duty of Professionalism, Candor and Impartiality

The Prosecutor must be impeccably professional because he or she is required to meet standards of candor and impartiality not demanded of other attorneys. [vi]Professionalism as a human being and a prosecutor is your most important quality. Police officers, victims, witnesses, attorneys and judges will make critical decisions based upon their observations of your candor, honor, and integrity.

2.2 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. The duty of candor requires the disclosure of all material facts as well as citation of controlling legal authority including adverse authority which defense counsel has not cited;

c. 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;

d. 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;

e. 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;

f. 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;

g. 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;

h. All attorneys shall treat members of the public with dignity and respect. They shall remain courteous and civil at all times in their relationship with the public;

i. A prosecutor should avoid obstructive and improper tactics.

2.3 Conduct in the Office

All attorneys should treat their supervisors, subordinates, administrative professionals, Inspectors and peers with dignity and respect. They shall, at all times, remain courteous and civil in their relationships with one another. All attorneys shall conduct themselves in accordance with County and Office policies regarding sexual harassment, workplace violence, and abusive conduct prevention. No attorney shall discriminate against another person. Nor shall any attorney make derogatory, racial, ethnic, sexual, or religious remarks against or about other persons. Consumption of alcohol during work hours is prohibited.

2.4 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. 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 report the matter to their immediate supervisor.

2.5 Social Media Guidelines

2.5.1 Purpose of Guidelines

Recognizing the ever-increasing use of social media by all members of the District Attorney's Office and the overlapping nature of personal and professional dissemination of information on these various sites, the Office has developed the following guidelines to fulfill the following objectives:

1. To maintain the integrity of the District Attorney's Office;
2. To satisfy the obligations and professional responsibilities required of officers of the court and members of the District Attorney's Office;
3. To safeguard court proceedings, judicial rulings and jury verdicts;
4. To ensure the personal safety and security of all Office employees.

2.5.2 Definition of Social Media

For purposes of these guidelines, the term "social media" encompasses the electronic communication and the platforms that enable users to interact, participate in and share content with each other. Social networking is the act of communicating and participating in social media. Social Media platforms include but are not limited to: *Facebook, Twitter, Snapchat, Instagram, You Tube, Flikr and LinkedIn.* Given the constant advancements in online technology, it must be assumed that all postings are or may be available to the public and that all will exist in cyberspace permanently.

2.5.3 Authorization to Post on Social Media Maintained by the Office

No member of the Office shall post or otherwise represent the views of the Office on any Social Media outlet maintained by and for the Office without the express consent of the District Attorney.

2.5.4 Individual Employee Use of Social Media

2.5.4.1 Postings by Employees About Cases Handled by the Office

Any posting made by a member of the Office on a Social Media site regarding any case prosecuted by the Office must be considered a statement to the media. Therefore, all such postings must comply with the mandates of State Bar of California Rule of Professional Conduct 5-120 regarding trial publicity[vii].

No employee of the Office shall make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if he or she knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. Public Communication includes statements to the media as well as statements made on social media platforms.

2.5.4.2 Postings by Employees About Office Policies, Practices and Prosecutions

When posting, commenting or writing about the business conducted by the Office or any of its members, every employee should maintain the highest standard of professionalism. Before making any public statement, (all social media postings should be considered public statements)

the employee should consider the possible consequences and impact of the statement. No employee should create a post about his or her own work, that of his/her colleagues, or the policies or practices of the Office that would negatively reflect upon or undermine the professionalism or reputation of the Office.

2.5.4.3 Postings by Employees About Non-Office Matters

Recognizing that every member of the Office has the right to express his or her individual opinions as a private citizen, every employee, when posting on any social media website:

Must not: Represent oneself as an official spokesperson for the Office, nor claim to be speaking on behalf of the District Attorney.

Should: Consider the effect that the posting will have on all recipients (both intended and non-intended), as it relates to the author's personal and professional reputation and credibility, as well as the good standing of the Office.

2.5.4.4 Sharing Personal Information

Social Media sites provide ever-increasing outlets for sharing of personal information, photos, and special events. At the same time, sites that claim to offer privacy settings are increasingly available to the public.

It is recommended that you keep your personal information and that of your family and colleagues as private as possible. Be cautious about accepting "friend" requests. Be smart and think before you put out information regarding your whereabouts (especially late at night) your future vacation plans, your children's activities, and other personal identifying information. All these materials can easily reach audiences, including criminal defendants, witnesses and their associates.

3 Civility in the Legal Profession

3.1 Responsibilities to the Justice System

The dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice.

3.2 Communications

An attorney's communications about the legal system should at all times reflect civility, professional integrity, personal dignity and respect for the legal system:

a. An attorney should not disparage the intelligence, integrity, ethics, morals or behavior of the court or other counsel, parties or participants when those characteristics are not at issue;

b. Respecting cultural diversity, an attorney should not disparage another's personal characteristics;

c. An attorney should avoid hostile, demeaning or humiliating words;

d. An attorney should not create a false or misleading record of events or attribute to an opposing counsel a position not taken by him or her;

e. Unless specifically permitted or invited by the court or authorized by law, an attorney should not correspond directly with the court regarding a case.

3.3 Punctuality

An attorney should be punctual in appearing at trials, hearings, meetings and other scheduled appearances.

3.4 Scheduling

An attorney should promptly notify the court and other counsel of problems with key witnesses' availability or when scheduled hearings must be canceled or rescheduled. An attorney should provide alternate dates when said witness will be available.

3.5 Writings Submitted to the Court, Counsel or Others

Written materials directed to counsel, third parties or the court should be factual and concise and focused on the issue(s) to be decided. All revisions to a document previously submitted to the court or counsel should clearly identify the revisions that have been made.

3.6 Conduct in Court

To promote a positive image of the Office and the profession, an attorney should always act respectfully and with dignity in court and assist the court in the proper handling of a case. For example:

a. An attorney should be prepared;

b. An attorney's conduct should avoid disorder or disruption and preserve the right to a fair trial;

c. An attorney should maintain respect for and confidence in a judicial office by displaying courtesy, dignity and respect toward the court and courtroom personnel;

d. An attorney should refrain from conduct that inappropriately demeans another person;

e. An attorney should make objections for legitimate and good faith reasons, and not for the purpose of harassment or delay;

f. While appearing before the court, an attorney should address all arguments, objections and requests to the court, rather than directly to opposing counsel;

g. While appearing in court, an attorney should demonstrate sensitivity to any party, witness or attorney who has requested, or may need, accommodation as a person with physical or mental impairment, so as to foster full and fair access of all persons to the court.

3.7 Social Relationships with Judicial Officers, Neutrals and Court Appointed Experts

An attorney should avoid even the appearance of bias by notifying opposing counsel of any close, personal relationships between the attorney and a judicial officer or court-appointed expert and allowing a reasonable opportunity to object.

4 Interactions with Others

4.1 Interactions with Victims

Prosecutors must comply with Marsy's Law (PC 679.026) in all of their dealings with victims of crime and/or their representatives.[viii]

4.1.1 Notice

The prosecutor should insure that victims or their representatives are given timely notice of all important stages of the criminal proceeding to the extent feasible, upon request or as required by Marsy's Law, including but not limited to:

a. Acceptance or rejection of a case by the prosecutor's office, the return of an indictment or the filing of criminal charges;

b. The Judicial proceedings relating to the victims' case;

c. Any decision or action in the case which results in the accused's provisional or final release from custody;

d. Disposition of the case, including plea bargains, trial and sentencing;

e. Any proceeding within the knowledge of the prosecutor which does or may result in the defendant no longer being incarcerated, including appellate reversal, parole, release,

escape, and any other event within the knowledge of the prosecutor that may put the victim at risk of harm or harassment.

4.1.2 Victim Orientation

To the extent feasible and when it is deemed appropriate, such as in cases of violent crime, an orientation to the criminal justice process should be provided to the victim or his/her surviving representatives. Special *in person* orientation should be given to sexual assault victims and child and spousal abuse victims as well as their families whenever practicable.

4.1.3 Case Status Updates

A prosecutor should readily provide victims with information about the status of his/her case upon request. The prosecutor should ensure that victims are given notice as soon as possible of upcoming court dates which require their attendance. In the event of a scheduling change which will affect the victim's required attendance at a judicial proceeding, the prosecutor should notify the victim as soon as is practicable (recognizing that in cases with uncooperative victims such notice may not be possible or may interfere with attempts at personal service).

4.1.4 Attendance in Court

A prosecutor should not require victims to attend judicial proceedings unless their testimony is essential to the prosecution or is required by law. When their attendance is required, the prosecutor should seek to reduce to a minimum the time they must spend at the proceedings.

4.1.5 Interviewing Victims

Unless a prosecutor is prepared to stipulate to the contents of an interview with a victim, a prosecutor should avoid interviewing a victim without a third party present (ideally an Inspector or other attorney). Further, any notes taken during the interview must be discovered to the defense. If no notes are taken, any new information coming from the interview must be disclosed to defense counsel.

The prosecutor may discuss with the victim the content, style, and manner of the victim's testimony, but should at all times make efforts to ensure that the victim understands his or her obligation to testify truthfully.

4.1.6 Victim or Witness Contacts by Defense

The prosecutor *shall not* advise a witness (including victims) to decline to meet with or give information to the defense. The prosecutor *may* advise a victim or witness that they are not required to provide information to the defense outside of court. The prosecutor *may* also inform a victim or witness of the implications and possible consequences of providing information to the defense. Further the prosecutor *should* insure that all victims are aware of their right to refuse contact by representatives of the defendant pursuant to Marsy's Law (PC 679.026).

4.1.7 Protection

The prosecutor should seek to insure that victims and witnesses who may need protections against intimidation are advised of and afforded protections where feasible.

4.2 Interactions with Witnesses

4.2.1 Information Conveyed to Witnesses

The prosecutor should keep witnesses informed of all pre-trial hearings which the witnesses may be required to attend as well as trial dates and the scheduling of that witness' appearance. In the event of a scheduling change which will affect the witness's required attendance at a judicial proceeding, the prosecutor should notify the witness as soon as is practicable.

4.2.2 Witness Interviewing and Preparation

Unless a prosecutor is prepared to stipulate to the contents of an interview with a witness, a prosecutor should avoid interviewing a witness without a third party present (ideally an Inspector or other attorney). Further, any notes taken during the interview must be discovered to the defense. If no notes are taken, any new information coming from the interview must be disclosed to defense counsel.

The prosecutor may discuss with a witness the content, style, and manner of the witness' testimony, but should at all times make efforts to ensure that the witness understands his or her obligation to testify truthfully.

4.2.3 Represented Witnesses

When the prosecutor is informed that a witness has obtained legal representation with respect to the criminal proceeding, the prosecutor should arrange all out-of-court contacts with the witness regarding the subject of that proceeding through the witness' counsel.

4.2.4 Witness Protection

The prosecutor should be mindful of the possibility of intimidation and harm arising from a witness' cooperation with law enforcement. The prosecutor should be aware of programs available in his or her jurisdiction to protect witnesses to crime and should make referrals and recommendations for program participation where appropriate.

4.2.5 Police Witnesses

The prosecutor should be available to meet with police witnesses prior to testimony in the same way he or she would with a civilian witness. When possible, the prosecutor should make contact with police witnesses in advance of the scheduled hearing to ensure the officer has ample time to review the police report or any notes, videos, etc., that are necessary in preparation for testimony. Further, if the testimony is to be limited in scope, the prosecutor should direct the police witness

as to which items or relevant portions of a lengthy report he or she should review prior to testifying.

Please keep in mind that police witnesses are often working long and/or nighttime hours in addition to their duty to testify. They also may have family obligations during their off hours. Accordingly, if you are going to need an officer to testify to statements of another person at a Preliminary Hearing under Proposition 115, you *must* give the officer enough advanced notice to review those statements and prepare during their work hours.

4.2.6 Expert Witnesses

A prosecutor who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject.

4.3 Interactions with Defense Counsel

4.3.1 Standards of Professionalism

The prosecutor should comply with the provisions of professionalism as identified in Section 2.1 in his or her relations with defense counsel, regardless of prior relations with or animosity toward the attorney. The prosecutor should attempt to maintain a uniformity of fair dealing among different defense counsel.

This can be particularly difficult if a defense attorney fails to abide by the same standards of professionalism that all officers of the court should abide by and/or has lodged personal attacks on the prosecutor. Furthermore, the nature of our adversarial system means that we are constantly working against the objectives of the same set of people, which can negatively impact our ability to have a working relationship. In trial where the stakes are high this can be particularly challenging. However, ultimately we must take the high road in our dealings with defense attorneys because there are higher expectations for and greater scrutiny of the behavior of a prosecutor than a defense attorney.

When faced with a difficult interpersonal experience with a defense attorney it is important to seek out the support of others *within* the Office, including a supervisor, rather than lashing out against opposing counsel or in court. Moreover, it would be unfair for our feelings towards a particular defense attorney to impact the treatment of his or her client.

4.3.2 Cooperation to Assure Justice

The prosecutor should cooperate with defense counsel at all stages of the criminal process to ensure the attainment of justice and the most appropriate disposition of each case. The prosecutor need not cooperate with defense demands that are abusive, frivolous, or made solely for the purpose of harassment or delay.

4.3.3 Disclosure of Exculpatory Evidence

The prosecutor shall make timely disclosure of exculpatory or mitigating evidence, as required by law and/or applicable rules of ethical conduct.
[***See*** Section 5.7 Discovery]

4.3.4 Suspicion of Criminal Conduct

When a prosecutor has reasonable suspicion of criminal conduct by defense counsel, the prosecutor has a responsibility to take such action necessary to substantiate or dispel such suspicion.

4.3.5 Responsibility to Report Ethical Misconduct

When a deputy or assistant district attorney has knowledge of ethical misconduct by defense counsel that raises a substantial question as to the attorney's fitness to practice law, the prosecutor should report such conduct to his or her supervisor. A chief prosecutor who has knowledge of ethical misconduct by defense counsel which raises a substantial question as to the attorney's fitness to practice law should report such conduct directly to the appropriate bar disciplinary authority in his or her jurisdiction. When such misconduct occurs during the course of litigation, the prosecutor should also report it to the judge presiding over the case or to his or her supervisor, if required by Office policy, and may seek sanctions as appropriate.

4.3.6 Avoiding Prejudice to Defendant

When the prosecutor believes that the defense counsel has engaged in misconduct, remedial efforts should be directed at the attorney and not at his or her client. The prosecutor should at all times make efforts to ensure that a defendant who is not involved in misconduct is not prejudiced by the unlawful or unethical behavior of his or her attorney.

4.4 Interactions with Suspects and Defendants

4.4.1 Communications with Unrepresented Defendants

When a prosecutor communicates with a defendant charged with a crime who is not represented by counsel, the prosecutor should make certain that the defendant is treated with honesty, fairness, and with full disclosure of his or her potential criminal liability in the matter under discussion. A prosecutor should identify himself or herself to the defendant as a prosecutor and make clear that he or she does not represent the defendant. If legally required under the circumstances, the prosecutor should advise the defendant of his or her rights.

If a prosecutor is engaged in communications with a charged defendant who is not represented by counsel and the defendant changes his or her mind and expresses a desire to obtain counsel, the prosecutor should terminate the communication to allow the defendant to obtain counsel or to secure the presence of counsel. When appropriate, the prosecutor should advise the defendant on the procedures for obtaining appointed counsel.

4.4.1.1 Plea Agreements with Unrepresented Defendants

If a prosecutor enters into a plea negotiation with a defendant who is not represented by counsel (e.g., misdemeanor DUI), he or she should seek to ensure that the defendant understands his or her rights, duties, and liabilities under the agreement. When possible, the agreement should be reduced to writing and a copy provided to the defendant. The prosecutor should never take unfair advantage of an unrepresented defendant. The prosecutor should not give legal advice to a defendant who is not represented by counsel, other than the advice to secure counsel.

4.4.2 Communication with Represented Defendants

A prosecutor should respect a suspect's and defendant's constitutional right to the assistance of counsel. A prosecutor should also take steps to ensure that those persons working at his or her direction respect a suspect's and defendant's constitutional right to the assistance of counsel.

4.5 Interactions with the Media

According to ABA Standard 8.21(a), during the pendency of a criminal matter, a lawyer participating in that criminal matter should not make, cause to be made, condone or authorize the making of a public extrajudicial statement if the lawyer knows or reasonably should know that it will have a substantial likelihood of:

1. Influencing the outcome of that or any related criminal trial or prejudicing the jury venire, even if an untainted panel ultimately can be found;

2. Unnecessarily heightening public condemnation of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation, or of a witness or victim; or

3. Undermining the public's respect for the judicial process.

As a general matter, lawyers participating in a criminal matter should consult with their supervisors prior to making any public extrajudicial statements. Further, statements regarding the following subject areas, when made by prosecutors, pose a particular risk of violating standard 8.21(a) and therefore should be avoided:

1. The prior criminal record of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation;

2. The character, credibility, or reputation of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation, or the race, ethnicity, creed, religion, or sexual orientation of such person unless such information is necessary to apprehend a suspect or fugitive;

3. The personal opinion of the prosecutor as to the guilt or innocence of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation;

4. The existence or contents of any confession, admission, or statement given by a defendant or a person or entity who has been publicly identified in the context of a criminal investigation, or the refusal or failure of such person to make a statement;

5. The performance or results of any examinations or tests, or the refusal or failure to submit to an examination or test by a defendant or a person or entity who has been publicly identified in the context of a criminal investigation;

6. The nature of physical evidence expected to be presented;

7. The identity, race, ethnicity, creed, religion, or sexual orientation, expected testimony, criminal record, character, reputation, or credibility of prospective witnesses other than the victim, and the race, ethnicity, creed, religion, sexual orientation, expected testimony, criminal record, character, reputation, or credibility of the victim;

8. The possibility of a plea of guilty to the offense charged or other disposition; and

9. Information that the lawyer knows or has reason to know would be inadmissible as evidence in a trial.

Public statements regarding the following subjects by a prosecutor ordinarily will not violate Standard 8.21(a):

1. Statements necessary to inform the public of the nature and extent of the prosecutor's actions, such as:

    a. The existence of an investigation in progress, including the general length and scope of the investigation, and the identity of the investigating officer or agency;

    b. The facts and circumstances of an arrest, including the time and place and the identity of the arresting officer or agency;

    c. The identity of the victim, when the release of that information is not otherwise prohibited by law or would not be harmful to the victim;

    d. The general nature of the charges against a defendant, provided that the statement explains that the charge is an accusation and that the defendant is presumed innocent until and unless proven guilty;

    e. The name, age, residence, and occupation of a defendant;

    f. The scheduling or result of any stage in the judicial proceeding, and the information necessary for the public to locate documents contained within the public court record of the matter.

2. Statements that serve a legitimate law enforcement purpose, such as:

    a. Statements reasonably necessary to warn the public of any ongoing dangers that may exist or to quell public fears; or

    b. Statements reasonably necessary to obtain public assistance in solving a crime, obtaining evidence, or apprehending a suspect or fugitive.

5 Pre-Trial Considerations

5.1 Screening Cases

The decision to initiate a criminal prosecution should be made by the prosecutor's office.

5.2 Charging

No prosecutor should charge or handle a case at any stage of its progress through the system unless he or she is personally satisfied that the defendant is guilty. In the words of former Alameda County DA's Office Senior Deputy District Attorney and Associate Justice of the California Supreme Court Carol Corrigan, "while the prosecutor is legally justified in charging on mere probable cause, he serves no useful, legitimate purpose in doing so."[ix] The prosecutor should charge only if the following four basic requirements are satisfied:

1. The prosecutor, based on a complete investigation and a thorough consideration of all pertinent data readily available to him or her, is satisfied that the evidence shows the accused is guilty of the crime to be charged;

2. There is legally sufficient, admissible evidence of a *corpus delicti* (i.e., concrete evidence of a crime);

3. There is legally sufficient, admissible evidence of the accused's identity as the perpetrator of the charged crime;

4. The prosecutor has considered the probability of conviction by an objective fact-finder hearing the admissible evidence. The admissible evidence should be of such convincing force that it would warrant conviction of the crime charged by a reasonable objective fact-finder after hearing all the evidence available to the prosecutor at the time of charging and after hearing the most plausible, reasonably foreseeable defense that could be raised.

Charging a person with a crime because he or she *might* be guilty simply is not good enough. Not only is the potential for individual injustice intolerably great, but also charging without confidence in the truth of the charge puts the entire system at risk. [x]

5.2.1 Other Factors to Consider

In addition to the four basic requirements listed above, other factors which may be considered when making charging decisions include:

a. The nature of the offense, including whether the crime involves violence or bodily injury;

b. The probability of conviction;

c. The characteristics of the accused that are relevant to his or her blameworthiness or responsibility, including the accused's criminal history;

d. Potential deterrent value of a prosecution to the offender and to society at large;

e. The value to society of incapacitating the accused in the event of a conviction;

f. The willingness of the offender to cooperate with law enforcement;

g. The defendant's relative level of culpability in the criminal activity;

h. The status of the victim, including the victim's age or special vulnerability;

i. Whether the accused held a position of trust at the time of the offense;

j. Excessive costs of prosecution in relation to the seriousness of the offense;

k. Recommendation of the involved law enforcement personnel;

l. The impact of the crime on the community;

m. The negative impact of a prosecution on a victim (although consideration of this factor necessarily requires a discussion with the victim);

n. The availability of adequate civil remedies;

o. The availability of suitable diversion and rehabilitative programs;

p. Provisions for restitution;

q. Likelihood of prosecution by another criminal justice authority;

r. Whether non-prosecution would assist in achieving other legitimate goals, such as the investigation or prosecution of more serious offenses;

s. The charging decisions made for similarly-situated defendants;

t. The attitude and mental status of the accused;

u. Undue hardship that would be caused to the accused by the prosecution;

v. A history of non-enforcement of the applicable law;

w. Failure of law enforcement to perform necessary duties or investigations;

x. Whether the alleged crime represents a substantial departure from the accused's history of living a law-abiding life;

y. Whether the accused has already suffered substantial loss in connection with the crime;

z. Whether the size of the loss or the extent of the harm caused by the alleged crime is too small to warrant a criminal sanction;

aa. Any other aggravating or mitigating circumstances.

5.2.2 Factors Not to Consider

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

a. The prosecutor's individual or the prosecutor's office rate of conviction;

b. Personal advantages or disadvantages that a prosecution might bring to the prosecutor or others in the prosecutor's office including the impact of asset forfeiture;

c. Political advantages or disadvantages that a prosecution might bring to the prosecutor;
d. Characteristics of the accused that have been recognized as the basis for invidious discrimination, insofar as those factors are not pertinent to the elements or motive of the crime.

5.3 Continued Case Evaluation

As prosecutors we have a duty to continually evaluate cases at all stages. Sometimes the strength of a case may change as the investigative and trial preparation processes continue. New information may come to light. Witnesses may provide additional or different information. If a once solid case becomes less so, the prosecutor has a duty to reconsider the matter. The prosecutor must be satisfied that the only just result is a conviction. A prosecutor should never ask a jury to do something he or she would not do were he or she seated in their place.[xi]

5.4 Diversion and Collaborative Courts

A prosecutor may divert individuals from the criminal justice system when he or she considers it to be in the interest of justice and beneficial both to the community and to the individual.

5.4.1 Factors to Consider for Diversion and Collaborative Courts

Factors which may be considered in the decision to use diversion or referral to a Collaborative Court may include:

a. The nature, severity, or class of the offense;

b. Any special characteristics or difficulties of the offender;

c. Whether the defendant is a first-time offender;

d. The likelihood that the defendant will cooperate with and benefit from the diversion program;

e. Whether an available program is appropriate to the needs of the offender;

f. The impact of diversion and the crime on the community;

g. Recommendations of the relevant law enforcement agency;

h. The likelihood that the defendant will recidivate;

i. The extent to which diversion will enable the defendant to maintain employment or remain in school;

j. The opinion of the victim;

k. Provisions for restitution;

l. The impact of the crime on the victim;

m. Diversion decisions with respect to similarly situated defendants.

n. Existing protocols of the Collaborative Court.

5.4.2 Diversion Procedures

The process of diverting a defendant should include the following procedures:

a. A signed agreement or court record specifying all requirements for the accused;

b. A signed waiver of speedy trial requirements, where applicable;

c. The right of the prosecutor, for a designated time period, to proceed with the criminal case when, in the prosecutor's judgment, such action would be in the interest of justice;

d. Appropriate mechanisms to safeguard the prosecution of the case, such as admissions of guilt, stipulations of facts, and depositions of witnesses.

5.4.3 Explanation of Diversion Decision

When applicable and upon request, the prosecutor should provide adequate explanations of diversion decisions to victims, witnesses, law enforcement officials, the court and statewide diversionary programs and when deemed appropriate to other interested parties (i.e., probation, community partnership programs, etc.)

5.5 Pre-Trial Release

5.5.1 Pre-Trial Detention Release Pilot Program

Under Marsy's Law, The California Constitution article 1, section 28, section (b)(3) provides victims with the following right: "To have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant." In setting, reducing or denying bail, Penal Code section 1275 states that "The public safety shall be the primary consideration." The Alameda County District Attorney's Office is committed to the reform of the current pre-trial detention system. For years, we have purposefully and intentionally implemented protocols to improve our pre-trial processes. We now more quickly identify and agree to release pre-trial individuals from custody who do not pose a threat to public safety or to the victims of the alleged crimes. Detention decisions and outcomes should be made without unnecessary delay, and depend on an accurate and unbiased risk assessment and appropriate supervision, not on the individual's inability to afford bail.

As part of the Judicial Council of California Pre-Trial Release Project, Alameda County is collaboratively developing a tiered system for the consideration of, and the implementation of, pre-arraignment and expedited pre-trial releases. Pursuant to the pilot design, which includes the use of an evidence-based, locally validated, risk assessment tool, Probation would make release decisions for the lowest risk individuals, who had not already been released by the arresting agency or the jail. The court would then evaluate all the other individuals entitled to be reviewed for possible early release.

Although the specifics are not yet established for the Pre-Trial Release Pilot Project, the Judicial Council of California expressly stated that existing law is governing. Thus, the pilot design and implementation must stay within the law, both as to who may be released and when his/her release may be timely. Accordingly, the pilot should harmonize with existing law and procedures already in place to facilitate appropriate releases without delay.

For example, the pilot would provide that, to expedite release for the lowest level offenders, no risk assessment will be conducted (see §849(b) and §853.6). For those individuals, whom the police would summarily release, requiring a risk assessment before release would likely delay their release.

On the other hand, certain Penal Code sections prohibit the early release of specific higher risk individuals. The pre-trial release decision is always subject to Penal Code §1270.1, which requires that, before any person who is arrested for certain crimes may be released on O.R. or on bail [in any amount], a noticed "hearing shall be held in open court before the magistrate or judge," in conformance with the considerations required by Penal Code §1270, and §1270.1. Section 1270.1 identifies the crimes requiring a noticed hearing, and they are also expressly identified in the court's bail schedule. The crimes requiring notice and a hearing in open court are not limited to serious and violent felonies.

6 Discovery

6.1 Statutory Requirement

Penal Code Section 1054.1 states: "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

a. The names and addresses of persons the prosecutor intends to call as witnesses at trial;

b. Statements of all defendants;

c. All relevant real evidence seized/obtained during investigation of the offenses charged;

d. The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial;

e. Any exculpatory evidence;

f. Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

6.2 Brady Obligations/Constitutional Requirement

A prosecutor's constitutional obligation to provide discovery derives from the due process clause of the Fourteenth Amendment. (*Brady* v. *Maryland* (1963) 373 U.S. 83, 86-87.)

In *Brady* v. *Maryland* (1963) 373 U.S. 83, the Supreme Court held that the prosecution must reveal to the defense "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (Id. at p. 87.) In *United States* v. *Agurs* (1976) 427 U.S. 97, the Supreme Court held the duty to disclose favorable material evidence was not dependent on a request by the defense. (Id. at p. 107.)

In order for there to be any constitutional obligation on the part of the prosecution to provide information to the defense, the following must be shown:

1. The information constitutes "evidence";

2. The information is "favorable" to the defense;

3. The information is "material" (i.e., failure to disclose the evidence must be prejudicial to the defense in that there is a reasonable probability that had the information been disclosed the result of the trial would have been different);

4. The information must have been "suppressed" by the prosecution (i.e., the information be in the actual or constructive possession of the "prosecution team" or the prosecution must be aware the information exists, and the prosecution must have failed to disclose the information, and the information must not be known to the defense and available to them through the exercise of reasonable diligence).

6.3 Timing of Discovery

Penal Code Section 1054.7 governs when discovery must be provided under the California discovery statute. In relevant part, that section states: "The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred."

Though not required of us by law, our Office typically provides discovery to the defense as soon as it is available regardless of the trial posture of the case. Because of our discovery practice, some defense attorneys may claim discovery violations and attempt to compel discovery, before they are lawfully entitled to it (this is more common in misdemeanor cases with less experienced defense attorneys). While we should continue to provide discovery as soon as possible whenever practicable, we should also defend against defense claims of discovery violations and point courts to Penal Code Section 1054.7 which clearly sets forth the time frame for discovery compliance.

6.4 Sanctions for Violations of the Discovery Statute

Statutory language of Penal Code Section 1054.5(b) and (c):

"Before a party may seek court enforcement of any of the disclosures required by this chapter, the party shall make an informal request of opposing counsel for the desired materials and information. If within 15 days the opposing counsel fails to provide the materials and information requested, the party may seek a court order. Upon a showing that a party has not complied with Section 1054.1 or 1054.3 and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, ***including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order.*** Further, the ***court may advise the jury of any failure or refusal to disclose and of any untimely disclosure***." (Emphasis added.)

Penal Code Section 1054(c) states: "***The court may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted***. The court shall not dismiss a charge pursuant to subdivision (b) unless required to do so by the Constitution of the United States." (Pen. Code, §1054.5(b).)

6.4.1 Exclusion of Evidence is <u>not</u> an Appropriate Sanction Unless All Other Options Are Exhausted

Under subdivision (c) of Section 1054.5, the trial court "may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted." (*People* v. *Superior Court (Mitchell)* (2010) 184 Cal.App.4th 451, 459.) Moreover, although excluding the testimony of a witness is not unconstitutional, it is "not an appropriate remedy absent a showing of significant prejudice and willful conduct motivated by a desire to obtain a tactical advantage at trial." (*People* v. *Gonzales* (1994) 22 Cal.App.4th 1744, 1758; see also *People* v. *Edwards* (1993) 17 Cal.App.4th 1248, 1261-1266; see also *People* v. *Superior Court (Mitchell)* (2010) 184 Cal.App.4th 451.)

In the event of a belated disclosure, other alternative sanctions <u>must</u> be explored. For example, the opposing party should be given an opportunity to interview the witness or be given additional time to prepare for the witness' testimony. (See e.g., *People* v. *Walton* (1996) 42 Cal.App.4th 1004, 1017; see also *People v. Verdugo* (2010) 50 Cal.4th 263, 281-289 [repeatedly finding proper sanction for any failure to disclose statements in violation of statutory duty was giving counsel additional time to prepare for cross-examination or allowing defense to recall witness rather than excluding evidence or granting mistrial].)

On the other hand, while the sanction of exclusion may only be used as a last resort, this does not mean it may never be used. In *People* v. *Jackson* (1993) 15 Cal.App.4th 1197, the defense belatedly disclosed the identity of a witness who had given an alleged declaration against interest to a defense investigator. The defense attorney did not inform the prosecution the defense investigator would be a witness until moments before the defense investigator was called to

testify. The violation appeared willful since the declaration was exculpatory and thus it was unlikely that the defense would have only decided to call the defense investigator who took the statement at the last minute despite having known of the statement for three months. A continuance would have been inadequate because the whereabouts of the witness who gave the declaration against interest were unknown and the prosecution would have been unduly prejudiced by the admission of the declaration without an opportunity for cross-examination. Under these circumstances, the court held the sanction of exclusion was appropriate. (Id. at pp. 1200-1203; see also *People* v. *Reed* [unreported] 2010 WL 1493148, *10 -*11 [upholding exclusion of some character witnesses who were members of defendant's family (from a list of 20 witnesses) where defense counsel had case for 18 months, disclosure of the witnesses was not made until evidentiary portion of trial, and the defense had told the prosecutor on four separate occasions he had no witnesses except one doctor].) However, courts often suggest that the most appropriate sanction for failure to provide discovery is to allow opposing counsel a continuance to prepare to meet the hitherto undisclosed evidence. (See e.g., *People v. Verdugo* (2010) 50 Cal.4th 263, 281-282; *People* v. *Jenkins* (2000) 22 Cal.4th 900, 950.)

6.5 Digital Discovery Policy

Digital evidence is discoverable in criminal cases. However, with the increased number of law enforcement agencies adopting protocols of officers wearing body cameras and/or law enforcement vehicles equipped with recording devices, the amount of digital evidence that is generated is enormous. It is therefore, the policy of this Office to restructure its Discovery Protocols and Guidelines so as to ensure complete discovery compliance in a legal and manageable manner:

a. Law Enforcement shall provide the initial police reports at the time of presentation of cases for review and/or filing of charges;

b. Law Enforcement is not required to provide a copy of the digital evidence at the time of the presentation of the case for review and/or filing of charges unless the reviewing DA requests the digital evidence to make a charging decision. However, law enforcement shall complete the DA's Discovery Form as to the existence of digital evidence and/or officers involved in any manner in the case at the time of presentation of the case;

c. If the case results in charges, the Complaint, Information or Indictment shall be filed electronically when possible along with the Statement of Probable Cause only;

d. At the first appearance of the defendant, a copy of the charging document shall be provided to the defendant(s);

e. If the defendant is referred to the Public Defender's Office for consideration of representation, the District Attorney shall provide a copy of the initial police report appropriate for determining if a conflict in representation exists;

f. The assigned Deputy District Attorney shall review the case, request all discoverable evidence in preparation of the case and comply with discovery compliance.

Pursuant to Penal Code Section 1054, it is the mandate of the prosecution to promote the ascertainment of truth in trials by requiring timely pretrial discovery, and shall make every effort to complete discovery informally between and among parties before the judicial enforcement is requested.

The assigned Deputy District Attorney shall file, in a timely manner, a Motion for Discovery and serve said motion on the defendant or his or her attorney of record. If informal discovery between the parties is not productive, the Deputy District Attorney shall file a Motion to Compel Discovery pursuant to Penal Code Section 1054.3 with the Court.

The District Attorney's Office shall comply with the laws of California that articulates time frames for providing discovery to the defense pursuant to Penal Code §1054.7 and applicable case law.

6.6 Further Discovery Questions

For more detailed information about discovery or further questions regarding discovery, please see the document entitled **Brady & Statutory Discovery Obligations 4-16-14 Edition**. This document is located in the Brady Docs folder on the shared drive.

6.7 Reciprocal Discovery

A prosecutor should take steps to ensure that the defense complies with any obligation to provide discovery to the prosecution.

6.8 Preliminary Hearing

At the preliminary hearing the prosecutor should present such reliable evidence as is required for a judicial officer to make the probable cause determination. (***See Also*** Sections 4.1 and 4.2 Interaction with Victims and Witnesses) .

7 The Grand Jury

7.1 Prosecutor's Role

A prosecutor presenting a criminal case to the Grand Jury:

a. May explain the law and argue the legal significance of the evidence;

b. Should assist the Grand Jury with procedural and administrative matters appropriate to its work;

c. May recommend that specific charges be returned;

d. Should encourage members of the Grand Jury to consider the fact that sufficient evidence must exist to enable the prosecutor to meet the state's burden of proof at trial;

e. Should take all necessary steps to preserve the secrecy of the grand jury proceedings.

7.2 Evidence Before the Grand Jury

The following should apply to evidence presented to the Grand Jury:

a. A prosecutor should inform the Grand Jury of any evidence or information of actual innocence or other credible evidence that a prosecutor reasonably believes tends to negate guilt, as required by law and applicable rules of ethical conduct;

b. A prosecutor should not present evidence to the Grand Jury that the prosecutor knows was obtained illegally by law enforcement;

c. A prosecutor should not take any action that could improperly influence the testimony of a Grand Jury witness;

d. The prosecutor should inform the Grand Jury that it has the right to hear in person any available witness or subpoena pertinent records;

e. A prosecutor should not knowingly make a false statement of fact or law to the Grand Jury.

8 Plea Agreements

The prosecutor is under no obligation to enter into a plea agreement that has the effect of disposing of criminal charges in lieu of trial. However, where it appears that it is in the public interest, the prosecution should engage in negotiations for the purpose of reaching an appropriate plea agreement.

8.1 Factors to Consider in Plea Negotiations

Prior to negotiating a plea agreement, the prosecution should consider the following factors:

a. The nature of the offense(s);

b. The degree of the offense(s) charged;

c. Any possible mitigating circumstances;

d. The age, background, and criminal history of the defendant;

e. The expressed remorse or contrition of the defendant, and his or her willingness to accept responsibility for the crime;

f. Sufficiency of admissible evidence to support a verdict;

g. Undue hardship caused to the defendant;

h. Possible deterrent value of trial;

i. Aid to other prosecution goals through non-prosecution;

j. A history of non-enforcement of the statute violated;

k. The potential effect of legal rulings to be made in the case;

l. The probable sentence if the defendant is convicted;

m. Society's interest in having the case tried in a public forum;

n. Defendant's willingness to cooperate in the investigation or prosecution of others;

o. The likelihood of prosecution in another jurisdiction;

p. The availability of civil avenues of relief for the victim, or restitution;

q. The willingness of the defendant to waive his or her right to appeal;

r. Avoidance of adverse immigration consequences for the defendant pursuant to Penal Code Section 1016.3(b);

s. With respect to witnesses, the prosecution should consider the following:

    1. The availability and willingness of witnesses to testify;

    2. Any physical or mental impairment of witnesses;

    3. The certainty of their identification of the defendant;

    4. The credibility of the witness;

    5. The witness' relationship with the defendant;

6. Any possible improper motive of the witness;
7. The age of the witness;

8. Any undue hardship to the witness caused by testifying.

t. With respect to victims, the prosecution should consider those factors identified above and the following:

1. The existence and extent of physical injury and emotional trauma suffered by the victim;

2. Economic loss suffered by the victim;

3. Any undue hardship to the victim caused by testifying.

8.2 Record of Plea Agreement

Whenever the disposition of a charged criminal case is the result of a plea agreement, the prosecutor should make the existence and terms of the agreement part of the record. Where a disposition is out of the ordinary for the particular type of crime, the prosecutor should also record the reasons for the disposition in the case file and in the special handling section of DALITE.

8.3 Record of Dismissal

Whenever felony criminal charges are dismissed, the prosecutor should make a record of the reasons for his or her actions in the case file. Whenever the dismissed charge is a violent felony the reasons for the dismissal should also be recorded in the special handling section of DALITE.

9 Trial

9.1 Calendar Control

Control over the trial calendar should be vested in the court. However, prosecutors should advise the court of facts relevant in determining the order of cases on the court's calendar (i.e., age of case, seriousness of and type of charges [i.e., sex crimes], age and availability of witnesses, custody status of defendant.)

9.2 Courtroom Professionalism

As an officer of the court, the prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom.

When court is in session, the prosecutor should address the court, not opposing counsel, on all matters relating to the case.

A prosecutor should comply promptly with all orders and directives of the court, but the prosecutor has a duty to have the record reflect adverse rulings or judicial conduct which the prosecutor considers prejudicial. The prosecutor has a right to make respectful requests for reconsideration of adverse rulings.

9.3 Motions in Limine

A prosecutor should attempt to resolve issues relating to the admissibility of evidence prior to the swearing of the jury, or in a court trial prior to the swearing of the first witness. This may be accomplished by the filing of and a hearing on Motions in Limine. A prosecutor should also request that the court similarly resolve questions as to the admissibility of any defense evidence.

9.4 Jury Selection

The prosecutor should prepare himself or herself prior to trial to discharge effectively the prosecution function in the selection of the jury and the exercise of challenges for cause and peremptory challenges.

The opportunity to question jurors personally should be used solely to obtain information for the intelligent exercise of challenges. A prosecutor should not intentionally use voir dire to present factual matter which the prosecutor knows will not be admissible at trial.

9.4.1 Interaction with Jury

A prosecutor should not intentionally communicate privately with persons summoned for jury duty or impaneled as jurors prior to or during trial. The prosecutor should avoid the reality or appearance of any such communications.

The prosecutor should treat jurors with deference and respect, avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.

After discharge of the jury from further consideration of a case, a prosecutor should not intentionally make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which will tend to influence judgment in future jury service.

9.5 Opening Statements

The prosecutor's opening statement should be confined to a statement of the issues in the case and the evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible. A prosecutor should not allude to any evidence unless there is a

good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.

9.6 Presentation of Evidence

A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses. If a prosecutor learns of the falsity of earlier presented evidence he or she must seek withdrawal of that evidence.

A prosecutor should not ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the jury.

A prosecutor should not permit any tangible evidence to be displayed in the view of the jury which would tend to prejudice fair consideration by the jury until such time as a good faith tender of such evidence is made.

9.7 Examination of Witnesses

The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.

The prosecutor's belief that the witness is telling the truth does not preclude cross-examination, but may affect the method and scope of cross-examination.

A prosecutor should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

9.8 Argument to the Jury

In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.

The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

9.8.1 Facts Outside the Record

The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

9.9 Comments by Prosecutor After Verdict

The prosecutor should not make public comments critical of a verdict, whether rendered by judge or jury.

10 Sentencing

10.1 Prosecutor's Role in Pre-Sentence Reports

10.1.1 Felony Cases Resolved by Plea Agreement

In a felony case resolved by a plea agreement, the prosecutor should submit a letter to the Probation Department prior to the sentencing date. The Probation letter should provide a factual description of the crime and the details of the plea agreement. Further, when applicable, the letter should include the name and contact information of the victim to assist the deputy probation officer in following up with the victim regarding restitution and victim impact statement. However, the portion of the letter containing the victim's name and contact information **must** be marked confidential and filed under confidential cover because the probation letter will become a public document once attached to the probation report.

The prosecutor should review pre-sentence reports drafted by the Probation Department prior to or upon submission of such reports in court on the sentencing date. The prosecutor has a duty to notify appropriate parties if any material information in the probation report conflicts with information known by the prosecutor.

10.1.2 Felony Cases Resolved by Verdict of Guilt

If the sentence is a result of a jury verdict, the prosecutor should file a sentencing memorandum with the Court and provide a copy to defense counsel (and the Probation Department in felony cases) in advance of the sentencing date. The memo should lay out the applicable law, describe the prosecutor's sentencing recommendation and explain the rationale for that recommendation.

10.2 Victim Impact Statements

Regardless of the method of conviction, the prosecution should also take steps to see that the victim is made aware of and is not denied his or her rights to address the sentencing body.

11 Juvenile Justice

The primary duty of the prosecutor in juvenile court is to seek justice while fully and faithfully representing the interests of the state. While the safety and welfare of the community, including the victim, is their primary concern, prosecutors should consider the special interests and needs of the juvenile to the extent they can do so without unduly compromising their primary concern.

11.1 Screening Juvenile Cases

A designated prosecutor(s) should review all cases for which some action is required to decide whether a case will be filed as a formal petition with the juvenile court, transferred to adult court, or diverted. If the facts are not legally sufficient to warrant the current action, the matter should be terminated or returned to the referral source pending further investigation or receipt of additional reports.

11.2 Transfer or Certification to Adult Court

When making a discretionary decision whether to transfer a juvenile to adult court, a prosecutor should consider, among other factors, whether the gravity of the current alleged offense or the record of previous delinquent behavior reasonably indicates that the treatment services and dispositional alternatives available in the juvenile court are adequate to protect the safety and welfare of the community and adequate for dealing with the juvenile's delinquent behavior.

11.3 Criteria for Deciding Formal Adjudication Versus Diversion

In determining whether to file formally or, where allowed by law, divert, the prosecutor should consider the following factors in deciding what disposition best serves the interests of the community and the juvenile:

a. The seriousness of the alleged offense, including whether the conduct involved violence or bodily injury to others;

b. The role of the juvenile in that offense;

c. The nature and number of previous cases presented by law enforcement or others against the juvenile, and the disposition of those cases;

d. The juvenile's age, maturity, and mental status;

e. The existence of appropriate treatment or services available through the juvenile court or through diversion;

f. Whether the juvenile admits guilt or involvement in the offense charged, and whether he or she accepts responsibility for the conduct;

g. The dangerousness or threat posed by the juvenile to the person or property of others;

h. The decision made with respect to similarly-situated juveniles;

i. The provision of financial restitution to victims;

j. Recommendations of the referring agency, victim, law enforcement and advocates for the juvenile.

11.4 Diversion

The prosecutor should be responsible for recommending which cases should be diverted from formal adjudication. Treatment, restitution, or public service programs developed in his or her office may be utilized, or the case can be referred to existing probation or community service agencies. No case should be diverted unless the prosecutor reasonably believes that he or she could substantiate the criminal or delinquency charge against the juvenile by admissible evidence at a jurisdictional hearing.

11.5 Disposition Agreements

The decision to enter into a disposition agreement should be governed by both the interests of the state and those of the juvenile, although the primary concern of the prosecutor should be protection of the public interest as determined in the exercise of traditional prosecutorial discretion.

11.6 Dispositions

The prosecutor should take an active role in the dispositional hearing and make a recommendation to the court after reviewing reports prepared by prosecutorial staff, the Probation Department, and others. In making a recommendation, the prosecutor should consider those dispositions that most closely meet the interests and needs of the juvenile offender, provided that they are consistent with community safety and welfare.

11.7 Victim Impact

At the dispositional hearing, the prosecutor should make the court aware of the impact of the juvenile's conduct on the victim.

12 Special Considerations

12.1 Implicit Bias

Implicit Bias is an issue that social scientists have been studying for decades. *Implicit Bias* is the idea that even well-meaning people frequently harbor hidden prejudices against members of other racial groups. These prejudices are unconscious and unintentional. It is not about bigotry, rather *implicit bias* is grounded in a basic human tendency to divide the social world into groups. In other words, it is a manifestation of a broader propensity to think in terms of "us vs. them"—a prejudice that can even apply to fans of different sports teams.

The notion of *implicit bias* has become part of the public discourse regarding the interactions between law enforcement and people of color. Moreover, given the racial disparities in the criminal justice system, it is something that we as prosecutors in this diverse community should not ignore. Furthermore, because it is an unconscious process that all human beings are susceptible to, it is not something to be defensive about. More importantly, recent studies have

shown implicit bias can be overcome by rational deliberation, something that we should all employ as prosecutors.

In a series of recently published studies in The Journal of Experimental Psychology, several hundred volunteers were recruited to play an online game that involved giving and receiving small sums of money and created a situation in which people witnessed one player stealing another player's money. The volunteers were then presented with the opportunity to punish the perpetrator. The experiments were manipulated so that the perpetrator appeared to be either a member of either the same group as the punisher or a different one (the groups used were citizens of the same or different country and fans of the same or different football teams). When people made their decisions swiftly - in a few seconds or less - they were biased in their punishment decisions, punishing out of group members more harshly and in-group members more leniently. However, when people had the chance to reflect on their decision, they were largely unbiased, handing out equal punishments to in-group and out of group members.

To be the fairest prosecutors we can be, we must make efforts to make rational and deliberate decisions as opposed to knee-jerk reactions. Doing so will help combat implicit biases we may hold and be unaware of. [xii]

12.2 Consequences of Unethical Behavior

A prosecutor's worst nightmare is not losing a major case or watching a dangerous criminal go free, it is convicting an innocent person. Nothing is more repugnant to our core principles of truth and justice. Unethical behavior by a prosecutor increases the risk that an innocent person will be convicted.

12.2.1 Consequences for the Defendant

The consequences for the defendant are obvious: unwarranted incarceration, destruction of reputation, separation from family and friends, and extended and/or irreparable damage to employability.

12.2.2 Consequences for the Victim

Unethical behavior by a prosecutor can re-victimize crime victims, the very people we strive to protect. The ordeal of appearing in court, facing the perpetrator, risking retaliation, describing the crime to strangers, being cross-examined, having his or her credibility attacked, and waiting in suspense through jury deliberations may be the second most harrowing experience of a victim's life. It leaves most victims and their families thinking: "I never want to go through that again." Now imagine having to call the victim or victim's family to tell them that because of your own unethical behavior or that of another prosecutor in your office, they must go through it all again, their ordeal was wasted, the wrong person was convicted, or the right person was convicted but will now get a second chance to evade responsibility. Worse yet, imagine having

to explain that, because of the gravity of the prosecutorial misconduct, there will be no retrial, only a dismissal with prejudice, and that the perpetrator will go free.

12.2.3 Consequences for the Community

Conviction of an innocent person leaves the community exposed to future crimes by the guilty person. Also, the conviction will usually halt any further investigation, making it much less likely that the guilty person will ever be found. Moreover, every instance of a false conviction further undermines the communities' trust in the justice system and taints future jurors' abilities to view the prosecution in a fair light.

12.2.4 Consequences for the Prosecutor

You are not expected to win every case but you are expected to conduct yourself ethically in every case. If for some reason you do not, there are many consequences for unethical actions:

1. You will lose your reputation and effectiveness:

    a. You will spend years building your reputation for integrity in the community of judges, defense attorneys, police, potential jurors and fellow prosecutors. You can lose it all by a single act of unethical behavior;

    b. With diminished reputation comes diminished effectiveness; Judges have a hundred ways to punish a prosecutor whom they suspect of unethical conduct—they don't need to prove it or even accuse you and most times there will be no appeal;

    c. Your credibility with the defense bar will affect your ability to negotiate a plea and cooperation agreements, as well as the civility of your practice and the enjoyment of your job.

2. You may lose your job;

3. A written reprimand may be placed in your file;

4. Your case may suffer a variety of sanctions (damaging delays, preclusion of evidence, negative inference instructions to jury, dismissal with prejudice, and reversal of conviction);

5. You may be criminally prosecuted if the violation involves suborning perjury, obstructing justice, or official misconduct:

    a. **Pen. Code §141 (c)** makes a felony crime of a prosecuting attorney intentionally and in bad faith altering, modifying, or withholding evidence or information knowing that it is relevant and material to the outcome of the case, and doing so with the specific intent that the evidence or information be concealed or

destroyed, or that the prosecutor would fraudulently represent it as the original evidence. The offense is punishable by 16 months, two years or three years in jail pursuant to 1170(h).

6. You may be censured, suspended or disbarred by the State Bar Association:

    a. Even apart from these new criminal penalties, keep in mind that courts are still required to refer prosecutors to the State Bar if the attorney acted in bad faith in deliberately and intentionally withholding relevant, material exculpatory evidence or information and the withholding contributed to guilty verdict or plea, or seriously limited the ability of a defendant to present a defense.

13 Defending an Allegation of Misconduct

Criminal defense attorneys routinely accuse prosecutors of misconduct. Allegations are sometimes made presumptuously without any analysis, with the purpose of intimidating and distracting the prosecutor and even the judge and jury, or for the purpose of delay. In the heat of litigation, the defense can catch a prosecutor in an act of momentary negligence, a lapse in judgment, or just simply making a mistake—yes, prosecutors are human and fallible.

In any case, allegations of prosecutorial misconduct interrupt proceedings and waste a great deal of time. And the vast majority of the allegations prove false. But any allegation of prosecutorial misconduct, bona fide or not, is serious and must be handled in a professional and thorough manner. Particularly in light of the newly enacted Penal Code Section 141:

13.1 Never Allow Accusations of Misconduct to Go Unanswered

Almost every allegation of prosecutorial misconduct requires a response because such an allegation is very serious and can have severe consequences for the case and the prosecutor. Prosecutors should **deny false accusations on the record** even if no special hearing is requested. If discussions of the alleged prosecutorial misconduct occur in chambers, the prosecutor should ensure that a court reporter makes a record then and there or later in the courtroom. The response can be minimal—but a prosecutor should make certain the record does not contain any implied admissions due to a silent record. And even where the court shuts down a frivolous accusation, **a supervisor should be informed**.

13.2 Allegations of Misconduct Require a Factual Basis

No allegation of misconduct can prevail without factual specificity. Similarly, knowledge of the accusation and the available facts is essential to successfully defeating an allegation of misconduct. Thus, it is imperative to require the defense attorney to specify the accusation and its factual basis when the accusation is first made:

a. A prosecutor must require defense counsel to specify the allegation(s), the alleged factual basis, the remedy sought, and the court's authority to do anything;

b. A prosecutor may then choose to respond at that time, ask for reasonable time to respond, or make the calculated decision to make little or no response at all;

c. A prosecutor must be certain he or she understands the actual accusation and the alleged factual support—if there is any—in order to make a clean record and to respond appropriately. It also forces defense counsel to fully articulate what sometimes can be an ill-conceived theory based on a knee-jerk reaction;

d. Keep in mind that for a defense attorney to make an accusation of misconduct, absent proof that the prosecutor violated the law, a rule of professional conduct or a court order, is unprofessional in and of itself, because it violates the duty of candor owed to the court under Business and Professions Code Section 6068(d) and Rule 5-200 of the Rules of Professional Conduct.

13.3 Representation

Prosecutors should not represent themselves unless they have carefully considered the allegation(s), are familiar with the applicable law, have gathered the facts they need to defend themselves, are satisfied that the accusation is factually baseless and/or without legal merit, and understand the possible consequences. If not, prosecutors run the risk of creating bigger problems.

13.4 Avoid Testifying

Prosecutors should avoid testifying under any circumstances, especially at an evidentiary hearing involving an accusation of misconduct. No prosecutor should willingly subject himself or herself to cross-examination by the defense and, thereby, put the court in the position of having to make a credibility call between the prosecutor and the defense attorney. Despite how good the prosecutor thinks he or she will do on the witness stand, it is never a good idea.

Prosecutors should consider drafting a declaration if it is absolutely necessary to establish a particular fact that only the prosecutor can supply from his or her personal knowledge and request that the defense stipulate that it be entered into the record as evidence. If the prosecutor's testimony is absolutely necessary, the prosecutor and another attorney handling the evidentiary hearing should thoroughly prepare for the testimony in advance, if possible, just as any other witness in the case.

14 Conflicts of Interest and Outside Activities

14.1 Private Law Practice

A prosecutor may not practice criminal defense. Except for self-representation, a prosecutor may not defend anyone in regard to felonies, misdemeanors or infractions including traffic tickets. (Government Code Section 26540).

A prosecutor is prohibited in engaging in the practice of civil law against governmental entities. (See Government Code Sections 26527, 26542, 26543).

The District Attorney and the assistants, deputies or other attorneys employed in the Office shall not personally engage in the private practice of law in or out of court, nor be interested directly or indirectly therein; provided that **they may, without compensation and with approval of the District Attorney, act as attorney for themselves and their mothers, fathers, spouses, children, brothers and sisters** in matters and cases which have not been assigned; and provided further that said assistants, deputies or other attorneys may, **without compensation and with the approval of the District Attorney,** render legal services on behalf of **nonprofit religious, charitable, scientific, law enforcement or educational institutions or organizations**, provided that there is no conflict of interest or impairment of office work involved in any of said legal services. The District Attorney may also without compensation in his private capacity as an attorney represent public districts, public boards, and public officers in their official and personal capacities and sureties on their bonds given in an official capacity whenever in the opinion of the District Attorney such representation is for the best interest of the public or the public service; and provided further that the District Attorney may appear without compensation as amicus curiae in matters and proceedings when in his opinion such appearance is for the best interest of the public or the public service. (County Administrative Code: 2.26.070 – Limitations on Private Practice of Law).

14.2 *Limitations on Outside Employment for Attorneys*

California Government Code Section 1126 prohibits County employees from engaging in "any employment, activity or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer or employee or with the duties, functions, or responsibilities of his or her appointing power or the agency by which he or she is employed." In accordance with that provision, the Alameda County District Attorney's Office has placed limitations on outside employment for its attorneys.

The District Attorney and the assistants, deputies or other attorneys employed in the Office, shall not personally engage in employment in "For-Profit" Businesses or Organizations without the written approval of the District Attorney. The policy does not preclude the District Attorney and the assistants, deputies or other attorneys employed in the Office the right to have a financial interest in or serve on the Board of a "For-Profit" Business or Organization, but under no circumstances shall the attorney employee reference his or her employment in the Alameda County District Attorney's Office for the benefit of the Business or Organization, nor shall the attorney employee use the reputation or goodwill of the Alameda County District Attorney's Office to advance the "For-Profit" Business or Organization.

The District Attorney and the assistants, deputies or other attorneys employed in the Office may, **with the approval of the District Attorney and with compensation, engage in outside employment with Academic Institutions of Higher Learning** that provide legal education. Further, the District Attorney and the assistants, deputies or other attorneys employed in the Office, **with the approval of the District Attorney and with compensation, may provide technical and professional advice, guidance and/or assistance to organizations and/or endeavors that furthers the interest of criminal justice, including prosecution, victims' rights, environmental or consumer protection or other areas.** However, **under no circumstances shall such technical and professional advice, guidance and/or assistance provided reflect negatively on the Office or any of its employees, nor shall it conflict with the policies and practices of the Office, nor shall it include reference to any actual case and/or facts or circumstances surrounding or involving matters that are handled by the Office.** If, in the opinion of the District Attorney or Chief Assistant District Attorney, such technical and professional advice, guidance and/or assistance does reflect negatively on the Office or any matter under the purview of the Office is used outside this Office, approval will be withdrawn.

The District Attorney is an elected official. However, no political, campaign or election activity shall occur on the worksite. An assistant, deputy or other attorney employed in the Office **who desires to run for elected office or be considered for appointment to a public political commission or board must obtain approval from the District Attorney** before such action is taken. Under no circumstances shall an assistant, deputy or other attorney employed in the Office who is either elected or appointed to a public political position engage in any decision making process that appears to be or is a conflict of interest with his or her employment at the District Attorney's Office.

14.3 Financial Disclosure

A prosecutor may be required to disclose personal financial interests which would be affected by official duties. (Government Code Sections 87100-87313—Conflict of Interest Code.)

14.4 Teaching, Writing and Public Speaking

Unless restricted by Office policy, a prosecutor may teach, write and appear on media programs provided a deputy or assistant clearly identifies personal views, never reveals confidential information without official authorization and considers how personal comments may affect the prosecutor's office. (Business & Professions Code Section 6068(e)).

14.5 Community Activities

Prosecutors may engage in community activities provided they do not create a conflict of interest or the appearance of impropriety. While participation by attorneys is encouraged as a matter of civic responsibility, community involvement must be disassociated from the individuals' official

position unless it is expressly sanctioned by the Office. (See Government Code Sections 3205, 3207).

14.6 *Service on Governmental Committees*

"Service on an appointed or elected governmental board, commission, committee, or other body by an attorney employed by a local agency in a non-elective position shall not, by itself, be deemed to be inconsistent, incompatible, in conflict with, or inimical to the duties of the attorney as an officer or employee of the local agency and shall not result in the automatic vacation of either such office." (Government Code Section 1128). Prosecutors seeking service on government committees shall get prior approval from the District Attorney.

14.7 Prosecutors as Candidates

Prosecutors seeking to become candidates for elective office shall get prior approval from the District Attorney. In addition to state and federal law governing political action, conflicts of interest, financial disclosure, and campaign contribution reporting (see the Political Reform Act in Government Code Sections 81000-9105), other statutes and local campaign ordinances may also apply.

15 *Assignments, Promotions and Career Development*

15.1 *Transfers*

Transfers and rotation of assignments is part of the career path for attorneys in the Office. Early in one's career, the goal is to develop the prosecutor with the tools necessary to be a successful felony trial prosecutor. Attorneys can expect routine transfers throughout the various branches of the County in misdemeanor jury trial, juvenile, preliminary examination, and law and motion assignments.

15.2 *Limitations of Assignments for Certain Units and/or Divisions*

Certain assignments within the District Attorney's Office carry greater emotional and psychological impacts. Assignments such as Sexual Assault, Human Exploitation And Trafficking (H.E.A.T), Child Abuse, Elder and Dependent Adult Protection, Domestic Violence, Stalking, are examples. Studies have established that professionals, who are assigned to teams or positions that are shown to be emotionally or psychologically taxing areas of focus, can experience secondary trauma and/or impact.

It is critical for the Alameda County District Attorney's Office to be aware of and support to the health and well-being of its employees.

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