

Fresno County District Attorney's Office
Beginning Prosecutor Training

- Media and Ethics -



March 2020

I. Media

American Bar Association Canons – 1908

20. Newspaper Discussion of Pending Litigation.

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned.

I. Media



I. Media

California Rules of Professional Responsibility

Rule 3.6 – Trial Publicity

(New – 2018)

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will (i) be disseminated by means of public communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

I. Media

Statements to Avoid

Based on the California Rules of Professional Conduct (Rule 3.6), the American Bar Association Model Code of Professional Conduct (Rules 3.6 and 3.8), National Prosecution Standards (Rules 2-14.2 to 2-14.8), and common sense, the following information should not be divulged directly to the media during the pendency of a criminal matter:

- (a.) The statement that has a “substantial likelihood of materially prejudicing an adjudicative proceeding in the matter”;
- (b.) The subject of any gag order;
- (c.) A confession or admission of a suspect or defendant (may taint the jury);

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- (d.) A statement regarding the suspect’s or defendant’s refusal to make a statement (Doyle error);
- (e.) The prior criminal history of the suspect or defendant unless it is part of the criminal pleading or crime under investigation (confidential);
- (f.) The prosecutor’s personal belief in the guilt of the suspect or defendant;
- (g.) The identity of a sexual assault victim, domestic violence victim, confidential informant, or any at risk person involved in the criminal matter;
- (h.) The results of examinations or the defendant’s refusal to submit to certain examinations (e.g., lineup, polygraph, blood-alcohol, DNA, or voice sample);

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- (i.) The pendency of a search warrant;
- (j.) The events of a closed courtroom session or secret grand jury proceeding.

[REDACTED]

[REDACTED]

I. Media

Information that you can Provide

. . . if the information does not have a "substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." (Rule 3.6)

1. The claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
2. Information contained in a public record;
3. That an investigation of the matter is in progress;
4. The scheduling or result of any step in litigation;
5. A request for assistance in obtaining evidence and information necessary thereto;

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6. A warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public but only to the extent that dissemination by public communication is reasonably necessary to protect the individual or the public; and
7. In a criminal case:
 - (i.) The identity, general area of residence, and occupation of the accused;
 - (ii.) If the accused has not been apprehended, the information necessary to aid in apprehension of that person;
 - (iii.) The fact, time, and place of arrest; and
 - (iv.) The identity of investigating and arresting officers or agencies and the length of the investigation.

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Public Information

Description of allegations in the charging document

Penalty range for the charged offenses or the sentence imposed

Amount of bail

Court dates and explanation of the court process

Description of motions filed and contained within the judicial record and probation reports while they are part of the public judicial record

[REDACTED]

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General Reminders

Juveniles – CONFIDENTIAL (Welf. & Inst. Code § 827)

[REDACTED]

[REDACTED]

[REDACTED]

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General Reminders (contd.)

6.11 SIGNIFICANT CASES

An attorney's immediate supervisor must be apprised of any "significant" cases or any case involving a "significant" defendant that is being handled by the office. Significant cases include, but are not limited to, cases with a significant victim impact, cases which have received or can be expected to receive media attention, three strike cases, cases which may substantially impact a significant portion of the community, cases with unusually large amounts of drugs or weapons, cases involving well-known members of the community, cases involving local officials, cases involving law enforcement agency employees and/or family members, and/or cases involving employees and/or family members of employees of the D.A.'s Office, etc.

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[REDACTED]

[REDACTED]

[REDACTED]

II. Ethics

[REDACTED]

[REDACTED]

[REDACTED]

II. Ethics

The prosecutor must be completely and consistently professional because he or she is required to meet standards of candor and impartiality not demanded of other attorneys. (People v. Hill (1998) 17 Cal.4th 800.)

II. Ethics

We rely upon jurors to ascertain the truth and entrust them with the responsibility of determining whether an accused person is or is not guilty. At times, the decisions we ask jurors to make are particularly difficult and carry with them enormous consequences.

If we expect jurors to do their job, they must be presented with the truth – not just part of the truth, but all of the truth. For if they are not, neither the trial participants nor the public will have confidence in the results.

Prosecutors have a special obligation to promote justice and the ascertainment of truth. (People v. Kasim (1997) 56 Cal.App.4th 1360.)

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"The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of 'The People' includes the defendant and his family and those who care about him. It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name." (On Prosecutorial Ethics (1986).)

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"The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he [or she] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He [or she] may prosecute with earnestness and vigor – indeed, [the prosecutor] should do so. But, while [the prosecutor] may strike hard blows, he [or she] is not at liberty to strike foul ones. It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (Berger v. United States (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 633, 79 L.Ed. 1314, 1321].)

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California Rules of Professional Responsibility

Rule 3.8 – Special Responsibilities of a Prosecutor
(New – 2018)

The prosecutor in a criminal case shall:

- (a) not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

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- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

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- (e) exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6.

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- (f) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
- (1) promptly disclose that evidence to an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

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

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Penal Code Section 141
(2016)

- (c) A prosecuting attorney who intentionally and in bad faith alters, modifies, or withholds any physical matter, digital image, video recording, or relevant exculpatory material or information, knowing that it is relevant and material to the outcome of the case, with the specific intent that the physical matter, digital image, video recording, or relevant exculpatory material or information will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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The admissible evidence should be of such convincing force that it would warrant conviction of the crime charged by a reasonable and objective factfinder after hearing all of the evidence available to the prosecutor at the time of charging and after hearing the most plausible, reasonably foreseeable defense that could be raised under the evidence presented to the prosecutor (CDAA Uniform Crime Charging Standards.)

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Filing/Maintaining

ABA Crime Charging and Maintaining Prosecutions

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

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- (c.) If a prosecutor has significant doubt about the guilt of the accused or the quality, truthfulness, or sufficiency of the evidence in any criminal case assigned to the prosecutor, the prosecutor should disclose those doubts to supervisory staff. The prosecutor's office should then determine whether it is appropriate to proceed with the case.
- (d.) A prosecutor's office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence. (Standard 3-4.3—Minimum Requirements for Filing and Maintaining Criminal Charges, ABA Criminal Justice Standards for the Prosecution Function (4th Edition, 2017), See also Standard 3-4.4.)

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IMPROPER FILING CRITERIA

Prosecutors must avoid improper bases for charging. It is improper, and a violation of the law, if any or all of the following factors are the only reasons for charging:

1. Race, religion, nationality, gender, occupation, economic class, or political association or position of the victim, witnesses, or the accused;
2. The mere fact of a request to charge by a police agency, private citizen, or a public official;
3. Public or journalistic pressure to charge;
4. The facilitation of an investigation, including obtaining a statement from the accused; and

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5. To intentionally resist or impede the efforts of any public official, candidate, or prospective candidate for elective or appointed public office.

Additionally, a prosecutor should not attempt to dissuade a witness from testifying or attempt to affect a witness' testimony by threatening to file charges if the witness testifies for the defendant or in a particular manner.

A prosecutor does not represent the victim of a crime, and it is an abuse of prosecutorial discretion to threaten criminal prosecution or to institute criminal proceedings in order to redress a victim's personal or financial loss.

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Discovery

Penal Code § 1054.1 – witnesses, statements, evidence

Brady v. Maryland – exculpatory evidence

Turn it all over . . .

Then fight about its admissibility in Court

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Victim's Rights

Penal Code § 679.02 – statutory rights (1986)
 Victims' Bill of Rights Act of 2008 – Marsy's Law
 California Constitution, Article I, § 28(b)
 Penal Code § 679.026 – codified above

[REDACTED]

[REDACTED]

[REDACTED]

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Trials/Verdicts

The prosecutor should respectfully accept acquittals. While the prosecutor may publicly express respectful disagreement and an intention to pursue lawful options for review, the prosecutor should refrain from public criticism of any participant. Public comments after a verdict or ruling should be respectful of the legal system and process.

The prosecutor may publicly praise a verdict. The prosecutor should not publicly gloat.
 (ABA Standard 3-6.10)

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8.14 GIFTS

Fresno County Administrative Policy Number 1 states that employees should "ACCEPT no money, commissions or thing of value of any kind in exchange for or as quid pro quo for County services other than the regular County salary."

Consistent with the countywide policy, employees of the District Attorney's Office shall not, without the written consent of the District Attorney, accept any fee, compensation, gift, payment of expense, or any other thing of monetary value, other than authorized salary and approved job-related reimbursements, presented and/or given in connection with an employee's service, duties, and employment with the District Attorney's Office.

If a perishable item (such as flowers, food, candy, etc.) is delivered or dropped off at the office, the item should be placed in a common area to be enjoyed by all. However, please use your common sense and keep in mind the safety of all.

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Do Not Misuse Official Position

8.10 BADGES AND IDENTIFICATION CARDS

Prosecutors are not peace officers, and should keep in mind that displaying a badge or other identification with the intent to convey the impression that he or she is a peace officer is a misdemeanor. (Penal Code §538d.)

Specific prohibitions on the use of these items include the following:

1. Using any District Attorney identification method outside the scope of employment in a manner that may result in intimidation.

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2. Placing the card or badge in a wallet or purse so that it becomes observable by law enforcement officers upon demand for inspection of driver's license or other identification documents.
3. Using the card or badge to gain personal financial advantage or benefits not otherwise equally available to all county employees on a group rate basis, and seeking preferential treatment, either expressly or implied, by other agencies in the criminal justice system.
4. Using the card or badge as a means of gaining entry to any location which one is not otherwise authorized to enter.

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Off the clock?

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. (Rule 1-2.1, NDAA National Prosecution Standards)

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. (Section [5], ABA Model Rules of Professional Conduct: Preamble and Scope)
