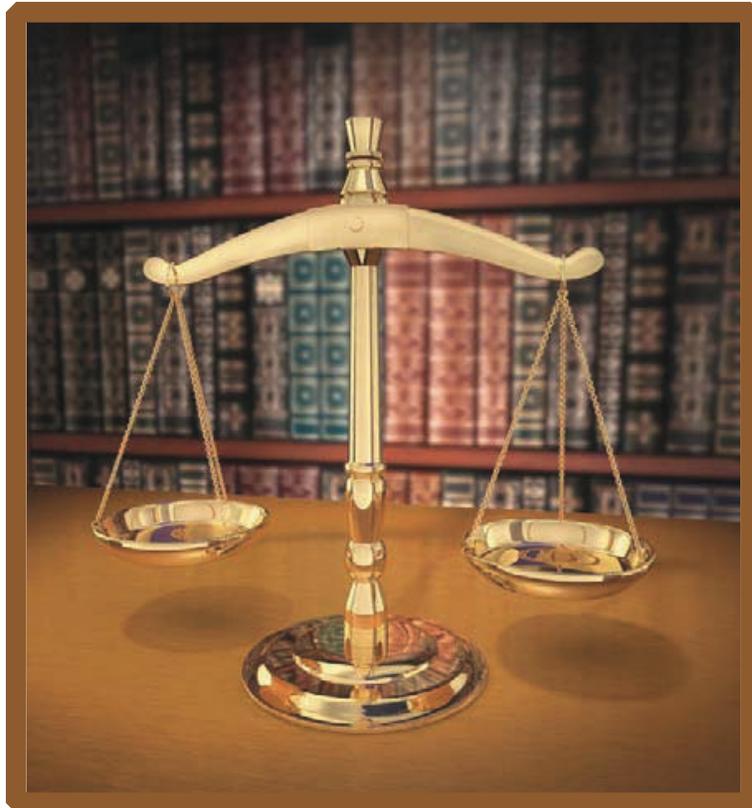


DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK

“The Right Thing”

Ethical Guidelines for Prosecutors



2021

Produced by the Ethics and Best Practices Subcommittees of the
DAASNY Committee on the Fair and Ethical Administration of Justice

Dear Colleagues,

I am pleased to distribute the 2021 Edition of the District Attorneys Association of the State of New York's *The Right Thing*.^{*} This handbook collects, in one place, the most significant cases and rules that govern ethical behavior by prosecutors in this state, and reflects our long-standing commitment to ethical prosecution and to the protection of the rights of victims, defendants, and the public. The ethical principles that govern prosecutors are described in a practical and meaningful way that will help us all in our daily work.

The Right Thing was originally developed by the Ethics and Best Practices Subcommittees of our Committee on the Fair and Ethical Administration of Justice, chaired by District Attorney William Fitzpatrick of Onondaga County. DA Fitzpatrick's leadership sparked the idea and spurred forward the effort that led to the creation of this booklet.

While president of the District Attorneys Association in 2011, DA Derek Champagne of Franklin County had these guidelines printed and distributed to every District Attorney and Assistant District Attorney in the state. I am likewise distributing this 2021 edition to every local prosecutor in the state, knowing that it continues to be extremely useful in all our offices.

The Right Thing is meant to supplement existing ethics training that is conducted by both the New York Prosecutors Training Institute (NYPTI) and individual District Attorneys. District Attorneys may use *The Right Thing* as a foundation upon which additional protocols and procedures may be added, or to supplement their own training programs and ethics policies.

Please note that this edition contains sections of the New York Rules of Professional Conduct. While not a comprehensive reprint of the rules, it provides additional material at your fingertips to help guide your practice. Attorneys are strongly urged to consult all the Rules as questions arise in your daily practice.

This handbook also contains the names and contact information for the members of our Ethics Guidance Committee, whose purpose is to provide informal advice upon request

^{*} This handbook is intended to provide general guidance to prosecutors by expressing in writing the long-standing commitment of New York's District Attorneys and their assistants to ethical prosecution and the protection of the rights of victims, defendants, and the public. This handbook summarizes aspirational principles, as well as ethical obligations created by statute, case precedent, and duly authorized rules of professional conduct. It is not intended to, and does not, create any rights, substantive or procedural, in favor of any person, organization, or party. It may not be relied upon in any matter or proceeding, civil or criminal, nor does it create or impose any limitations on the lawful prerogatives of New York State's District Attorneys and their staffs.

about ethics issues, with the understanding that the ultimate decision will rest with the elected District Attorney (see Appendix A-III).

The principal editors of this 2021 Edition were Tammy Smiley and Autumn Hughes of Nassau County, who devoted a tremendous amount of time and attention to this effort.

Acknowledgement for their participation in editing this edition is given to: Michael Coluzza of Oneida County, and Timothy Koller of Richmond County, who serve as Co-Chairs of the Ethics Guidance Committee; Michael Flaherty, formerly of Erie, Wyoming, and Chautauqua Counties; Robert Conflitti of Orange County, and Robert Masters, formerly of Queens County.

Kristine Hamann, Chair of the Best Practices Committee, and now Executive Director of the Prosecutors' Center for Excellence, was instrumental in bringing the original publication to fruition, and continues to contribute her insights with this latest edition.

The primary author of the original version of *The Right Thing* was Philip Mueller, the former Chief Assistant District Attorney in the Schenectady County District Attorney's Office. His vision for *The Right Thing* is displayed on every page, and his strong knowledge of the subject matter provides support for his powerful words. Tammy Smiley of Nassau County, Wendy Lehman, formerly of Monroe County, and Lois Raff, formerly of Queens County, helped edit the original version.

Additional credit must be given to those who edited prior updates, namely, Robert Masters, Rick Trunfio of Onondaga County, Morrie Kleinbart of Richmond County, Chana Krauss of Putnam County, David Cohn of New York County, Maryanne Luciano, formerly of Westchester County, and Joshua Vinciguerra, formerly of NYPTI.

I hope that these guidelines prove useful both as a quick reference guide and as a starting point for essential conversations about our ethical obligations and how we can best serve the People of the State of New York.

Respectfully Yours,



Sandra Doorley
President, DAASNY
District Attorney, Monroe County

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“The Right Thing”

The prosecutor *“is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”* *Berger v. United States*, 295 U.S. 78, 88 (1935).

We prosecutors have the best job in the criminal justice system because we have more freedom than any other actor to do “the right thing.” Defense counsel protect their clients’ interests and legal rights. Judges protect the parties’ rights and the public’s interest in the proper resolution of pending cases. But it’s not their job to find the truth, decide who should be charged, or hold the perpetrator accountable. Only prosecutors are given the freedom – and with it the ethical duty – to promote all these vital components of “the right thing.”

What Does This Mean?

It means we – you – have great power to alter the lives of many people: people accused of crimes; people victimized by crimes, their families and friends; and, the community at large. A criminal charge may be life-changing to an accused or a victim; it must never be taken for granted. Handle it like a loaded gun. Never forget its power to protect. Never forget its power to profoundly harm.

It means we keep an open mind. Not every person who is suspected should be arrested, not every suspect who is arrested should be prosecuted, not every case tried, and not every trial won. We have the freedom, and with it the ethical duty, not to bring a case to trial unless we have diligently sought the truth and are convinced of the defendant’s guilt. Even then, none of us – not the police, the witness, the prosecutor, the judge, nor the juror – is omniscient or infallible. Like all lawyers, we have an ethical duty to zealously advocate for our client. But unlike other lawyers, the client we represent is the public, whose interests are not necessarily served by winning every case. A guilty verdict serves our client’s interest only if the defendant is in fact guilty and has received due process.

It means we seek the truth and tell the truth, regardless of the consequences. We serve our client’s interest when we respect the rights of the accused, when 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 – with its awesome consequences – is the product of our best effort and the fairest system humankind has devised. When we lose, we can sleep at night for the same reason.

It means we succeed when the innocent are exonerated, as well as when the guilty are convicted.

It means each of us has a duty to know the ethical rules that govern our conduct, and to remain alert to the myriad and often subtle ethical challenges that arise in our work.

It means that district attorneys and their senior staff must set the tone, emphasize the primacy of ethical conduct, instruct junior prosecutors in these principles, and monitor their compliance.

It means we treat everyone with courtesy and respect.

These core principles, which both define what it means to be a prosecutor and make ours the best of jobs, are reflected in the mandatory rules of professional conduct. Ethical violations can ruin the lives and reputations of innocent people, cheat victims of their chance at justice, and endanger the public. Such dire consequences to others justify dire consequences to prosecutors who act unethically. Ethical violations expose prosecutors to formal discipline including censure, suspension and disbarment; case-specific sanctions, such as preclusion of evidence, reversal of convictions, and dismissal of charges; personal harms such as a damaged reputation, and loss of effectiveness; and, employment sanctions, such as demotion and even termination. Compliance with ethical rules necessarily requires that we know the rules, recognize that they define rather than restrain our mission, and anticipate challenges. But beyond merely knowing the black letter content of the rules, it requires us to understand the spirit of the rules and to incorporate that understanding into our daily practice decisions. This handbook was created by New York's prosecutors to help you meet these challenges.

Unethical Conduct: Consequences for Others

The Defendant

“The prosecutor . . . enters a courtroom to speak for the People and not just some of the People. 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.” Lindsey v. State, 725 P.2d 649 (Wy. 1986) (quoting Commentary on Prosecutorial Ethics, 13 Hastings Const. L.Q. 537-539 [1986]).

A prosecutor’s worst nightmare is not losing a major case or watching a dangerous criminal go free; it’s 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. The consequences for the defendant are obvious: destruction of reputation, incarceration, separation from family and friends, and extended damage to employability.

But the damage done by unethical behavior is not limited to innocent defendants or to defendants who are convicted. All defendants, innocent and guilty alike, are entitled to due process, including the presumption of innocence, the benefit of reasonable doubt, and the right to a fair trial. Unethical behavior by a prosecutor can render these fundamental rights illusory. Even defendants who are ultimately acquitted can nevertheless suffer irreparable harm from unethical prosecution: loss of freedom, employment, reputation, sense of security, and trust in our criminal justice system.

The Defendant’s Family

Convicted defendants facing sentencing often bolster their pleas for leniency by citing the damage their incarceration will do to their families. This collateral damage from crime and punishment is real and can be devastating – the heartbreaking separation from a defendant who is also a spouse, a parent, or a child; financial destitution of his or her family; and public shame. If a guilty person has been fairly convicted, it is the defendant who has victimized his or her own family. But if the conviction was procured by your unethical behavior as a prosecutor, the destruction of the defendant’s family will be your legacy.

The Victim and the Victim's Family

Unethical behavior by a prosecutor can subject crime victims to renewed stress and heartache. These are the very people we strive to protect. Convicting an innocent person means that the guilty person is left unpunished, rendering any sense of “closure” illusory. Convicting a guilty person by unethical conduct means subjecting the victim and his or her family to the agony of seeing the conviction overturned, being dragged through a second, painful trial, or even watching the true perpetrator go free.

Crime forces people from outside the criminal justice system into a strange and frightening world in the role of “victims.” Some have already suffered horrific losses. The challenge of appearing in court, facing the perpetrator, risking retaliation, describing the crime to strangers, being subjected to cross-examination, attacks on one’s credibility, and waiting in suspense through jury deliberations can be nearly as harrowing as being the victim of a crime in the first instance. The average person leaves that process thinking, “I never want to go through that again.” Now imagine calling the victims or their families 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 suffered for no valid purpose, 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 and the perpetrator will go free.

Your Community

“The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner’s guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community” (Hurd v. People, 25 Mich. 405, 416 [1872]).

Conviction of an innocent person leaves the community exposed to future crimes by the true perpetrator. In addition, the police will frequently see a conviction as “closing the book” on the crime, making it much less likely that the guilty person will ever be found.

Conviction of a guilty person, if tainted by unethical prosecutorial behavior, exposes the community to the tremendous expense, waste, and risk of reversal and retrial.

Worse still, the damage potentially caused to the community by a prosecutor's unethical behavior goes beyond any case. The public's trust in the integrity of the criminal justice system is impaired when there is a perception that law enforcement does not follow basic rules of fairness. Witnesses who feel that prosecutors are corrupt or unethical may refuse to come forward or may feel justified in withholding evidence or giving false testimony. Jurors may be reluctant to serve or may bring with them into the deliberation room a crippling mistrust of the law enforcement community.

Unethical Conduct: Consequences for *You*

We prosecutors hold people accountable for their actions. We are, in turn, accountable for ours. In the criminal justice system, with its multitude of actors, motivated adversaries, high stakes, and extensive consequences, any unethical behavior by a prosecutor is likely to be exposed. Violations of your ethical obligations will expose you, your cases, your office, and your District Attorney to dire consequences. Unethical behavior by one prosecutor, if unpunished, can poison the atmosphere in an entire office. Moreover, your unethical conduct can cause the District Attorney public embarrassment, grievances, and possible electoral defeat. Just as there are many levels of culpability for professional misconduct, there are many consequences for unethical actions.

- **You may be censured, suspended, or disbarred.** Remember, everything that you do will eventually come to light. Your unethical conduct may be noticed by defense attorneys, coworkers, judges or any member of the public, any one of whom could file a grievance against you. Violations of ethical rules governing the conduct of attorneys, including prosecutors, are overseen by the Supreme Courts of New York State. Under the rules set forth by each Appellate Division, those courts have empowered permanent committees on professional standards to investigate allegations of misconduct and “censure, suspend from practice or remove from office any attorney . . . guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice” (Judiciary Law § 90[2]).

Furthermore, professional discipline is not limited to the prosecutor who violates ethical rules. It may also extend to the violator’s colleagues, if they become aware of the misconduct and fail to take prompt remedial action. For example, in *In re Riehlmann*, 891 So. 2d 1239 (La. 2005), a prosecutor who learned about another prosecutor’s failure to disclose exculpatory blood evidence – which resulted in an innocent man nearly being executed for crimes he did not commit, see *Connick v. Thompson*, 563 U.S. 51, 56 n.1 (2011) – was sanctioned for not revealing his colleague’s misconduct.

- **You may lose your job.** You are not expected to win every case, but you are expected to conduct yourself ethically in every case. Your unethical conduct can lead to your demotion or dismissal.

- **A written reprimand may be placed in your permanent file.**

- **Employment sanctions.** If the District Attorney who imposed a sanction short of termination leaves office, you could still be demoted or fired by the next District Attorney. If your unethical behavior embarrassed the prior District Attorney, you will probably be fired by his or her successor. Even if your misconduct never became public, a new District Attorney finding indications of unethical conduct in your personnel file or in oral reports from senior staff or other sources may consider you a liability. What's more, he/she only owns the decision of his/her predecessor to keep you on staff if you are shown the same mercy under the new administration. Imagine yourself in the position of the newly elected District Attorney. Is this the way you would want to start your term?
- **Your case may suffer sanctions.** These include damaging delays, preclusion of evidence, negative inference instructions to the jury, dismissal with prejudice, and reversal of a conviction.
- **You may be criminally prosecuted.** You could be prosecuted under state law, for example, for suborning perjury, obstructing justice, or official misconduct, or under federal law for deprivation of rights under color of law (*see* 18 USC § 242; *Dennis v. Sparks*, 449 U.S. 24 [1980]; *United States v. Otherson*, 637 F.2d 1276 [9th Cir. 1980]). Moreover, ethical transgressions that also violate court orders – for example, an order directing disclosure of certain evidence that trial judges are expected to issue at the beginning of each criminal case – may subject you to charges of contempt.
- **You may be sued civilly.** The law confers absolute immunity from civil liability upon individual prosecutors acting in their role as advocates for the state to ensure the prosecutor's independent judgment and zealous advocacy. You may have only qualified immunity, however, when acting outside your role as an advocate (for example, when performing investigative functions). When you have only qualified immunity, unethical behavior can result in a civil judgment against you. Civil juries may award both compensatory and punitive damages against you. Moreover, if a civil suit against you is settled by the agency representing you, or if you are found responsible following a civil trial, those results may have additional consequences for you; future employment applications or malpractice insurance applications may require you to disclose the results of any civil proceeding finding you liable. And, even if you were to be personally immune from civil liability or receive indemnification, such benefits do not diminish your ethical duties or shield you, in extreme cases, from criminal liability.

- **You may cause the District Attorney’s Office or the county to be named in a civil action.** Even though an individual prosecutor may not have been personally involved during the course of events that led to an ethical breach by a co-worker, he or she may nevertheless be affected. An exonerated defendant may sue the District Attorney’s Office or the county in which it sits for such unethical behavior. The actions of a single individual can therefore result in the loss of funding for your office if it is forced to pay a civil judgment. Fiscal concerns aside, the effects of the erosion of your office’s reputation for integrity will be visited upon you repeatedly in the form of public criticism and distrust in future cases. The resultant juror apathy and distrust of police and prosecutors will likewise affect your ability to seek justice in future trials.

- **You will lose your reputation and effectiveness.** You will spend years building your reputation for integrity in the community of judges, defense attorneys, police, and fellow prosecutors. Your credibility is truly your currency, and you depend upon it each day of your professional life. You can lose it all with a single act of unethical behavior. With diminished reputation comes diminished effectiveness. Judges have a hundred ways to disadvantage a prosecutor whom they suspect of unethical conduct; they don’t need to prove it or even accuse you. Typically, there will be no avenue of appeal. Your credibility with members of the defense bar will affect your ability to negotiate pleas and cooperation agreements, as well as the civility of your practice and your enjoyment of your job. No case is worth your reputation.

- **You’ll know.** You didn’t become a prosecutor to get rich or take the easy path. You did it because you know right from wrong and it’s important to you to be on the side of right. In the end, what else is there? What is most fulfilling about our work, if not that? Remember this when you’re tempted to cut an ethical corner; even in the unlikely event that it stays hidden for your entire career, you’ll still know, and it will deprive you of the self-esteem that is your work’s most valuable reward.

- **Commission on Prosecutorial Conduct Bill.** In 2020, the Assembly drafted a bill designed to address those constitutional infirmities, which was re-introduced in the 2021 legislative session. That these bills have yet to be enacted does not change the reality that while the Commission does not currently exist, momentum for its implementation continues, and the potential of such a body becoming a reality should never be forgotten by anyone.

Rules of Fairness and Ethical Conduct

Our ethical duties as prosecutors derive from and are defined by many sources. These include, of course, the Rules of Professional Conduct codified at Title 22, Part 1200 of the New York Codes, Rules and Regulations (“NYCRR”). These mandatory rules are also construed by advisory ethics opinions issued by bar associations. But we are wise not to view our ethical duties as limited by the Rules of Professional Conduct. They are also shaped by procedural statutes and case law, including, for example, the *Brady* and *Giglio* doctrines and other case law codifying a defendant’s constitutional right to a fair trial, and discovery rules under the Criminal Procedure Law. To be sure, not every mistake made by a prosecutor in applying these doctrines, and not every error in judgment, is an ethical breach. But deliberate violations of these rules of fairness, or willful ignorance of them, are ethical failures.

a. Rules of Professional Conduct, 22 NYCRR Part 1200

Effective April 1, 2009, the Chief Judge of the Court of Appeals and the Presiding Justices of the Appellate Divisions adopted new Rules of Professional Conduct to replace New York’s Code of Professional Responsibility and bring our state’s ethical rules more in line with the American Bar Association’s Model Rules of Professional Responsibility. Although all the Rules of Professional Conduct apply to prosecutors, some have little relevance to criminal prosecution because they regulate the private practice of law, fees, and relationships with individual clients. Most of the now familiar Rules have similar counterparts in the old Code, causing the chairman of the committee that drafted the new Rules to opine that “the new rules represent a fine tuning of the existing code of professional responsibilities in New York so that the obligations remain exactly the same” (Steven Krane, Esq., Chairman of the New York State Bar Association’s Committee on Standards of Attorney Conduct, quoted in the *New York Law Journal*, 12/17/2009).

The complete Rules of Professional Conduct can be accessed through the websites of the District Attorneys Association, the New York Prosecutors Training Institute (“NYPTI”) and the New York State Bar Association. If you confront specific issues involving any of these mandatory ethical rules, you should review the text of the rule itself and relevant advisory opinions issued by the state or local bar associations.

For your day-to-day practice, however, most ethical principles underlying the Rules can be distilled to a few commonsense principles of fairness and professionalism:

- **Be Prepared.** You must acquire “the legal knowledge, skill, thoroughness and preparation necessary for the representation” (Rule 1.1). This obligation includes maintaining familiarity and competency with the technological aspects of a criminal case. In our modern era, much more time and energy is required of a prosecutor by way of preparing a case that contains digital evidence. Therefore, you must proceed proactively. Your failure to adequately prepare your case could sabotage it before you even select your first juror. Moreover, reacting, rather than following a plan, often leads to unforced errors which courts may well consider to be misconduct.
- **Be on Time.** You must “act with reasonable diligence and promptness” and not “neglect a legal matter entrusted to” you (Rule 1.3), or “use means that have no substantial purpose other than to delay or prolong a proceeding” (Rule 3.2).
- **Tell the Truth.** You must be candid about the facts and the law with judges, opposing counsel and others. In representing the People, you must not “knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law [you] previously made to the tribunal”; “fail to disclose to the tribunal controlling legal authority” not already cited by opposing counsel; “offer or use evidence that [you] know is false” (Rule 3.3); or “knowingly make a false statement of fact or law to a third person” (Rule 4.1). When communicating with unrepresented persons, you must not misrepresent your role in the matter (Rule 4.3). You must not make a false statement in an application for membership to the bar (Rule 8.1) or “concerning the qualifications, conduct or integrity of a judge” or judicial candidate (Rule 8.2). If you learn of false testimony or other fraud upon the court, you must “take reasonable remedial measures, including, if necessary, disclosure to the tribunal” (Rule 3.3[b]). In an *ex parte* proceeding, you must disclose to the court all material facts, including adverse facts that will enable the court to make an informed decision (Rule 3.3[d]).
- **Don’t Reveal Confidential Information.** With certain exceptions, you must not “knowingly reveal confidential information to the disadvantage of a client” (Rule 1.6). This rule is drafted with the private practitioner and client in mind, but maintaining confidentiality is even more important for prosecutors than for private attorneys. Careless or unauthorized disclosure of the sensitive information we

routinely acquire can cost lives, compromise investigations, and ruin reputations. It may also trample over legally protected relationships. Some unauthorized disclosures – notably, of grand jury proceedings – are crimes and punishable as such (Penal Law § 215.70; C.P.L. § 190.25[4][a]).

Note that prosecutors are not required to disclose physical addresses or the names of confidential informants (C.P.L. § 245.20[1][c]). Similarly, social security numbers and tax numbers should be redacted from any documents that you disclose to the defense (C.P.L. § 245.20[6]). Protective orders should be sought where disclosure of otherwise discoverable material threatens “the safety of a witness” or otherwise carries a “risk of intimidation, economic reprisal, bribery, harassment or unjustified annoyance or embarrassment to any person” (C.P.L. § 245.70[4]).

• **Don’t Prosecute Without Probable Cause.** As a prosecutor, you are specifically forbidden to “institute, cause to be instituted or maintain a criminal charge when [you] know or it is obvious that the charge is not supported by probable cause” (Rule 3.8[a]). If you come to know that a pending charge is not supported by probable cause, you must act appropriately to dismiss or reduce the charge, or advise a supervisor with the authority to do so, regardless of who caused the charge to be instituted (Rule 5.2). The breadth of the term “maintain” and the objective component of Rule 3.8(a) (“or it is obvious that the charge is not supported by probable cause”) highlight the importance of the initial screening process for charges or indictments in place in each District Attorney’s Office, as well as the ongoing review of charges by prosecutors familiar with and exercising substantial control over each case. Moreover, even *with* probable cause, you must not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter (Rule 3.4[e]). These obligations continue after conviction, as well (Rule 3.8[c], [d]).

• **Don’t Make Frivolous Arguments.** You must not “bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous” (Rule 3.1). A claim is “frivolous” if it is knowingly based on false factual statements, if it is made for no purpose other than delay, or if it is “unwarranted under existing law.” Attorneys may, however, argue in good faith for an extension, modification, or reversal of existing law (Rule 3.1).

- **Comply with Procedural and Evidentiary Rules.** When appearing before a tribunal, you must not “intentionally or habitually violate any established rule of procedure or of evidence” (Rule 3.3[f][3]). When questioning a witness in court, you must not “ask any question that [you have] no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person” (Rule 3.4[d][4]).

- **Be Fair.** You must not act, or encourage others to act, in ways designed to unfairly undermine the opposing party’s ability to defend. For example, you must not: advise a witness to hide or leave the jurisdiction to avoid testifying; knowingly use false testimony or evidence; pay or offer to pay compensation to a witness contingent on the content of the witness’s testimony or the outcome of the case; or act as an unsworn witness in a proceeding and assert personal knowledge of material facts (Rule 3.4).

- **The "No Contact" Rule.** You must not communicate directly or indirectly with a person represented by another lawyer about the subject matter of that representation, unless you have the lawyer’s consent or are otherwise legally authorized to do so (Rule 4.2).

This issue often arises in situations involving a defendant who stands charged by way of a desk appearance ticket (DAT) or a simplified vehicle and traffic information (VTL). It is not uncommon for the represented individual themselves to initiate contact with the assigned ADA in such circumstances. As a matter of sound and careful practice, all such conversations should begin with the ADA assessing whether the right to counsel has been triggered, followed by a further inquiry as to whether the accused has either retained counsel, been assigned counsel, or has otherwise established an attorney-client relationship concerning the matter at issue.

If an attorney has entered the case, the ADA should immediately discontinue further discussion with the defendant and refer him/her back to their counsel. The ADA should thereafter notify such opposing counsel and the Court that the contact has occurred.

If the accused confirms that counsel has not entered the case, the ADA should inquire as to whether an arraignment has occurred, and whether the Court has been made aware that the defendant wishes to self-represent.

Be mindful that letters regarding a plea offer, an administrative adjournment, a diversion program, or some other issue related to the case should not be sent by the District Attorney to a defendant who is known to be represented by counsel.

A challenging scenario may arise in the earnest observance of the No Contact Rule when a represented defendant spontaneously approaches an ADA with information that their attorney is engaging in criminal conduct, and that the defendant wants to speak with the ADA outside the presence of that attorney.

This presents a thorny issue for the ADA, as a strict reading of the No Contact Rule prevents the ADA from speaking with the defendant, placing the ADA in a somewhat untenable position. Several factors could affect the proper course of action, including but not limited to:

- whether the information is even true; or
- whether the putative “crime” relates to counsel’s actual defense of the defendant; or
- whether the lawyer is an accomplice to the crimes for which the defendant stands accused; or
- whether a criminal fraud is about to be perpetrated upon the court on some other matter.

Should such a situation present itself, the ADA should proceed with extreme caution. First and foremost, the ADA should not go it alone, and should *immediately* consult with a supervisor. Analyze whether you have reason to believe that the defendant may be gaming you – that the fraud being perpetrated is occurring then and there. Do not underestimate that a defendant, desperate to get out from under a criminal charge, may resort to this kind of behavior. Additionally, even if you feel that the defendant is reaching out in apparent good faith, you should presume that the defendant naturally wants, and perhaps expects, a benefit from you on the defendant’s own case.

The ADA should proceed only if authorized by their supervisor, and if so, special care should be used in the choice of words used when speaking with the defendant. The ADA should consider the following:

- have another person from the office present as a witness;
- advise the defendant that the ADA cannot speak with the defendant as long as the current attorney continues to represent the defendant;
- the ADA cannot specifically recommend that the defendant discharge their current attorney;
- the ADA should not use their investigator to have a conversation with the defendant that the ADA themselves cannot have;
- the ADA should document what took place, and what was said, and by whom.

Although the ADA's first reflex may be to advise the Court of the defendant's outreach, your ethical compliance with the No Contact Rule cannot be at the expense of having an inappropriate *ex parte* conversation with the Court¹, although in some circumstances you may arrive at this as the only appropriate option. The decision on whether to notify the Court, and whether to do so on notice, or *ex-parte*, will therefore involve an in-depth analysis, the outcome of which will turn on case-specific permutations of fact that are unique to the matter at hand. For instance, you may conclude that the most appropriate approach in a given case is to ask the Court to appoint "shadow counsel" to represent the defendant during any conversation with the ADA regarding his first attorney. (*see People v. Stewart*, 91 N.Y.2d 900 [1998]). The complexities of all these permutations reinforces the advice to not go it alone, and instead to involve your supervisors.

• **Be Courteous and Respectful.** When appearing before a tribunal, you must not "engage in undignified or discourteous conduct ... [or] conduct intended to

¹ Of course, if the defendant does indeed discharge the attorney in question, your conversations with subsequent counsel on this issue will take their natural course.

disrupt the tribunal”; or “fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply” (Rule 3.3).

- **Protect the Integrity of Courts and Juries.** In an adversarial proceeding, you must not engage in unauthorized *ex parte* communications with the judge or his or her staff regarding the merits of the case. During a litigation, whether you are a participant, you must not engage in or cause another to engage in prohibited communications with a sitting juror or prospective juror or a juror’s family members. After the litigation ends, you must not communicate with a juror if this has been prohibited by the court or if the juror has expressed a desire not to communicate, and you must not communicate with a juror in a misleading, coercive or harassing manner, or in an attempt to influence the juror’s action in future jury service. You must promptly reveal to the court any improper conduct by a juror or by another toward a juror, venire person, or members of their families (Rule 3.5).

- **Try Your Case in the Courtroom, not the Media.** Rule 3.6 (“Trial Publicity”) is long and complex, and is perhaps the ethical rule most likely to trip up the unwary prosecutor. The public’s intense interest in crimes committed in their communities, which is reflected in media attention, combined with the propensity of some defense attorneys to try their cases in the press, may tempt you to provide the media with more information than you should. Many District Attorneys have clear guidelines advising who is authorized to speak with the media on behalf of the office. Follow that mandate. The general rule is that a lawyer participating in a criminal or civil proceeding “shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter” (Rule 3.6[a]). Rule 3.6(b) includes a list of categories of statements to the media deemed likely to materially prejudice a criminal proceeding, while Rule 3.6(c) is a list of statements that can *usually* be made without running afoul of the rules; read it before speaking with the media. Moreover, take special note of the limited breadth of the list of permissible subjects that a prosecutor can talk about regarding a pending matter, and how deeply you may delve into each. But be aware that even a statement that usually is permissible might, under the circumstances of your case, “materially prejudic[e]” the proceeding. While making a statement that is ethically appropriate, always beware of the media’s inevitable follow up questions seeking further information

or opinion that may prove to be problematic. You may start out fine, and in the course of responding to questions, talk yourself onto ethically shaky ground, wondering all the while how you got there. On this front, beware of sharing what you personally think or believe, especially while a case is pending. Finally, bear in mind that any statement announcing that a particular person has been charged with a crime must be accompanied by a statement that the charge is merely an accusation, and that the defendant is presumed innocent unless and until proven guilty (*see* Rule 3.6[b] in the Appendix, which delineates the subject matter of prohibited commentary during the pendency of a criminal case).

- **Comply with Disclosure Rules.** All lawyers are ethically bound to disclose any evidence which they have “a legal obligation to reveal or produce” (Rule 3.4[a][1], [3]). As a prosecutor, you must also make timely disclosure to the defense of all evidence or information known to your office that negates or reduces guilt or supports a potential defense to a charged offense, may be used to impeach a witness, undermines the identification of the defendant as the perpetrator of an offense, or may be used to suppress evidence, unless relieved of this obligation by a protective order (Rule 3.8[b]; *see* C.P.L. § 245.20[1][k]). A prosecutor’s duty to disclose exculpatory or impeachment material – so-called *Brady* material – falls under this ethical rule.

- **Trust Jurors, Trust Your Advocacy, Trust the Truth.** Lawyers who do not trust jurors to act reasonably, intelligently and justly, or do not trust their own ability to help jurors make sense of conflicting evidence, tend to make ethical errors. The villain, played by Jack Nicholson, in the courtroom drama *A Few Good Men*, famously thundered: “*You can’t handle the truth!*” He was wrong. The truth, when presented in a calm, coherent and engaging manner, has a compelling power of its own. Jurors take their duty seriously and want to find the truth. Many of the ethical principles cited above (“tell the truth,” “be fair,” “comply with procedural and evidentiary rules,” “comply with disclosure rules”), are aimed at restraining attorneys from substituting their own judgment for that of courts and jurors. Prosecutors should not focus their advocacy on suppressing discordant evidence, but on helping jurors put it in its proper perspective.

- **Keep Doing Justice *After* a Conviction.** Our ethical duties don’t end when a defendant is convicted. Prosecutors must act appropriately upon learning of new evidence indicating that an innocent person was convicted, keeping in mind that no person or system is infallible and that exonerating the innocent is as important

as convicting the guilty. In July 2011, the District Attorneys Association of the State of New York adopted the following Statement of Principle:

“The fundamental core of a prosecutor’s responsibility is to ‘do justice.’ It is an obligation that does not end with a conviction, regardless of whether the conviction is by verdict or plea. Whenever a credible claim of innocence is put forward we remain committed to pursuing the path that justice demands. Every case must be determined on its facts and its own merits. Where the facts and the merits demonstrate that DNA testing could conclusively establish innocence, or is otherwise the appropriate course of action, we will pursue it.”

In addition, in July 2012, the Rules of Professional Conduct were amended to describe the special responsibilities of a prosecutor who “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” (*see* Rules of Professional Conduct, Rule 3.8; *Connick v. Thompson*, 563 U.S. 51 [2011]; *District Attorney’s Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 67-68 [2009]; *McKitthen v. Brown*, 626 F.3d 143 [2d Cir. 2010]; *Warney v. Monroe County*, 587 F.3d 113 [2d Cir. 2009]). When such a situation arises, Rule 3.8 requires that the prosecutor shall promptly disclose that evidence to an appropriate court or authority, and if the conviction was obtained in the prosecutor’s jurisdiction:

- promptly disclose that evidence to the defendant unless a court authorizes delay, and
- 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.

Beyond mere disclosure and further investigation, 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 a remedy consistent with justice, applicable law, and the circumstances of the case.

- **Obey the Law.** Attorneys are ethically bound to avoid deceit and misconduct in their personal as well as their professional activities. You must not engage in conduct that is illegal, adversely reflects on your “honesty, trustworthiness or fitness as a lawyer,” involves “dishonesty, fraud, deceit or misrepresentation,” is

“prejudicial to the administration of justice . . . [or] any other conduct that adversely reflects on [your] fitness as a lawyer” (Rule 8.4[b]-[d], [h]).

- **Ask Yourself – Is This What “Right” Looks Like?** All of us possess an inner voice guiding us to not just what we *can* do in a given situation, but what we *should* do. When faced with one of the countless grey regions that exist in our work, ask whether you are following that inner voice that represents your better, ethical, self, or if you are choosing to ignore it.

- **When in Doubt, Reach Out.** The ethical principles summarized here, although straightforward in theory, will often prove difficult to apply in the complex factual circumstances you will undoubtedly confront. You must stay watchful for ethical issues that may arise in subtle ways. When in doubt, seek guidance from experienced colleagues, supervisors, bar association advisory opinions or other resources. Senior lawyers probably have confronted and resolved the same ethical issues that seem new and vexing to you. In addition, the Ethics Committee of the District Attorneys Association has an Ethics Guidance Committee (“EGC”) staffed with representatives from each of the State’s four appellate divisions. You may reach out to any of the EGC’s members for consultation, after, if practical, discussing the matter with your supervisors. A list of the EGC members and their contact information may be found in Appendix A-III, as well as on the DAASNY webpage.

Rule 5.2 (“Responsibilities of a Subordinate Lawyer”) highlights the value of seeking advice, while making clear that, in the end, you are responsible for your own ethical conduct, regardless of what anyone else may tell you. A lawyer is bound by the Rules of Professional Conduct even when acting at the direction of another person (Rule 5.2[a]); but, a subordinate lawyer does not violate the Rules if he or she “acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty” (Rule 5.2[b]).

- **Provide Guidance:** Any law firm, including a District Attorney’s Office (Rule 1.0[h]), must make “reasonable efforts” to ensure that all lawyers in the office conform to the Rules of Professional Conduct, and must “adequately supervise” the work of all employees. Senior and supervisory prosecutors have an ethical duty to “make reasonable efforts” to ensure that subordinates act ethically (*see* Rules 5.1 [“Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers”] and 5.3 [“Lawyer’s Responsibility for Conduct of Nonlawyers”]).

On September 8, 2014, the American Bar Association issued Formal Opinion 467, discussing the obligations of managerial and supervising prosecutors. The opinion, issued by the ABA's Standing Committee on Ethics and Professional Responsibility, states that prosecutors with managerial authority must adopt reasonable internal policies and procedures promoting compliance with ethical rules, and supervisors must take reasonable steps to ensure that their staffs comply. While managers are generally the top executives and chiefs, supervisors include any individual who oversees some of the work of another individual in the office, regardless of title or position in the office's hierarchy. Managers and supervisors also have an ethical obligation to avoid or mitigate consequences of improper conduct once they become aware of it, if possible (*see* Formal Opinion 467 at 5 [discussing Rules 5.1(c)(2) and 5.3(c)(2)]). Adequate training and discipline are integral to the responsibilities of managers and supervisors (*id.* at 9-10, 12). Deliberate indifference to the training needs of supervised lawyers and other employees which results in ethical violations can in turn result in a civil action against the office (*see Connick v. Thompson*, 561 U.S. 51, 61-62 [2011]). Finally, Formal Opinion 467 requires managers and supervisors in prosecutors' offices to create and maintain a "culture of compliance" with the ethical rules, such as by emphasizing ethics during the interview and hiring processes for new staff, rewarding ethical behavior, promoting initiatives that make compliance with the ethical rules less demanding, and disciplining and reporting lawyers who violate the Rules of Professional Conduct (Formal Opinion 467 at 11). The efforts that managers and supervisors must take to ensure compliance with the Rules will, of course, depend on many individual factors, including the size and structure of the prosecutors' offices.

b. *Brady* and *Giglio*: The Constitutional Right to a Fair Trial

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that the prosecution in a criminal trial must disclose to the defense material information that is favorable to the accused. Failure to disclose such information may violate due process if the evidence is material to either guilt or punishment, “irrespective of the good faith or bad faith of the prosecution” (see also *People v. Cwikla*, 46 N.Y.2d 434, 441 [1979]). In *Giglio v. United States*, 405 U.S. 150, 174 (1972), the Court made clear that *Brady* information includes not only information directly related to the crime, but also, under some circumstances, information that would negatively affect the credibility of a prosecution witness.

The New York Court of Appeals has held that unproven or untested allegations, such as those alleged in pending civil lawsuits, may constitute impeachment information that must be disclosed (see *People v. Garrett*, 23 N.Y.3d 878, 886 [2014] [allegations in an unrelated pending civil lawsuit that favored the defendant’s false confession theory, satisfied the *Brady* favorable evidence prong]). *Garrett* and its progeny largely deal with civil lawsuits against police officers, but the holding is generally applicable to all witnesses (see *People v. Smith*, 27 N.Y.3d 652, 659 [2016]) [explaining “the unremarkable proposition that law enforcement witnesses should be treated in the same manner as any other prosecution witness”]). In addition, police officer disciplinary records, which are no longer automatically confidential under the Civil Rights Law with the June 2020 repeal of Section 50-a of that statute, also contain relevant impeachment material that should be disclosed to the defense. This area of the law is evolving and as-yet unsettled, so be alert to continuing expansion in this field.

In short, when you become aware of information that calls into question a witness’s ability to perceive or recall the events to which he or she will be testifying, or which calls into question his or her credibility as a witness, you have an affirmative obligation to turn that information over to the defense. Be aware, however, that these disclosures are not automatically admissible evidence at a trial or hearing. As a prosecutor, you will need to be cognizant of the tension between your duty to disclose and your duty to zealously advocate. For further information on what must be disclosed and how to handle both the disclosure and a defendant’s use of that material, see *Don’t Stress The Giglio: A Prosecutor’s Guide To Impeachment Material*, by ADAs Tammy Smiley and Autumn Hughes, available on NYPTI’s Prosecutor’s Encyclopedia (see Resources, page 32).

In *United States v. Agurs*, 427 U.S. 97 (1976), the Court held that the prosecution must disclose *Brady* information even if the defense has not specifically requested it. In *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), the Court held that prosecutors have an affirmative duty to learn of, as well as to disclose, favorable evidence known to “others acting on the government’s behalf in the case, including the police.” This duty to disclose pertains to all exculpatory and impeachment “information,” including oral information, and not merely to written materials or documents. It applies, moreover, not only at the trial stage, but also to pretrial suppression hearings (*see People v. Williams*, 7 N.Y.3d 15 [2006]). Logically, the duty to disclose *Giglio* impeachment information should extend to any pretrial hearing where the witness to be impeached will testify. That would include, for example, a *Sirois* hearing where the court determines whether the defendant levelled threats against a witness, thereby causing the witness to become unavailable. Similarly, any impeachment material that could be used against a witness in a competency hearing, pursuant to C.P.L. Article 730, to determine if a defendant is competent to stand trial, must be turned over in advance of the hearing.

In addition, prior statements of a non-testifying witness, where inconsistent with those of a testifying witness and of a material nature, must, for example, be disclosed before a hearing or trial in which they could be used to question the testifying witness (*see People v. Geaslen*, 54 N.Y.2d 510, 514-16 [1981] [officer’s grand jury testimony should have been disclosed to the defense, where it conflicted with that of the only officer to testify at the suppression hearing]). The People’s duty to search for impeachment material, however, is not unlimited. In *Garrett*, the Court of Appeals appeared to set limits on the prosecution’s duty to disclose information not actually known to the prosecution but contained in a police officer’s personnel files, or in an unrelated civil litigation (*see Garrett*, 23 N.Y.3d at 888-91). Specifically, the Court held that an officer’s awareness of misconduct allegedly committed in an unrelated case is not imputable to the People. Therefore, its nondisclosure did not constitute suppression, on the facts of the case. The distinction is a fine one at best. Prosecutors are deemed to have possession of all information possessed by the police related to the subject matter of the case and have a duty to learn of and disclose almost all information held by the district attorney’s office, or any law enforcement agency working in conjunction with the district attorney’s office (C.P.L. § 245.20[1]). They do not, however, have a duty to learn of material that is hidden by a bad actor and unrelated to the case in question – for example, in *Garrett*, a federal lawsuit against a police officer for misconduct stemming from an incident unrelated to the prosecution in question was not deemed to be *Brady* material (*id.* at 889).

This obligation to disclose exculpatory and impeachment evidence is a product exclusively of the defendant's "fair trial" guarantees inherent in the fifth, sixth, and fourteenth amendments to the Constitution (*United States v. Ruiz*, 536 U.S. 622, 628 [2002]). Thus, *Brady* "does not direct disclosure at any particular point of the proceedings" (*People v. Bolling*, 157 A.D.2d 733 [2d Dept. 1990]; *People v. Fernandez*, 135 A.D.2d 867 [3rd Dept 1987]; *United States v. Coppa*, 267 F.3d 132, 135, 139-44, 146 [2d Cir. 2001]). Rather, the People's obligation to disclose *Brady* material is satisfied when the defendant has been given "a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his case" (*People v. Cortijo*, 70 N.Y.2d 868, 870 [1987]). Thus, it follows, "the concerns of *Brady* are not implicated during grand jury proceedings" (*People v. Reese*, 23 A.D.3d 1034, 1036 [4th Dept. 2005]). However, there is a separate, statutory duty to disclose certain information with stricter deadlines, discussed below (*see* C.P.L. art. 245). But beyond the new statutory timeframes created by Article 245 discussed below, it is an ethical imperative that early disclosure of *Brady* and *Giglio* materials be embraced and implemented. Indeed, the principled prosecutor should not expend his/her energies trying to calculate the latest possible moment of disclosure that will pass appellate muster. Such an approach may flirt with disaster and, perhaps more importantly, runs contrary to what we are all about.

Courts and commentators have become extremely sensitive to *Brady* issues in recent years. In February 2017, the New York State Justice Task Force issued a Report on Attorney Responsibility in Criminal Cases. The Report considered how and to what extent misconduct by both prosecutors and defense attorneys led to wrongful convictions. Although it found that the term "misconduct," particularly "prosecutorial misconduct," is frequently overused or used improperly, the Report determined that even good-faith error can result in wrongful convictions and, accordingly, recommended several proposals to prevent such error. Chief among those proposals was a model order, authorized by Chief Judge Janet DiFiore in November 2017, to be issued in all criminal cases. Among other things, this order directed the prosecutor in every case to turn over all impeachment *Brady* material at least 15 days before any pretrial hearing, and all exculpatory *Brady* material at least 15 days before a misdemeanor trial or 30 days before a felony trial. The model order was intended to be issued at the start of every case, but recent changes in the discovery statute have made its value less significant.

New York's recent criminal justice legislation, which became effective on January 1, 2020, and was modified in some respects effective May 1, 2020, sets new statutory

deadlines for disclosure. Now, as a matter of New York State statutory law, most mandatory disclosure, which includes all disclosable material in the possession of the police, must be turned over within 20 days of arraignment for an in-custody defendant, and 35 days for a defendant not in custody (C.P.L. § 245.10[1][a]). *Molineux* and *Sandoval* material – prior bad acts committed by the defendant to be used as proof-in-chief or impeachment evidence respectively – must be turned over at least 15 days before the first scheduled trial date (C.P.L. § 245.10[1][b]).

Because the right to *Brady* material is a product of a defendant’s fair trial guarantees, the Supreme Court has also held that, at least in regard to impeachment material, a defendant who pleads guilty has no constitutional right to disclosure (*Ruijz*, 536 U.S. at 625). Disclosure, of course, will never be error. Furthermore, be aware that while nondisclosure might not be a constitutional *Brady* violation, it might still be an ethical violation under one or more of the Rules of Professional Conduct. For example, it would not be a *Brady* violation but would be an ethical violation to permit a defendant to plead guilty to a crime when a prosecutor is aware that the defendant is innocent (Rule 3.1). Moreover, New York’s 2020 discovery rules require that *Brady* and *Giglio* information, as well as most other discoverable materials, be disclosed prior to a court’s acceptance of a guilty plea, unless the defendant waives this right. While a defendant may waive his discovery rights, as a matter of New York statutory law a prosecutor may not condition a guilty plea on such a waiver (C.P.L. § 245.25).

The failure to disclose impeachment or exculpatory information, when constitutionally or statutorily required, can result in the reversal or vacatur of a conviction, or other sanctions, even if that failure was inadvertent. A knowing or willful failure to disclose such information is an ethical violation (*see* Rule 3.4[a][1] [“a lawyer shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce”]; 3.4[a][3] [“a lawyer shall not conceal or knowingly fail to disclose that which the lawyer is required by law to reveal”]; 3.8[b] [“a prosecutor . . . shall make timely disclosure to counsel for the defendant . . . of the existence of evidence or information known to the prosecutor. . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence”]). Notably, Rule 3.4 and New York’s discovery statute (C.P.L. Article 245) both may require far more disclosure than *Brady* and its progeny.

Innumerable judicial decisions and scholarly articles have sought to define what information is “material” within the meaning of the *Brady* doctrine, what is exculpatory, at what juncture in the case disclosure must be made, how rigorously the prosecutor must seek out exculpatory information, how damaging the impeachment information

or important the prosecution witness must be to invoke *Giglio*'s disclosure requirement, and what sanctions will be imposed for various failures to disclose. Obviously, particularized research and factual analysis are required to address the specifics of each prosecution.

Caution is recommended in making any pre-disclosure assessment of "materiality" in the context of a *Brady* issue. Under the law, "materiality" in that context involves an assessment of the impact that a failure to disclose *Brady* material might have had on the outcome of the proceeding. (See, e.g., *People v. Vilaridi*, 76 N.Y.2d 67 [1990]). The principled prosecutor, however, will not make an assessment, pre-disclosure, of the impact that exculpatory material might have on the outcome of the case, or of the use that the defense might make of exculpatory material. Instead, a prosecutor should engage in broad disclosure of exculpatory material, without regard to its impact on the case. In other words, the prosecutor should not engage in a pre-disclosure assessment of "materiality." In short: When in doubt, disclose.

Remember that *Brady* material is information, regardless of the medium in which it exists. Although it may exist in the form of a written document, a record, video footage, etc., it can also be in the form of the spoken word, whether recorded or not. Examples include witness utterances to the police, or what the witness reveals to you or a colleague during case preparation.

With the introduction of the use of body worn cameras in many police departments throughout the State, footage of an incident or occurrence related to what becomes part of a criminal investigation must therefore be carefully reviewed in its entirety, as it may contain *Brady* material. Proceeding forward without fully reviewing such footage is therefore a course fraught with peril.

Lastly, remember that disclosure is only part of the equation. You also have an obligation to further investigate situations where *Brady* material is suspected to exist. Avoid engaging in willful blindness and studied ignorance.

c. C.P.L. Article 245: Statutory Discovery Obligations

In 2019, the New York Legislature passed sweeping criminal justice reforms targeting, among other things, the discovery statutes. In brief, under the latest iteration, which became effective on May 1, 2020, prosecutors are obligated to turn over most discovery in criminal cases within 20 days of an in-custody defendant’s arraignment and 35 days of an at-liberty defendant’s arraignment (C.P.L. § 245.10[1][a][i-ii]). Where a defendant has been charged solely with traffic infractions or municipal offenses, discovery must be completed at least 15 days before trial (C.P.L. § 245.10[1][a][iii]). The list of automatically discoverable material includes twenty-two enumerated items, for example: all statements, transcripts of grand jury testimony, potential witness names and contact information, expert opinion evidence, audio and video recordings, photographs and drawings, reports, exculpatory and impeachment material, tangible objects seized, and search warrant information. The duty to disclose is easily summed up in the preamble to the automatic discovery provision: “The prosecution shall disclose . . . *all items and information that relate to the subject matter of the case* and are in the possession . . . of the prosecution or persons under the prosecution’s direction or control” (C.P.L. § 245.20[1]) (emphasis added). In short, the only material in a prosecutor’s file or within the possession of the police that is not automatically discoverable is work product, which the new statutes define as “records, reports, correspondence, memoranda, or internal documents . . . which are only the legal research, opinions, theories or conclusions” of the District Attorney, assistant district attorneys, or “agents” of the District Attorney (C.P.L. § 245.65).

In this regard it may be the prosecutor’s obligation to obtain a protective order. Protective orders are permitted where a party can show “good cause” for the denial, restriction, or deferral of certain items of discovery (C.P.L. § 245.70). The court may consider the danger to witnesses and evidence, the possibility that a defendant will use disclosure to tamper with the case, and whether law enforcement may be impacted by disclosure (C.P.L. § 245.70[4]). The key analysis is whether the court finds facts that “outweigh the usefulness of the discovery (*id.*).

While the new rules make provisions to request the court’s permission to withhold certain otherwise-discoverable material or to allow the prosecutor to turn over certain material later (C.P.L. § 245.70), prosecutors should generally expect to disclose all of their files’ contents, except for work product, within 20 or 35 days of a defendant’s arraignment. The new rules will require you to be extremely diligent in managing your files, as well as communicating with your local and state police departments to ensure

that you have everything the police have. This is not an idle duty; the courts are now empowered to issue sanctions that may include dismissal of your case (C.P.L. § 245.80[2]).

Finally, where new, disclosable material is discovered past the statutory timeframe to disclose, the new rules require that the prosecutor turn over this new information “expeditiously” (C.P.L. § 245.60).

Because the new law places significant additional requirements upon us at a very early stage in the case, now more than ever, advance planning, promptness, scrupulous attention to detail and vigilance in the extreme are therefore the orders of the day in this, our new reality. The practice commentaries to C.P.L. Art. 245 are an excellent resource to guide you in this area.

d. *Rosario*: Discovery Concerning Prosecution Witnesses

Under *People v. Rosario*, 9 N.Y.2d 286 (1961), you must give the defense any prior written or recorded statement of a witness whom you intend to call at trial or a pretrial hearing, which statement is in your possession or control, and which concerns the subject matter of the witness’s testimony. Under the discovery statute, the timing and contents of disclosure are strict.

The discovery statute requires disclosure of all written or recorded statements of a witness, or those “made by persons who have evidence or information relevant to any offense charged or to any potential defense thereto” (C.P.L. § 245.20[1][e]). The Legislature has omitted previous language that required this disclosure only in regard to witnesses whom the prosecution intended to call to testify, and concerning only statements that related to the subject matter of the witnesses’ testimony. While this provision has not been the subject of appellate litigation, a plain reading of the statutory language seems to indicate that any statements recorded during the investigation of a case are disclosable, regardless of whether the person who made the statement will be a witness. Furthermore, this provision falls under the automatic discovery rules, which require disclosure within 20 or 35 days of arraignment (C.P.L. § 245.10[1][a]).

Rosario violations, even if inadvertent, can lead to a new trial or new pretrial hearing if the defendant shows a reasonable possibility that the nondisclosure materially contributed to the conviction or the denial of suppression following a pretrial hearing

(C.P.L. § 245.80[3]). A knowing or willful *Rosario* violation is an ethical breach (Rules 3.4[a][1],[3]).

Remember that notes taken by a prosecutor of a witness's statement during the course of a criminal prosecution is "a record of a prior statement by a witness within the compass of the rule in *People v. Rosario* ... and therefore not exempt from disclosure as a 'work product' datum of the prosecutor." *People v. Consolazio*, 40 N.Y.2d 446 (1976)(original source omitted).

Political Activity by Prosecutors

The District Attorneys Association of the State of New York (“DAASNY”) has adopted a *Code of Conduct for Political Activity* (“Code”). This Code recognizes the civil rights of a District Attorney, as an individual citizen, to vote, join a political party, contribute money to political organizations, attend political events, sign political petitions, and participate in community and civic organizations that have no partisan purpose. However, to avoid compromising the integrity of their offices and the appearance of conflicts with their professional responsibilities, District Attorneys and their assistants are forbidden to be members or officers of any organization or group having a political purpose.

Prosecutors generally may not speak at political functions, publicize their attendance at such functions, or act in a manner that could be interpreted as lending the prestige and weight of their office to a political party or function. Of course, a prosecutor who is running for election or re-election is permitted to campaign on his or her own behalf. Additionally, there is no bar to a District Attorney who is not running for re-election endorsing his or her successor (see NYSBA Opinion 552 [1983]).

Prosecutors may not coerce or improperly influence anyone to give money or time to a political party, committee or candidate; they may not engage in political activity during business hours or use office resources; and they may not misuse their public positions to obstruct or further the political activities of any political party or candidate. Furthermore, in some localities, all government employees, including prosecutors, may also be subject to local laws concerning political activity, such as the New York City Conflict of Interest Rules.

According to the DAASNY Code of Political Activity, District Attorneys and their assistants generally may not endorse political candidates, except that Assistant District Attorneys shall be permitted to engage in political activity in support of the re-election of the District Attorney by whom they are employed. In an amendment to the DAASNY Code that was adopted in July 2019, it now provides that in the event that the current District Attorney is not seeking re-election, District Attorneys and Assistant District Attorneys shall be permitted to engage in political activity in support of a candidate for District Attorney (contrast with NYSBA Opinions 675 [1995] and 683 [1996]). Caution is advised in all areas of political activity by prosecutors, particularly

in this regard, due to the clear conflict between these NYSBA Ethics Opinions and DAASNY's Code.²

Although the authority of these, and other, bar association opinions do not necessarily carry the same weight as statutory or common law, an Assistant District Attorney's lack of familiarity with their analyses and conclusions will not excuse any breach in appropriate conduct. Careful study of these decisions is recommended as a "Best Practice" before an Assistant engages in any form of political activity.

A careful review of not only the DAASNY Code (see Appendix A-II of this handbook), but also related NYSBA Opinions (see Opinions 217, 241, 264, 272, 552, 568, 573, 675, 683, 696, 1071), is strongly recommended. Such review of opinions relating to political activity by Assistant District Attorneys will provide valuable insight as to how the Grievance Committee in your Department might view conduct in this area, and how it might subject you to discipline. Indeed, a particular Grievance Committee in a particular Department may well view one or more of the NYSBA Opinions, cited above, as authoritative, and that view may influence that Committee's decision to refer the matter to the appropriate Appellate Division for further consideration. Adding to the uncertainty is the simple fact that a plain reading of the prior opinions demonstrates the position of NYSBA on this issue hardening over time insofar as it relates to political activity by Assistant District Attorneys:

- *Opinion 568 (1985)* – A District Attorney may not attend a political or social function of his or any other political party, either as a paying or invited guest, when he *is not* a candidate for re-election. That same standard applies to Assistant District Attorneys.

² To put these Opinions in historical context, it is noted that after NYSBA issued Opinion 675 in October of 1995, DAASNY requested reconsideration by the NYSBA's Ethics Committee. This request resulted in NYSBA's issuance of Opinion 683 in July of 1996, which confirmed its prior prohibition against political activity.

Thereafter, DAASNY concluded that these Ethics Opinions, advisory in nature, were unworkable. As a result, DAASNY amended its own Code to permit Assistant District Attorneys to participate in the re-election campaign of the incumbent District Attorney, by whom such Assistants were employed. DAASNY further amended this rule in 2019 to permit Assistant District Attorneys to participate in the campaign of a candidate for District Attorney when the incumbent chooses not to seek re-election.

- *Opinion 573* (1986) – While an ethically sensitive District Attorney should be commended for adopting a blanket prophylactic rule or practice, for himself and his assistants, of not attending political functions, attendance is not per se unethical in all cases.
- *Opinion 675* (1995) – Assistant District Attorneys may not circulate nominating petitions, campaign at public events, write letters to the editor or speak with the media in support of their District Attorney's candidacy. An Assistant District Attorney may, however, make financial contributions to the District Attorney's campaign committee in accordance with prior opinions that such contributions to a political party are permitted.
- *Opinion 683* (1996) – There is no basis to conclude that Assistant District Attorneys may not contribute to the incumbent District Attorney's election campaign, when they may contribute to the election campaigns of all other candidates. However, the rationale of Opinion 675, above, reiterated and reinforced that it is improper for an Assistant District Attorney to participate *actively* (emphasis added) in the incumbent District Attorney's re-election campaign.
- *Opinion 696* (1997) – The rationale in Opinion 683, above, underlying a prohibition of partisan political activity by Assistant District Attorneys applies equally to attorneys exercising investigative functions of the NYC Civilian Complaint Review Board, whose Chair is not an elected official.
- *Opinion 1071* (2015) – The rationale in Opinion 683, above, underlying a prohibition of partisan political activity by Assistant District Attorneys also applies equally to attorneys exercising investigative functions within the NYC Department of Investigation, whose Commissioner is not an elected official.

It is important to be aware that NYSBA has not issued a further opinion on this topic as it specifically relates to Assistant District Attorneys in nearly 25 years. However, the conclusions of NYSBA in Opinion 1071 in 2015 are nonetheless instructive. Given the climate change in our profession in recent years, District Attorneys and their Assistants should consider whether the stance of NYSBA (or of their local grievance committee)

regarding the scope of permissible political activity for Assistant District Attorneys will expand, contract, or remain the same, as the Opinions noted above illustrate.

Accordingly, the prudent prosecutor is well served by being familiar with any public sanctions imposed on prosecutors by not only the Grievance Committee in the prosecutor's own Judicial Department, but also the Committees in the other three Departments, with respect to political activity by prosecutors. The exercise of due caution includes taking note of any regional differences in the approaches taken by the four Grievance Committees regarding political activity by Assistant District Attorneys.

In addition, please be aware that nothing in this Code is intended to usurp the authority of each District Attorney in the exercise of his or her individual discretion and authority to promulgate each office's own rules, codes, practices, and policies regarding permissible political activity by members of their legal staff. In this regard, Assistant District Attorneys should first seek to know whether, and to what extent, their own office's policies speak to this before seriously contemplating any such activity.

Finally, decisions about whether to participate in political activity are of critical ethical dimension. The policy of any office should be clearly articulated and well communicated to all members of staff, and only enacted after careful review of all relevant authority and thoughtful consideration of all aspects of these important matters.

Conclusion

Ethical principles are the essence of criminal prosecution, not a burden upon it. Compliance with ethical rules requires that we know the rules, remain vigilant, remember the diverse public interests we have sworn to serve, and remind one another that we became prosecutors to do “the right thing.”

Resources

The new *Rules of Professional Conduct*, NYCRR Part 1200, can be accessed through the websites of the New York Prosecutors Training Institute (“NYPTI”), www.nypti.org, and the New York State Bar Association (NYSBA), www.nysba.org. Additional local rules of the Appellate Divisions may cover specific areas of lawyer conduct not covered in the statewide rules. These include, for the First Department, 22 NYCRR Parts 603 - 605; for the Second Department, 22 NYCRR Parts 691 and 701; for the Third Department, 22 NYCRR Part 806; and for the Fourth Department, 22 NYCRR Part 1022. These, too, can be accessed through the NYSBA website.

The District Attorneys Association of the State of New York maintains a Committee for the Fair and Ethical Administration of Justice, whose Ethics Subcommittee is staffed with experienced prosecutors from District Attorneys’ offices across the State. DAASNY has created an Ethics Guidance Committee to render advisory opinions to local prosecutors seeking its guidance on a prospective or retrospective basis. Contact information for the Ethics Guidance Committee members can be found in Appendix A-III; current information may be found at DAASNY’s website (www.daasny.com).

Bar Associations also have ethics committees which issue nonbinding, advisory opinions to guide attorneys and courts on issues of professional conduct. Hundreds of advisory opinions by the Committee on Professional Ethics of the New York State Bar Association are indexed and accessible through the NYSBA website. You can also check the New York City Bar Association (www.nycbar.org), the New York County Lawyers Association (www.nycla.org), the Nassau County Bar Association (www.nassaubar.org), the Bar Association of Erie County (www.eriebar.org) and the American Bar Association’s Ethics Committee (www.abanet.org).

NYPTI is an invaluable resource that provides online and regional training sessions on prosecutors’ ethical obligations, *Brady*, *Rosario*, statutory discovery and prosecutorial misconduct. NYPTI’s online Prosecutor’s Encyclopedia (pe.nypti.org) gives easy access to these and a host of other resources, including summaries of, and links to, New York State Bar Association ethics opinions relevant to prosecutors. Furthermore, NYPTI publishes a quarterly Ethics Watch Bulletin, which provides an overview of recent developments in legal ethics for prosecutors. These bulletins are available online on the Prosecutor’s Encyclopedia webpage. The National District Attorneys Association (www.ndaa.org) has provided ethical guidance to prosecutors in its publications:

National Prosecution Standards and Commentaries (3d ed.) and *Doing Justice: A Prosecutor's Guide to Ethics and Civil Liability* (2nd ed.).

The New York State Justice Task Force was created in 2009 by then-Chief Judge Jonathan Lippman to, in his view, ensure justice, fairness, and efficiency in the criminal justice system. Training resources are available on the Task Force website (<http://www.nyjusticetaskforce.com/index.html>). You can also find numerous reports, including the Report on Attorney Responsibility in Criminal Cases.

(<http://www.nyjusticetaskforce.com/pdfs/2017JTF-AttorneyDisciplineReport.pdf>).

Helpful treatises include *Simon's New York Code of Professional Responsibility Annotated* (Thompson-West 2007); the *ABA/BNA Lawyers' Manual on Professional Conduct* (multivolume loose-leaf service also available in the Westlaw database "ABA-BNA-MOPCNL", and on LEXIS under "Secondary Legal" and the "BNA" database); and the *Restatement (Third) of the Law Governing Lawyers*, by the American Law Institute. Cornell Law School provides online access to its American Legal Ethics Library (www.law.cornell.edu/ethics).

Appendix A-I:

Rules of Professional Conduct (*Excerpts*)

From the New York State Unified Court System website's introduction to Part 1200:

Dated May 1, 2013: "These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009. They supersede the former part 1200 (Disciplinary Rules of the Code of Professional Responsibility). The New York State Bar Association has issued a Preamble, Scope and Comments to accompany these Rules. They are not enacted with this Part, and where a conflict exists between a Rule and the Preamble, Scope or a Comment, the Rule controls."

Reprinted below is a selection of the Rules of Professional Conduct, 22 NYCRR Part 1200, having perhaps the most frequent impact on our day to day work as prosecutors:

RULE 3.1. Non-Meritorious Claims and Contentions

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:

(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or

(3) the lawyer knowingly asserts material factual statements that are false.

RULE 3.2. Delay of Litigation

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

RULE 3.3. Conduct Before a Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

- (1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;
- (2) engage in undignified or discourteous conduct;
- (3) intentionally or habitually violate any established rule of procedure or of evidence; or
- (4) engage in conduct intended to disrupt the tribunal.

RULE 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a)** (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;
 - (2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;
 - (3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;
 - (4) knowingly use perjured testimony or false evidence;
 - (5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or
 - (6) knowingly engage in other illegal conduct or conduct contrary to these Rules;
- (b)** offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:
 - (1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or

(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness;

(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; or

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

RULE 3.5. Maintaining and Preserving the Impartiality of Tribunals and Jurors

(a) A lawyer shall not:

(1) seek to or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal when the recipient is prohibited from accepting the gift or loan but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Part 100 of the Rules of the Chief Administrator of the Courts;

(2) in an adversarial proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except:

(i) in the course of official proceedings in the matter;

(ii) in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer;

(iii) orally, upon adequate notice to counsel for the other parties and to any party who is not represented by a lawyer; or

(iv) as otherwise authorized by law, or by Part 100 of the Rules of the Chief Administrator of the Courts;

(3) seek to or cause another person to influence a juror or prospective juror by means prohibited by law;

(4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order;

(5) communicate with a juror or prospective juror after discharge of the jury if:

(i) the communication is prohibited by law or court order;

(ii) the juror has made known to the lawyer a desire not to communicate;

(iii) the communication involves misrepresentation, coercion, duress or harassment; or

(iv) the communication is an attempt to influence the juror's actions in future jury service; or

(6) conduct a vexatious or harassing investigation of either a member of the venire or a juror or, by financial support or otherwise, cause another to do so.

(b) During the trial of a case a lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(c) All restrictions imposed by this Rule also apply to communications with or investigations of members of a family of a member of the venire or a juror.

(d) A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge.

RULE 3.6. Trial Publicity

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

(b) A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness or the expected testimony of a party or witness;

(2) in a criminal matter that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal matter that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Provided that the statement complies with paragraph (a), a lawyer may state the following without elaboration:

(1) the claim, offense or defense and, except when prohibited by law, the identity of the persons involved;

- (2) information contained in a public record;
- (3) that an investigation of a 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;
- (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 to the public interest; and
- (7) in a criminal matter:
 - (i) the identity, age, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the identity of investigating and arresting officers or agencies and the length of the investigation; and
 - (iv) the fact, time and place of arrest, resistance, pursuit and use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission or statement.

(d) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(e) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

RULE 3.8. Special Responsibilities of Prosecutors and Other Government Lawyers

(a) A prosecutor or other government lawyer shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause.

(b) A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.

(c) 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 within a reasonable time:

(1) disclose that evidence to an appropriate court or prosecutor's office; or

(2) if the conviction was obtained by that prosecutor's office,

(A) notify the appropriate court and the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;

(B) disclose that evidence to the defendant unless the disclosure would interfere with an ongoing investigation or endanger the safety of a witness or other person, and a court authorizes delay for good cause shown; and

(C) undertake or make reasonable efforts to cause to be undertaken such further inquiry or investigation as may be necessary to provide a reasonable belief that the conviction should or should not be set aside.

(d) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted, in a prosecution by the prosecutor's office, of an offense that the defendant did not commit, the prosecutor shall seek a remedy consistent with justice, applicable law, and the circumstances of the case.

(e) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (c) and (d), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

ULE 4.1. Truthfulness in Statements to Others

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

RULE 4.2. Communication with Person Represented by Counsel

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

(c) A lawyer who is acting *pro se* or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

RULE 4.3. Communicating with Unrepresented Persons

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

RULE 4.4. Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

RULE 5.1. Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

(b) (1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.

(2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

(c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

(d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

RULE 5.2. Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

RULE 5.3. Lawyer's Responsibility for Conduct of Nonlawyers

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

(b) A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

RULE 8.3 Reporting Professional Misconduct

a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

(c) This Rule does not require disclosure of:

(1) information otherwise protected by Rule 1.6; or

(2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

RULE 8.4. Misconduct

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability:

(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a

determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

Appendix A-II

District Attorneys' Code of Conduct for Political Activity

The office of District Attorney, under the Constitution and laws of New York State, is an elected position. District Attorneys must regularly submit their record of performance to the electorate. The District Attorney is therefore involved directly in the political process. Thus, it is reasonable and proper for District Attorneys and members of their staffs to engage in activities that do not compromise their office's efficiency or integrity or interfere with the professional responsibilities and duties of their offices.

District Attorneys may engage in the following conduct:

1. Register to vote themselves, and vote.
2. Have membership in a political party.
3. Contribute money to political parties, organizations and committees.
4. Attend political/social events.
5. Participate in community and civic organizations that have no partisan purposes.
6. Sign political petitions as an individual.
7. In order to demonstrate public support for the nonpartisan nature of the District Attorney's office, a District Attorney should consider accepting the endorsement of more than one political party when running for office.
8. District Attorneys are entitled to criticize those policies that undermine public safety and support those policies that advance it, by freely and vigorously speaking out and writing on criminal justice issues and the individuals involved in those issues.

District Attorneys and Assistants shall not³:

1. Be a member or serve as an official of any political committee, club, organization or group having a political purpose.
2. Endorse candidates, except that Assistant District Attorneys shall be permitted to engage in political activity in support of the re-election of the District Attorney by whom they are employed, and, in the event that the current District Attorney is not seeking election or re-election, District Attorneys and Assistant District Attorneys shall be permitted to engage in political activity in support of a candidate for District Attorney.
3. Speak at a political/social function, publicize their attendance at such functions; nor act in a manner which could be interpreted as lending the prestige and weight of their office to the political party or function. However, this shall not prohibit normal political activity during the course of a campaign year.
4. Coerce or improperly influence any individual to make a financial contribution to a political party or campaign committee or to engage in political activities.
5. Except as otherwise provided, engage in any political activity during normal business hours or during the course of the performance of their official duties or use office supplies, equipment, facilities or resources for political purposes.
6. Misuse their public positions for the purpose of obstructing or furthering the political activities of any political party or candidate.

The above activities are reasonable and ethical, and are consistent with the impartiality of the District Attorney's office. The above activities should also help District Attorneys maintain a sense of public confidence in the non-partisan nature of the District Attorney's office. Such conduct also guarantees the constitutional rights of prosecutors and their assistants in the exercise of their elective franchise. Candidates for the office of District Attorney shall also abide by these rules.

³ ADAs are reminded to be mindful of their ethical obligations and to be sure that their ethical requirements do not create a conflict with their political actions. Please note the cautionary language, and discussion of NYSBA Opinions on this subject, at pp. 27-29 *supra*.

Appendix A-III

Members of the DAASNY Ethics Guidance Subcommittee

Committee Member	Judicial Department	County	Phone Number
Mike Coluzza <i>(Co-Chair)</i>	4 th Dept.	Oneida	315-798-5576
Rick Trunfio	4 th Dept.	Onondaga	315-435-2470
Bob Mascari	3 rd Dept.	Madison	315-366-2236 315-399-6453
Hon. Patrick Perfetti	3 rd Dept.	Cortland	607-753-5008
Chris Horn	3 rd Dept.	Albany	518-275-4758
Bill Ferris	2 nd Dept.	Suffolk	631-853-4170
Bob Conflitti	2 nd Dept.	Orange	845-615-3651
Tammy Smiley	2 nd Dept.	Nassau	516-571-3386
Tim Koller <i>(Co-Chair)</i>	2 nd Dept.	Richmond	718-556-7090
Bob Masters	2 nd Dept.	Rockland	347-551-1931
Charles King	1 st Dept.	New York	212-335-4037

