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Getting It Right: Practical Approaches to 21st Century Prosecution

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In recent years, the ethics of prosecutors has become a frequent topic of conversation in legal circles and beyond. Some commentators see wrongful convictions at every turn, often not distinguishing between misconduct and error.¹ Others believe that if only more prosecutors were punished, the criminal justice system would be vastly improved.² But little, if any, time is devoted to how prosecutors today approach their ethical obligations. This article provides a brief overview of some statewide initiatives on ethics that have been developed and spearheaded by prosecutors.

Decision to Prosecute

Any discussion of prosecutors' ethics must begin with putting the work of a prosecutor in context. A case does not arrive on a prosecutor's desk neatly organized into a coherent picture. The collective evidence can be messy, confusing, and filled with ambiguous information. After an arrest (and sometimes before), the prosecutor coordinates with police officers and detectives, who are usually working on little sleep, in an emotional setting populated with victims, family members and witnesses, all of whom are distraught and frightened.

In this chaotic environment, the prosecutor is tasked with conducting an investigation and deciding who, if anyone, should be charged, and with what crimes. The evidence in the case must be analyzed to assess if it is reliable, credible and sufficient to charge the defendant. As the case progresses, the prosecutor must continue to gather and evaluate evidence to determine whether defendant's guilt can be proven beyond a reasonable doubt. These decisions can be complex and difficult, and the truth can sometimes be elusive.

Although some may believe that the prosecutor stands at the bar of justice seeking only conviction and incarceration, the truth is that every day, prosecutors decline to prosecute cases, reduce arrest charges, and dismiss cases. The outcome of this process is critically important to the accused and to the public. A wrong decision can either improperly accuse an innocent person, causing untold personal damage, or release a guilty perpetrator who will be free to harm additional victims. In striving to make the right decisions and to present a strong case in court, prosecutors need to develop two critical skills: the ability to investigate a case thoroughly, and the ability to evaluate all evidence ethically and fairly.

This process can be seen through a simple statistic. New York State police officers made more than 156,000 felony arrests³ in 2012. However, after review by the prosecutor of the merits of prosecuting a case as a felony, only about 30 percent of felony arrests resulted in a felony indictment or superior court information.⁴ The exercise of prosecutorial discretion meant that 70 percent of felony arrests in 2012 did not lead to a felony charge in a superior court.

Committee Formed

In 2009, the District Attorneys Association of the State of New York (DAASNY) formed the Committee on the Fair and Ethical Administration of Justice, made up of elected District Attorneys from around the state and chaired by District Attorney William Fitzpatrick of Onondaga County. The committee oversees the Best Practices Committee and the Ethics Committee.⁵ The Best Practices Committee's mission is to review the causes of wrongful convictions and to recommend procedures that can enhance the truth-seeking function that is so critical to all investigations and prosecutions. The Ethics Committee analyzes ethical issues and generates updates for the District Attorneys Association on cases and rules that affect the ethical obligations of prosecutors. The Best Practices and Ethics committees are made up of elected district attorneys and senior assistant district attorneys from all parts of the state—urban, suburban and rural.

The committee has focused on a number of important issues over the years, including statewide protocols on eyewitness identification and the video recording of interrogations.⁶ One continuing topic of discussion, for both the Best Practices Committee and the Ethics Committee, focuses on the ethical obligations of prosecutors.

As any criminal practitioner knows, prosecutors who file criminal charges have a continuing duty to disclose to the defense all material exculpatory information. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In addition, the prosecutor must provide, at the appropriate time, material information that would reflect negatively on the credibility of a prosecution witness. *Giglio v. United States*, 405 U.S. 150, 174 (1972). New York Rule of Professional Conduct 3.8(b) provides a related, though not identical, obligation as a matter of attorney ethics.

The *Brady* and *Giglio* rules, crucial and ever-present, can be difficult to apply on occasion. Sometimes, the prosecutor, who is charged with constructive knowledge of the police investigation and constructive possession of police files, has not received the information from the police and does not know it exists. This can be especially difficult when many officers and different police agencies are involved. Other times, it is hard to identify when something is exculpatory in light of the facts known to the prosecutor and the police at a particular point in time. Further investigation may be needed to assess the true nature of the information.

With respect to *Giglio* impeachment information, it is part of human existence that people will remember things differently at different times, depending on a wide variety of circumstances and factors. Just imagine a chaotic homicide crime scene with multiple witnesses, under stress, viewing an event from different angles and with different personal characteristics. A truthful witness can have a criminal history, a drug problem or both. A lying witness can be a member of the clergy. Contradictory evidence and impeachment material can exist even in the strongest of cases. Credibility is often at the heart of the assessment and it is not always cut and dried. A thorough investigation by the prosecutor is needed to sort out these difficult issues.

Throughout the case, the prosecutor must evaluate the evidence for relevance and reliability, and provide any *Brady* or *Giglio* material to the defense in a timely fashion. *Brady* and *Giglio* place higher ethical and legal standards on the prosecution than are imposed on a defense attorney. To be a prosecutor is to embrace these principles.

Ethics Handbook

Working together, the Ethics and Best Practices committees produced "The Right Thing: Ethical Guidelines for Prosecutors," a handbook that supplements existing ethics training in the state. It articulates in direct and simple terms the legal and ethical obligations to which a prosecutor must adhere.⁷ In 2011, Derek Champagne, the District Attorney of Franklin County and the 2010-2011 president of DAASNY, distributed the handbook to the 62 elected district attorneys in New York State and the assistant district attorneys who work for them. When Rule 3.8 of the New York Rules of Professional Conduct was amended to address a prosecutor's post-conviction obligations, Manhattan District Attorney Cyrus R. Vance Jr., the 2012-2013 president of DAASNY, updated the handbook with the revised rule and redistributed it to all assistant district attorneys within the state.

The handbook outlines the importance of ethical behavior by prosecutors for the accused, for the community in general, and for the prosecutor herself. It summarizes the New York Rules of Professional Conduct with admonitions such as: be prepared; don't make frivolous arguments; when in doubt, reach out; and keep doing justice even after a conviction. While not attempting to be a legal treatise, the booklet provides a description of *Brady* and *Giglio* obligations, outlines the statutory mandates for discovery and includes a list of resources for further study.

A number of prosecutor's offices around the state have used the handbook, along with real-life ethics hypotheticals, to train their assistants. The hypotheticals include fact patterns on inconsistent testimony, ambivalent exculpatory material, and integrity questions about witnesses. Statewide training using a similar format is being developed. As a further enhancement to existing ethics training, starting in April 2013, a bulletin is sent quarterly to New York prosecutors, which summarizes and provides the full decision of any court ruling that addresses an ethical issue arising in a criminal prosecution. These communications seek to ensure that prosecutors stay up-to-date and are informed on ethical issues as they evolve.

Discovery Training for Police

Because prosecutors are charged with constructive knowledge of information in the possession of law enforcement officers, it is essential that they be able to obtain, or at least review, all of the necessary police paperwork. This is easier said than done. Even with good faith and diligence, it is possible for a prosecutor not to know all of the officers involved in a case and not to have all of the police paperwork that was generated. Though it is standard practice for a prosecutor to ask police officers about their investigation and their paperwork, inevitably information and paperwork is uncovered incrementally throughout the investigation and prosecution of a case.

Working together again, the Best Practices and Ethics committees created a training program for police officers about a prosecutor's discovery and *Brady* obligations. This program was developed in conjunction with the NYPD, the Chiefs of Police Association, the Sheriffs' Association, the New York State Police, the Division of Criminal Justice Services and the Municipal Police Training Council. The collaboration has taken different forms. Prosecutors have trained police trainers from around the state, some police departments have incorporated the training into their own curriculums, and some have adopted joint programs with police and prosecutors teaching courses together. An online program on this topic is close to completion and will allow officers to attend the training without having to travel long distances to a training facility.

Wrongful Convictions

The Best Practices Committee also serves as a forum where new issues and ideas are continually discussed and analyzed. The committee regularly reviews particular cases of wrongful conviction in various counties, not to assist in case decisions, but instead to gather lessons from such cases. These presentations are as informative as they are humbling, and they constantly lead to discussions of new and better practices for dealing with allegations of wrongful convictions and various ethical issues.

The Chief of the New York County District Attorney's Office's Conviction Integrity Program—the first of its kind in New York State—is a member of the Best Practices Committee and has made a number of presentations regarding the work of her office. Offices with similar programs, such as Brooklyn and Oneida County, have also shared their experiences.

Improved Reliable Evidence

Another frequent topic of the Best Practices Committee is the new, reliable evidence that did not exist just 10 or 20 years ago. DNA evidence, which is analyzed faster and cheaper than ever before, is being used in an increasing number of cases. Surveillance cameras often record crimes as they are happening. GPS devices, E-Z pass accounts, and MetroCards aid countless investigations.

Smartphones, carried by almost every victim and suspect alike, can be a treasure trove of information, including emails, texts, location information, photographs and contacts. Social networking sites demonstrate relationships between people, and contain photographs of suspects and crimes. Jail and prison calls, recorded according to law, are frequently sources of information. This growing array of new evidence, which has significantly improved law enforcement's ability to solve cases quickly and accurately, is essential for prosecutors to understand, to preserve, and to properly introduce at trial.

Forum for Learning

The Best Practices and Ethics Committees continue to provide prosecutors with a forum for learning, improving and collaborating. The criminal justice system cannot be static, but must always strive for improvement. The combination of increased reliable evidence and enhanced ethics awareness by all parties will help to achieve the ultimate societal goal of maintaining public safety by increasing the likelihood of convicting the guilty, while also reducing the risk of wrongfully convicting the innocent.

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Endnotes:

1. See, for example, Preventable Error—A Report on Prosecutorial Misconduct in California 1997-2009, by Kathleen M. Ridolfi and Maurice Possley (Oct. 4, 2010) and First Annual Report: Preventable Error—Prosecutorial Misconduct in California, 2010 by Maurice Possley and Jessica Seargeant (March 2011) and the response, The California Prosecutor 2011: Integrity, Independence, Leadership by the California District Attorneys Association (January 2012).
2. Pro Publica, "Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody," April 3, 2013.
3. New York State Division of Criminal Justice Services, Computerized Criminal History System (as of March 20, 2013).

4. New York State Division of Criminal Justice Services (DCJS), New York State Felony Processing Final Report, Indictment through Disposition, January-December 2012 and DCJS website, Adult Arrests 2003- 2012 (April 23, 2013).

5. The Mutual Assistance Committee was also formed to provide support to prosecution offices that request assistance in re-investigating a case where a wrongful conviction claim has been lodged.

6. In 2010, DAASNY and the Best Practices Committee collaborated with the NYPD, the NYS Chiefs of Police Association, the NYS Sheriffs' Association, the New York State Police, Division of Criminal Justice Services and the Municipal Police Training Council to develop new, enhanced identification procedures and to endorse the video recording of interrogations. The identification procedures and video interrogation protocols have been adopted by police statewide. See also, Outside Counsel, "Police, District Attorneys Unveil Statewide Identification Procedures," Kristine Hamann, NYLJ, Dec. 14, 2010; Outside Counsel, "Police and District Attorneys Endorse Video Recording of Interrogations," Kristine Hamann, NYLJ, Aug. 8, 2011.

7. Chief Assistant District Attorney Philip Mueller of the Schenectady District Attorney's Office was the primary author of the handbook; he also received significant input from assistant district attorneys statewide.



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