

Police/Prosecutor Relations: Alien v. Predator?

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What is a Prosecutor?

- "A prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

• UNKNOWN AUTHOR

What is the relationship between
prosecutor and police officer?

What should it be?

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What is the relationship between prosecutor and police officer?

- ◆ What should it be?
 - Problems?
 - Solutions?
 - Is it different in large and small jurisdictions?
- ◆ **Boundaries**

Suggestions for Establishing/Maintaining a Good Relationship with your officers



➤ Communicate

- Recognize it is “their” case, too
- Tell them your concerns (teach/advocate)
- Ask for their input on the outcome (they do care)
- Praise good work (atta boy letters)
- Encourage in person screening in major cases
- Make them an integral part of the prosecution
- Explain your prosecutorial decisions (declined – why?, charged but with different charges – why?, etc)

➤ Be accessible

- Be willing to answer their questions/concerns before it becomes an issue on the case
- Visit the crime scene when requested (it will also make you better prepared in your case)

Avoiding Liability



- ◆ The level of immunity afforded a prosecutor depends entirely upon the nature of the conduct being contested.

– See, e.g. *Cline v. State, Div. of Child and Family Services*, 142 P.3d 127 (UT App. 2005).

- ◆ Any grant of immunity carries with it the “burden of restraint and good judgment.”

– *Pendleton v. Utah State Bar*, 16 P.3d 1230 (UT 2000)

ABSOLUTE IMMUNITY

◆ As a general rule:

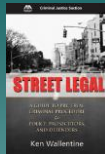
- Prosecutors are afforded absolute immunity from civil lawsuits where the conduct was “an integral part of the judicial process.”
- ◆ *Burns v. Reed*, 500 U.S. 478 (1991)
- ◆ *Imbler v. Pachtman*, 424 U.S. 409 (1976)
- ◆ Lesley E. Williams, Note, *The Civil Regulation of Prosecutors*, 67 Fordham L. Rev. 3441, 3453-64 (1999)
- ◆ Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. Law Rev. 53

QUALIFIED IMMUNITY

- ◆ Prosecutors will be afforded only qualified immunity when doing authorized acts that are *not* an integral part of the judicial process.
- Advising your officers?
- Participating in the arrest?
- Stepping outside of the prosecutorial role...

Prosecutor / Police Relations 101

Ken Wallentine



1. Work hard.
2. Show the police the respect they deserve.
3. Learn about what police do.
4. Train an officer who does something wrong.
5. Don't call an officer at home unless it is urgent.
6. If you don't agree with something an officer did, tell him/her. Don't just complain.
7. Communicate.
8. Assist in law enforcement training.
9. Prosecute aggressively and fairly. Defend the cops' reputations.
10. Take blame and apologize when you get it wrong.

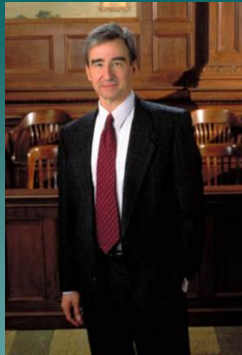




SCREENING & POLICE / PROSECUTOR RELATIONS

Between the private life of the citizen and the public glare of criminal accusations stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For that reason we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.

Young v. U.S. ex rel. Vuitton et
Fils S.A., et al, 481 US 787
(1987)



“The prosecutor has more
control over the life, liberty
and reputation than any
other person in America.”

Former U.S. Supreme Court Justice Robert
Jackson

"SCREENING"

"Screening" means the process used by a prosecuting attorney to terminate investigative action, proceed with prosecution, move to dismiss a prosecution that has been commenced, or cause a prosecution to be diverted.

UCA sec 77-2-2

PROSECUTORIAL RESPONSIBILITY - SCREENING

The decision to initiate a criminal prosecution should be made by the prosecutor's office. Where state law allows criminal charges to be initiated by law enforcement or by other persons or means, prosecutors should, at the earliest practical time, decide whether the charges should be pursued.

NDAA National Prosecution Standards 4-1.1

PROSECUTORIAL DISCRETION - SCREENING

The chief prosecutor should recognize and emphasize the importance of the initial charging decision and should provide appropriate training and guidance to prosecutors regarding the exercise of their discretion.

NDAA National Prosecution Standards 4-1.2

FACTORS TO CONSIDER - SCREENING

Prosecutors should screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest. Factors that may be considered in this decision include:

- a. Doubt about the accused's guilt;
- b. Insufficiency of admissible evidence to support a conviction;
- c. The negative impact of a prosecution on a victim;
- d. The availability of adequate civil remedies;
- e. The availability of suitable diversion or rehabilitative programs;
- f. Provisions for restitution;
- g. Likelihood of prosecution by another criminal justice authority;

cont.

- h. Whether non-prosecution would assist in achieving other legitimate goals, such as the investigation or prosecution of more serious offenses;
- i. The charging decisions made for similarly situated defendants;
- j. The attitude and mental status of the accused;
- k. Undue hardship that would be caused to the accused by prosecution;
- l. A history of non-enforcement of the applicable law;
- m. Failure of law enforcement to perform necessary duties or investigations;
- n. The expressed desire of an accused to release potential civil claims against victims, witnesses, law enforcement agencies and their personnel, or the prosecutor and his personnel, where such desire is expressed after having the opportunity to obtain advice of counsel and is knowing and voluntary;

cont.

- o. Whether the alleged crime represents a substantial departure from the accused's history of living a law-abiding life;
- p. Whether the accused has already suffered substantial loss in connection with the alleged crime;
- q. Whether the size of the loss or the extent of the harm caused by the alleged crime is too small to warrant a criminal sanction.

NDAA National Prosecution Standards 4-1.3

SCREENING PRE-ARREST

- Less pressure on the prosecutor
- Can complete investigation
- Can talk to investigating officers
- Can staff case with others in the office or with other colleagues
- Determine how to bring the defendant to court (Summons vs. Arrest Warrant)

SCREENING POST-ARREST

- Suspect booked into jail on charges as determined by law enforcement
- Determine what charges are appropriate and necessary to insure that justice is served
- Pressure to file the case
- If some charges are filed you may lose the opportunity to file more serious charges in the future
- Does the case need further investigation?

EVIDENCE

- Police Reports
- Witness statements
- Defendant's statement
- Photographs
- 911 calls
- Diagrams
- Criminal history of the defendant
- Medical records
- Prior bad acts
- Physical evidence
- Reports on testing of evidence

ADDITIONAL CONSIDERATIONS

- Corroborating evidence
- Quantity v. Quality of the evidence
- Elements of each crime
- Jurisdiction
- Enhancements
 - Weapons
 - Gang
 - Prior convictions

FACTORS NOT TO CONSIDER - SCREENING

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

- a. The prosecutor's office rate of conviction;
- b. Personal advantages or disadvantages that a prosecution might bring to the prosecutor or others in the prosecutor's office;
- c. Political advantages or disadvantages that a prosecution might bring to the prosecutor;
- d. Characteristics of the accused that have been recognized as the basis for invidious discrimination, insofar as those factors are not pertinent to the elements or motive of the crime;
- e. The impact of any potential asset forfeiture to the extent described in Standard 4-7.4.

NDAA National Prosecution Standards 4-1.4

The "Tough Prosecutor"

Creighton Horton

"[O]ne of the most difficult things you must do as a prosecutor is be willing to decline a case if it's not there, despite the considerable pressure that can be brought to bear to induce you to file."



The "Tough Prosecutor"

Creighton Horton

"[I]f you take your role as a prosecutor seriously, you must be willing to exercise your independent prosecutorial discretion and at times disappoint officers you work closely with and with whom you want to maintain good relationships. It's not easy to do, particularly with officers you work with on an ongoing basis, but you cannot delegate such decisions to the police without abrogating your responsibility as a prosecutor."

The "Tough Prosecutor"

Creighton Horton

How to maintain good relationships with officers:

Work hard with them on the cases you file, and

Decline cases respectfully.

STANDARD FOR FILING

Probable Cause

The prosecutor in a criminal case shall:

(a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.

Utah Rules of Professional Conduct, Rule 3.8 Special Responsibilities of a Prosecutor

STANDARD FOR FILING

Reasonable Likelihood of Success

- Recommended standard to use
- Gives you a higher degree of analysis including consideration of possible defenses without going to the extreme
- A good standard by which to compare all of the evidence and possible charges

FURTHER INVESTIGATION?

Do you need additional evidence or can you go forward with the evidence that you have?

What is the likelihood that further investigation will uncover additional evidence?

REMEMBER

Your case will generally get worse, not better, over time.

REMEMBER JUST ONE THING REMEMBER THIS:

Just because you CAN,
it doesn't mean you SHOULD

PROSECUTORIAL RESPONSIBILITY - CHARGING

It is the ultimate responsibility of the prosecutor's office to determine which criminal charges should be prosecuted and against whom.

NDAA National Prosecution Standards 4-2.1

PROPRIETY OF CHARGES

A prosecutor should file charges that he or she believes adequately encompass the accused's criminal activity and which he or she reasonably believes can be substantiated by admissible evidence at trial.

NDAA National Prosecution Standards 4-2.2

FACTORS TO CONSIDER CHARGING

The prosecutor should only file those charges that are consistent with the interests of justice. Factors that may be relevant to this decision include:

FACTORS TO CONSIDER CHARGING

- a. The nature of the offense, including whether the crime involves violence or bodily injury;
- b. The probability of conviction;
- c. The characteristics of the accused that are relevant to his or her blameworthiness or responsibility, including the accused's criminal history;
- d. Potential deterrent value of a prosecution to the offender and to society at large;
- e. The value to society of incapacitating the accused in the event of a conviction;
- f. The willingness of the offender to cooperate with law enforcement

FACTORS TO CONSIDER CHARGING

- g. The defendant's relative level of culpability in the criminal activity;
- h. The status of the victim, including the victim's age or special vulnerability;
- i. Whether the accused held a position of trust at the time of the offense;
- j. Excessive cost of prosecution in relation to the seriousness of the offense;
- k. Recommendation of the involved law enforcement personnel;
- l. The impact of the crime on the community;
- m. Any other aggravating or mitigating circumstances.

HOW MUCH IS ENOUGH?

Deliberate overcharging is a disservice to:

- Fellow prosecutors
- The reputation of the prosecutor's office
- Criminal justice system

Reminders

Victim's Rights - Notification of Filing

Notification of filing felony charges – 7 days
• UCA sec 77-38-3

Notification of filing DV cases – 5 days
• UCA sec 77-36-7



Case Preparation

Scott W. Reed

Assistant Attorney General

Some catchy sayings about preparation

- ♦ "Failing to plan is planning to fail."

♦ John Wooden, legendary UCLA basketball coach



- ♦ "Confidence is preparation. Everything else is beyond your control."

♦ Richard Kline, American Actor



- ♦ Luck is when preparation meets opportunity.

♦ Seneca the Younger, Roman Stoic philosopher



Some catchy sayings about preparation

- ♦ "Trials are lost for a variety of reasons. Trials are won for only one reason – preparation."



Scott W. Reed,
gracelessly aging former University of Utah defensive end

Alarming Statistic

- ◆ Unfortunately, well over 90% of the criminal charges you file will not go to trial. If you are looking for an excuse not to prepare, this is a pretty good one. If that is your attitude, then you have the makings of an excellent defense attorney.



Treat each case as if . . .

- ◆ . . . it were (was?) going to trial.
- ◆ . . . it was (were?) the only case you had.
- ◆ . . . it was (is?) the single case you wanted your prosecution career to be judged by.



Where do we turn?

- ◆ What is the key to effective and efficient case preparation? What are the things I should be thinking about from Day 1? Is there some checklist I can rely upon to lend some structure to this very important topic?

- ◆ You've come to the right place, Bub!



Case Preparation ABC Checklist

- ◆ *Investigation/Follow-up*
- ◆ *Discovery*
- ◆ *Witnesses*
- ◆ *Motions/Notices*
- ◆ *Evidence/Exhibits*
- ◆ *Trial Notebook*
- ◆ *Opening/Closing*
- ◆ *Defense Attorneys*



Preparation A Investigation/Follow-up

- ◆ *Almost every case that goes to trial will require some follow-up investigation. Most police agencies, once the case is filed, view that task as "your problem". Better to alert the agency and get a commitment to follow-up at the time of screening and charging, while the case is still "their problem".*



Preparation A Investigation/Follow-up

- ◆ *Consider whether you will require additional information from Defendant under URCrP Rule 16(h) – lineup, voice or handwriting exemplars, fingerprints, blood, hair, nail scrapings, physical or mental exam) and get notice of time and place out for appearance along with plea bargain offer.*

Preparation B Discovery

- ◆ *Prompt Delivery*
- ◆ *Plea Offer Deadlines*
- ◆ *Follow-up with Agency Rule 16*



Preparation B Discovery

- ◆ *At the time of screening, make sure the case file has all reports, follow-ups, transcripts, evidence logs and criminal history. Promptly after filing and appearance of defense counsel, deliver Discovery and "start the clock" on plea negotiations.*



Preparation B Discovery

- ◆ *No plea bargain/charge bargain offer is complete or effective without an expiration date. Be reasonable, be flexible, but be firm and remember – Deadlines with out a date are simply "**dead lines**" on a piece of paper which will likely be ignored.*

Preparation B Discovery

- ◆ *Once the Deal expires, treat the case as if it will go to trial. One thing that is imperative under URCrP Rule 16 is to confirm that information held by the police agency on this case has been turned over to you, and you in turn have provided Discovery of that material. Rule 16(b) makes this obligation ongoing, through the beginning of trial.*



Preparation C Witnesses

- ◆ *Confirm contact information and possibility of having to appear in court. Explain process and sequence of events, and that sometimes cases linger in the court for some time before being resolved. Notify of witness "rights" under § 78B-1-136 and option to speak with defense counsel or investigator at witness's election.*

Preparation C Witnesses

- ◆ *Foundation vs. Substance*
- ◆ *Identify the witnesses you will need to personally meet with to prepare, and list exhibits (documents, diagrams, hard evidence) to be identified and introduced by that witness. Given witness opportunity to "practice" identifying exhibits prior to actual hearing or trial.*



Preparation D Motions/Notices

- ◆ *Notice deadlines*
- ◆ *Motions in Limine*
- ◆ *Preliminary Questions –
URE Rule 104*



Notices

- ◆ *Expert Witness - § 77-17-13 (30/10)*
- ◆ *Alibi - § 77-14-2 (10 days in writing)*
- ◆ *D's Mental State - § 77-14-3 (30/10)*
- ◆ *URE Rule 412 (14 days)*
- ◆ *URE Rule 404(b) (reasonable notice)*
- ◆ *URE Rule 609(b) (written notice)*
- ◆ *URE Rule 902 (written notice)*

Motions in Limine

- ◆ *First of all, make sure you always request a motion cut-off date at the time of arraignment – ideally before the plea offer expires.*
- ◆ *Advise the court of request to deal with motions in limine prior to trial rather than the day of trial.*

Preliminary Questions

♦ URE Rule 104

"Preliminary questions concerning the qualification of a person to be witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of Subsection (b). In making its determination it is not bound by the rules of evidence except those with respect to privilege."

Preliminary Questions

♦ *In cases with many exhibits, and/or lots of foundation witnesses, it helps to "pre-admit" as many exhibits as possible, either through a 104 hearing or stipulation. This process also provides opportunity to use exhibits during opening statement.*

Preparation E Evidence/Exhibits

♦ Proof Analysis

♦ Prepared Charts, Diagrams, Maps



Preparation E Evidence/Exhibits

- ◆ *Proof Analysis – matching elements of the crime with sources of evidence, and the witnesses through whom the evidence will be introduced. Your proof analysis outline then becomes chapter one in your trial notebook.*



Preparation E Evidence/Exhibits

- ◆ *Prepared Charts, Diagrams, Maps*
Demonstrative evidence depicting crime scene, medical examiner reports, and other diagrams are far more meaningful to the jury when prepared in advance. This is highly preferable to handing a witness a flip chart and a Sharpie, and crossing your fingers.



Preparation F Trial Notebook

- ◆ *Doesn't have to be an actual "notebook" to start out. (Electronic file, paper file, bottom drawer of desk)*
- ◆ *Choose a format that you like (section subject matter/names, sequence, miscellaneous bin) and stick with it.*
- ◆ *Keep It Simple, Seymour.*



Preparation G Opening/Closing

- ◆ Theme – "In Search of the Lost Chord"



- ◆ Talk about case – tell the story to colleagues. Get input, feedback and/or critique.

Preparation H Defense Attorneys

- ◆ Adversarial relationships needn't be hostile.
- ◆ The quicker the defense bar learns that in your vernacular "No means no", the more respect and courtesy you will garner over the long haul.
- ◆ Courtesy is contagious – and civility is it's own reward.



Serenity Prayer

•Grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference.

•Reinhold Niebuhr, American theologian (1892-1971)

Translation – “Don’t sweat the small stuff”

- ◆ But think about all the stuff, and think of it in a variety of ways . . .
- ◆ *“A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.”*
◆ Ralph Waldo Emerson





The End

“ . . . or is it just the beginning?”
