

Utah Prosecutors Best Practices

Approved at SWAP 10 January 2020

Committee Purposes: The prosecutor is an independent administrator of justice who is accountable to the public. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected.

In seeking to achieve these goals, the Utah Best Practices Committee develops and promulgates prosecution professional standards to act as a minimum threshold for all prosecution offices in Utah. These professional standards will ensure justice is delivered uniformly throughout Utah with the highest degree of integrity. These standards will also demonstrate that Utah prosecutors have the will, expertise and means to self-regulate; that we are best able to “do justice” when we have the freedom to develop and implement prosecution professional standards.

1. General Standards

1-1 Office Policies

1-2 Improper Bias

1-3 Conflicts of Interest

1-4 Training

1-1.0 Office Policies and Their Promulgation:

- a. Each prosecutor’s office is encouraged to develop written statements of policies and procedures that guide the exercise of prosecutorial discretion with the objective of achieving the fair, efficient, and effective enforcement of the criminal law within the prosecutor’s jurisdiction.
- b. These policies and procedures should be accessible to relevant staff and regularly reviewed and updated.
- c. Policies and procedures guiding the exercise of prosecutorial discretion should be made available to the public.

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1-2.0 Improper Bias Prohibited

- a. A prosecutor should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status.
- b. A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion.
- c. A prosecutor should strive, within the scope of the prosecutor’s authority, to eliminate implicit biases and act to mitigate any improper bias or prejudice when credibly informed that it exists.
- d. A prosecutor’s office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work.
- e. A prosecutor’s office should be proactive in seeking to create an office culture of inclusivity and diversity.
- f. A prosecutor’s office should regularly assess the impacts of its policies on communities within the prosecutor’s jurisdiction, and eliminate those impacts that cannot be properly justified.

1-4.0 Training Programs

- a. The chief prosecutor (the city, county or district attorney, or the Attorney General) should develop and maintain programs of training and continuing education for both new and experienced prosecutors and staff. The chief prosecutor should require that prosecutors attend a reasonable number of hours of such training and education.
- b. The chief prosecutor should allocate adequate funds in the prosecutor's budget to allow for internal training programs and attendance at external training events.
- c. In addition to knowledge of substantive legal doctrine and courtroom procedures, a prosecutor's training should include the elimination of improper bias, prosecutorial ethics, the use and testing of forensic evidence, Brady/Giglio compliance, eyewitness identification, conviction and sentencing alternatives, and victim rights.
- d. Specialized prosecutors should receive training in their specialized areas.

2. Prosecutorial Relationships

3. Pre-Trial Considerations

- 3-1 Investigations**
- 3-2 Charging**
- 3-3 Grand Jury**
- 3-4 Discovery**
- 3-5 Plea Negotiation and Agreements**

3-2.0 Prosecutorial Responsibility to Charge:

- a. Pursuant to Article VIII Section 16 of the Utah Constitution, Utah Code Title 67 Chapter 5, Utah Code Title 17 Chapter 18a, and Utah Code Title 10, Chapter 3, Section 928, it is the ultimate responsibility of the prosecutor to determine when and which criminal charges should be prosecuted and against whom.
- b. Excepting cases authorized to proceed by citation pursuant to Utah Code 77-7-18 to -21, the decision to initiate a criminal prosecution should be made by a prosecutor's office.
- c. The initial charging decision affects fundamental rights of the accused and may affect the accused's standing in the community, whether or not a conviction ultimately results. Therefore, the chief prosecutor should provide appropriate training and guidance to prosecutors regarding the exercise of their discretion in the charging decision and should provide adequate time and resources for prosecutors to fully evaluate cases prior to making charging decisions.

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3-2.1 Filing and Maintaining Criminal Charges:

- a. A prosecutor should not file or maintain charges if the prosecutor reasonably believes the accused is innocent.
- b. A prosecutor should file and maintain criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge or maintain charges is in the interests of justice.
- c. A prosecutor should only file and maintain charges in number and degree than are reasonably necessary to fairly reflect the gravity of the offense or deter similar conduct.

d. In the event that a prosecutor learns of previously unknown information that could affect a screening decision previously made, the prosecutor should reevaluate that earlier decision in light of the new information.

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3-2.2 Factors to Consider When Screening and Charging a Case: In addition to the strength of the case and admissibility of evidence, in considering whether prosecution is in the interest of justice, prosecutors may consider the following factors when applicable:

- a. The impact of a prosecution on a victim, witness or third party;
- b. Whether the public's or victim's interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.
- c. The availability of suitable treatment, diversion and rehabilitative programs, the accused's willingness to enter such programs, and the accused's ability to qualify for entrance to and funding for such programs;
- d. The accused's efforts toward voluntary restitution and/or treatment and rehabilitation prior to prosecution;
- e. The availability of a noncriminal disposition, deferred prosecution or other diversionary disposition and the accused's willingness to participate in such a program;
- f. Characteristics of the accused that are relevant, including:
 - i. The mental status of the accused, including whether the accused committed the offense while substantially mentally ill;
 - ii. The accused's relative level of culpability in the criminal activity;
 - iii. Whether the accused held a position of trust at the time of the offense;
 - iv. The accused's criminal history;
 - v. Whether the alleged crime represents a substantial departure from the accused's history of living a law abiding life;
 - vi. Whether the accused has already suffered substantial loss in connection with the alleged crime or whether prosecution would cause unwarranted hardship on the accused;
 - vii. The extreme youth or advanced age of the accused
- g. The likelihood of prosecution by another criminal justice authority;
- h. Whether non-prosecution would assist in achieving other legitimate goals, such as the investigation or prosecution of more serious offenses;
- i. The willingness of the accused to cooperate with law enforcement in the apprehension or conviction of others;
- j. The charging decisions made for similarly-situated accused persons;
- k. A history of non-enforcement of the applicable law;
- l. A reasonable belief of the prosecutor that the applicable law is unconstitutional;
- m. Any improper conduct by law enforcement in relation to the accused or the investigation, or failure of law enforcement to perform necessary duties or investigations in relation to the prosecution;
- n. The evidence strongly suggests improper motives of the complainant and there is minimal evidence in addition to the complainant's statements corroborating the offense;
- o. Whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;
- p. The extent of harm caused by the offense;
- 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;
- r. The impact of the crime on the community, including the potential deterrent value of a prosecution to the accused and to society at large;

- s. Excessive costs of prosecution in relation to the seriousness of the offense(s), including the availability of resources to the prosecutor to undertake a particular prosecution or the prosecution of a certain category of offenses;
- t. The possible influence of any cultural, ethnic, socioeconomic or other improper biases against the accused, witnesses or victims.

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3-2.3 Factors Not to Consider When Screening and Charging a Case: In screening and charging decisions a prosecutor should not consider the following when exercising his or her discretion:

- a. The prosecutor's individual or the prosecutor's office rate of conviction;
- b. Personal advantages or disadvantages that a prosecution might bring to the prosecutor or others in the prosecutor's office;
- c. Hostility or personal animus towards an accused;
- d. Political advantages or disadvantages that a prosecution might bring to the prosecutor;
- e. Characteristics of the accused that have been recognized as the basis for invidious bias or discrimination, insofar as those factors are not pertinent to the elements or motive of the crime;
- f. When the primary purpose of filing charges is to obtain from the accused a release of potential civil claims or the forfeiture of seized property;
- g. The acts or behavior of the accused's attorney.

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3-4.0 Prosecutorial Responsibility to Provide Discovery

- a. Prosecutors will comply with the obligations outlined in Utah Rule of Criminal Procedure Rule 16.
- b. A prosecutor should, at all times, carry out discovery obligations in good faith and in a manner that furthers the goals of discovery, namely, to minimize surprise, afford the opportunity for effective cross-examination, expedite trials, and meet the requirements of due process.
- c. In the event defense counsel makes discovery demands that are abusive, frivolous or made solely for the purpose of delay, unless otherwise required by law or rule, the prosecutor need not cooperate with such demands and should seek court guidance on what must be provided.
- d. A prosecutor shall make timely disclosure of exculpatory and mitigating evidence pursuant to Brady v. Maryland, 373 U.S. 83, 87 (1963) and its progeny.
- e. If at any point in the pretrial or trial proceedings a prosecutor discovers additional witnesses, information, or other material previously requested or ordered which is subject to disclosure and was not provided, the prosecutor should promptly notify defense counsel and provide the required information.
- f. The chief prosecutor of a prosecution agency should seek to create and maintain a system that ensures discovery is provided to defense counsel in an expeditious and efficient manner. The chief prosecutor should harness reasonably available technology to obtain discovery materials from law enforcement and provide discovery to defense counsel.
- g. Notwithstanding the timelines dictated in Utah Rule of Criminal Procedure 16, a prosecutor should provide all discoverable materials in the prosecutor's possession or control as soon as reasonably possible.

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3-4.1 Open File Policy

- a. Providing broad and early discovery promotes the truth-seeking mission of the prosecutor and furthers the speedy trial and due process rights of both the accused and victims.
- b. A prosecutor's office should adopt and maintain an open file policy with regard to criminal cases, meaning that the prosecutor will provide to the accused copies of or access to all relevant, unprivileged

information known to the prosecutor. A prosecutor may redact information prior to providing discovery as necessary for the protection of victims and witnesses (See below Rule 3-4.3, Redacting Information).

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3-4.2 Obtaining Evidence from Law Enforcement

a. A prosecutor should educate and inform law enforcement agencies in the prosecutor’s jurisdiction that the prosecutor, not the law enforcement officer or agency, is the arbiter of what information is disclosed to the defense. The prosecutor should inform and train the law enforcement officers and agencies in its jurisdiction to timely provide to the prosecutor all information in its possession pertaining to a defendant’s case.

b. A prosecutor should seek discovery information from all members of the prosecution team which includes federal, state and local law enforcement officers and agencies and other government officials and agencies known to the prosecutor to be involved in the investigation and/or prosecution of a criminal case against a defendant--including those not in the prosecutor’s jurisdiction.

c. A prosecutor should seek to identify all information in the possession or control of the prosecution team that tends to negate the guilt of the accused, mitigate the offense charged, impeach the prosecution’s witnesses or evidence, or reduce the likely punishment of the accused if convicted.

d. Prosecutors should err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes and should seek discovery information from that team.

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3-4.3 Redacting Information.

a. Prior to providing discovery, a prosecutor should redact from materials provided as discovery all information reasonably necessary to protect the safety and privacy of a victim or witness.

b. When portions of materials are discoverable and other portions are not, a prosecutor should make good faith efforts to redact the non-discoverable portions in a way that does not cause confusion or prejudice to the accused.

c. If counsel for the accused requests information previously redacted by a prosecutor, the prosecutor should provide the information when it is relevant to the accused’s criminal case and the prosecutor can implement reasonable measures for the protection of the victim, witness, or any personal identifying information. If redacted or restricted material is ordered by a court to be produced or disclosed, a prosecutor should seek protective orders as necessary to control the dissemination of that material.

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3-4.4 Reciprocal Discovery.

In order to minimize surprise, afford the opportunity for effective cross-examination, expedite trials, and protect the rights of crime victims, a prosecutor should request the court order and the defense timely provide discovery to the prosecution.

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4. Court Hearings and Trial

5. Sentencing

5-1 Fair Sentencing

5-2 Mitigating Evidence

5-3 Sentencing Alternatives

6. Post Sentencing

6-1 Duty of Prosecutor After Conviction

6-1.0 Duty of Prosecutor After Conviction

- a. If a prosecutor becomes aware of material and credible evidence creating a reasonable likelihood that a defendant prosecuted by that prosecutor's agency is innocent of a crime for which the defendant has been convicted, the prosecutor should undertake further investigation or request an appropriate law enforcement agency conduct an investigation to determine whether the defendant was convicted of an offense that the defendant did not commit.
- b. When a prosecutor reasonably believes that a convicted person is actually innocent, the prosecutor should take appropriate steps to seek to remedy the conviction.

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