

# PROSECUTORS AND THE PRESS

## Ethical and Practical Guidance



**PCE**



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# Prosecutors and the Press – Ethical and Practical Guidance

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# Prosecutors and the Press – Ethical and Practical Guidance

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# INTRODUCTION

“It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression.”<sup>1</sup>

One of a prosecutor’s main duties is to communicate. Prosecutors can build community trust by educating the public about the facts, legal standards and procedures that underlie their decisions. This can tame accusations against prosecutors that range from allegations of over-charging to protests about failing to charge a case.<sup>2</sup> Though communicating with the public is essential, unlike the average citizen, prosecutors are governed by ethical rules that restrict what they may say publicly. These ethical rules take the rights of the accused and victims into account and are an important part of a fair and just criminal justice system.<sup>3</sup>

Reporters seek to uncover as much information as possible and are not bound by the same ethical rules as prosecutors. Thus, they will often pressure prosecutors to elicit provocative or out-of-context quotations, dig for unknown facts and search for matters that can make an exciting story. Often reporters are unaware of the ethical restrictions on prosecutors and do not understand why a prosecutor is not more forthcoming. As a result, they may continue to press for more information, causing further frustrations.

Prosecutors must resist the pressures from the press and find the right approach to providing needed information without overstepping the ethical boundaries. Prosecutors who give in to these pressures can face lasting consequences, including vacated sentences, mistrials, disbarment, censorship, or loss of reputation and trust within their community.

Fear of these grave risks have led prosecutors to reduce public contact by only presenting information in court and never speaking directly to the public. Some prosecutors adhere to the rule that they never speak with the press until a case is concluded. This tactic, however, abandons the prosecutor’s duty to inform the

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<sup>1</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6 cmt. 1 (Am. Bar Ass’n 1980).

<sup>2</sup> Telephone interview with Jennifer Joyce, fmr. Circuit Att’y for the City of St. Louis (Sept. 26, 2019); Georgetown Law School lecture to Best Practices for Justice class, Michael Herring, Oct. 3, 2019. (Notes on file with PCE)

<sup>3</sup> See also, Scott M. Matheson, Jr., *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV. 865, 889 (1990).

public they are elected to serve<sup>4</sup> and leaves others to frame the narrative. The realities of twenty-four-hour news coverage and the prevalence of social media outlets means that prosecutorial silence leaves a void—one that can be quickly filled with inaccuracies that could risk undermining the work of a prosecutor’s office and negatively impact the community’s trust in its justice system.

This paper provides guidance on navigating this difficult terrain.

## Goal and Structure of the Article

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Considerations and suggestions for prosecutors on how to ethically communicate with the public, how to develop a communications strategy and how to work with the press at various stages of a case are offered in this paper. It is not an exhaustive review of the ethical rules and related decisions. There are different approaches to these issues that vary depending on the many factors at play. However, to best serve their communities, prosecutors in offices of all sizes will benefit from knowing the ethical rules, assessing their public outreach, and developing an effective media strategy.

The guide has four sections. The first section outlines the ethical rules that apply to prosecutors. The second section provides general guidance about creating a communications strategy, including how to communicate with the press. The third section reviews the stages of a criminal case and special types of cases with recommendations for what can and cannot be said publicly in each instance. The fourth section is the Appendix that includes the ABA Model Rules, a chart with links to the rules of professional responsibility for all 50 states, sample media communication materials and considerations for developing an internal social media policy.

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<sup>4</sup> Sims v. Barnes, 689 N.E.2d 734, 737 (Ind. Ct. App. 1997).

# EXECUTIVE SUMMARY

## Ethical Rules and Guidelines

Prosecutors must be familiar with their state rules of professional responsibility and the ABA Model Rules of Professional Conduct Rules 3.6 and 3.8 (Rules 3.6 and 3.8 will be referred to collectively in the paper as “ABA Model Rules”) that establish baseline ethical standards and responsibilities regarding trial publicity, extrajudicial statements, and post-conviction matters. Most states have adopted the ABA Model Rules in whole or in part.<sup>5</sup> [See Section](#) on ABA Model Rules of Professional Conduct and the [Appendix](#) for a full copy of the ABA Rules and a chart of the state rules of professional responsibility. This paper focuses on the ABA Model Rules.

Under the ABA Model Rules, prosecutors may *not* make extrajudicial statements that they “know or reasonably should know will be disseminated to ...the public,”<sup>6</sup> and that would have a “substantial likelihood of materially prejudicing an adjudicative proceeding”<sup>7</sup> or “heightening public condemnation of the accused.”<sup>8</sup> As the comments to the ABA Model Rules recognize: It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression.”<sup>9</sup> [See Section](#) on What Prosecutors Cannot Say that provides examples of cannot be said.

The “substantial likelihood” of prejudice standard in the ABA Model Rules is distinct from actual prejudice. It does not matter whether a prosecutor’s statements did prejudice a defendant, but whether they had the potential to prejudice an adjudicative proceeding.<sup>10</sup> These constraints bind extrajudicial statements made regarding any adjudicative proceeding, and include all stages of

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<sup>5</sup> See Appendix for a chart with the Rules of Professional Responsibility for all 50 states and listing whether they have adopted ABA Model Rule 3.6 and 3.8 in whole or in part.

<sup>6</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(a) (Am. Bar Ass’n 1980).

<sup>7</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(a) (Am. Bar Ass’n 1980).

<sup>8</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.8(f) (Am. Bar Ass’n 1980).

<sup>9</sup> ABA Model Rule 3.6 – comment 1, MODEL RULES OF PROFESSIONAL CONDUCT r.3.6 cmt. 1 (Am. Bar Ass’n 1980)

<sup>10</sup> *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1081 (1991) (noting that the absence of actual prejudice is not dispositive in an ethics hearing). See also *In re Brizzi*, 962 N.E.2d 1240, 1247 (Ind. 2012).

an investigation, arrest, indictment, as well as civil and criminal trials, nonjury hearings, and even arbitration proceedings.<sup>11</sup>

[ABA Model Rule 3.6\(d\)](#) restricts all lawyers who are participating in the investigation or litigation of a case, including defense counsel. It also restricts investigators, paralegals, and other prosecutor support staff.<sup>12</sup> [ABA Model Rule 3.8\(f\)](#) goes further and extends restrictions to law enforcement personnel associated with the criminal case. [See Section](#) on Crisis Communication for tips on working with law enforcement during a crisis.

[ABA Model Rule 3.6\(c\)](#) is an exception to barred statements and allows prosecutors to make statements to mitigate adverse publicity “not initiated by the government” that a “reasonable lawyer would believe is necessary to protect the public from substantial and undue prejudice.”<sup>13</sup> However, any rejoinder *must be limited* to the information necessary to mitigate or redress the adverse publicity.<sup>14</sup>



## Developing a Communications Strategy

Every chief prosecutor should have a communications strategy for when and how to deal with the media. Controversial issues that require interaction with the

<sup>11</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6 cmt. 3, 6 (Am. Bar Ass’n 1980) (discussing the prejudicial impact of statements in different kinds of adjudicative proceedings).

<sup>12</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(d) (Am. Bar Ass’n 1980).

<sup>13</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(c) (Am. Bar Ass’n 1980).

<sup>14</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(c) (Am. Bar Ass’n 1980).

media is an inevitable part of a chief prosecutor's work. A communications strategy requires a thorough review by the prosecutor about how to work with the media and who should do so. Though developing a communications strategy takes time and thought, it is far better to create a plan than to respond during a crisis when no strategy has been developed. Ideally this should be a written policy. [See Section](#) on Preparing for Communicating with the Media for more detailed tips.

Examples of steps to create a communication policy include:

- **Media Outlets:** Identify local, statewide, and national media outlets and keep an up-to-date contact list of reporters.
- **Challenging Issues:** Collect challenging issues and prepare responses.
- **Identify Credible Allies:** Identify credible allies who may be available to speak and support issues of importance to the office.
- **Prosecution Initiatives:** Track new initiatives and innovations in the office, so that they are readily available to demonstrate the vision of the office.
- **Audience:** Identify the media audience for prosecution stories and establish allies and partners that can join in media outreach.
- **Means of Outreach:** Identify means of media outreach, such as press releases, website, and social media.
- **Office Policy:** Create an office policy on who can contact the press, when and how.
- **Social Media Policy:** Create a social media policy for the staff's use of social media.

**Regular Contact with the Press:** The degree of interaction between a prosecutor's office and the media will depend in large part on the size of the jurisdiction, the nature of the media market, and the personality of the chief prosecutor. However, regardless of the size of the office, or whether there is an active case of interest to the public, it is important for the prosecutor to speak regularly with the press. Prosecutors should meet with local reporters at least twice a year to talk about local crime issues, office priorities, innovative strategies, and the impact of crime on victims. During these meetings, the prosecutor can provide the reporter with materials that explain the criminal justice system, give an overview of the prosecutor's office, and explain the Rules of Professional Conduct that govern the prosecutor's ability to speak with the press. [See Section](#) on Managing Relationships with Reporters for detailed tips.

**Prosecutor Spokesperson:** Ideally, an office should have a full-time Public Information Officer (PIO), but this may not be feasible, especially in smaller offices. Instead, the chief prosecutor is often the sole spokesperson. The prosecutor can also consider authorizing a limited circle of people in the office to speak to the press.



**Early and Accurate Contact with the Press:** A prosecutor does not want to delay communication once facts are known about a story of interest, and a message is developed. However, the prosecutor should verify the information released, as incorrect information is common in the early stages of a case. Once the facts are known, early contact with the press will prevent inaccurate facts from being repeated and gaining traction as the truth. However, getting the story out first is limited by the ethical rules that apply throughout the case. Be aware that the media does not want detailed facts with nuances, instead the prosecutor should focus on providing clear and simple statements. [See Section](#) on Get Your Story Out First for tips on how to write a press release and how to use social media.

**Prepare for Talking to the Press:** Talking with a reporter requires planning. When someone calls for a story, basic questions should be asked including name of the reporter, topic, scope of questions to be asked, others who have been interviewed and the deadline. The prosecutor should plan for what can and cannot be said, identify the three main points to convey to the reporter, and prepare to explain the ethical limitations on what can be said. The interview should be conducted in a respectful manner, without being hostile or defensive. See Sections on [Speaking with a Reporter](#), [Setting the Terms for Speaking with the Reporter](#) and [Responding to the Negative or Inaccurate Story](#) for additional tips on how to work with a reporter.

**Press Conferences:** Press conferences should be considered when an issue is truly newsworthy and timely, and where all media have a fair and equal chance to ask questions. While most prosecutors will hold press conferences a few times per year to announce charges or provide updates on criminal cases, there are occasional opportunities to partner with other local leaders for community-wide announcements. [See Section](#) on Press Conferences for tips on how to plan and conduct a press conference.

## [Special Considerations for Various Aspects of a Case](#)

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As a case progresses, prosecutors will need to decide when to speak to the press and which topics are appropriate. What a prosecutor ethically can say to the media varies depending on the stage of the case. However, regardless of the stage of the case, prosecutors may share information such as dates, times, and locations of future proceedings, as well as explanations of certain procedural issues, such as “what is the function of a grand jury?”. Prosecutors should always steer clear of personal opinions pertaining to an investigation or case, refrain from criticizing the court, grand jurors, or trial jurors, and adhere to the known public facts of an individual case. [See Section](#) on Special Considerations for Various Aspects of a Case for more detailed tips for each phase of a case.

Examples of comments that can be made by prosecutors during different aspects of a case include:

- **Pre-Arrest Investigation:** In active investigations, statements should be general, devoid of details, and preferably limited to information that is part of a public filing.

- **Finding the Suspect:** When warning the community or requesting help in locating a suspect or evidence, photos and other relevant images previously disclosed in public filings are generally helpful.
- **Arrest:** After an arrest and before charging, statements should only contain basic information about the location, date and time of the arrest, and personal identifying information about the arrestee. While rules may permit disclosure of residence or workplace, prosecutors should be mindful, that such information can create security issues for others in those locations.
- **Charges Filed:** Once a prosecutor has filed charges, most documents filed with the court and their contents can be shared with the public. However, any public statement about the charges, post filing, must reference the presumption of innocence and should never reveal defendant statements, defendant's refusals to participate in law enforcement requests, or other inadmissible evidence. Furthermore, the prosecutor should not disclose information about the suspects' criminal history or any opinion about guilt or a potential plea.
- **Trial Pending:** After a probable cause hearing and prior to trial, prosecutors should refrain from commenting on the case or invoking community outrage through public statements.
- **Trial:** During trial, it is best not to make any comments as they will likely be used in subsequent litigation if a conviction occurs. Even anonymously posted comments can trigger serious issues on appeal or in disciplinary hearings.
- **Post-Conviction:** After conviction, it is appropriate to make general statements, consistent with the public interest, but incendiary language or criticism should be avoided as it can be construed as an effort to pressure the court into a harsher sentence or other action.
- **Acquittal or Dismissal:** In commenting on an acquittal, dismissal, or decision by a grand jury not to indict, prosecutors should avoid criticizing the result or releasing confidential information about victims or minors.
- **Victims and Witnesses:** Prosecutors should be mindful of the impact of coverage on victims and their families. Victims should be advised of their rights and consulted about media events that may affect them personally.
- **Crisis Communication:** Crisis communications are always enhanced by preparation and anticipation of scenarios that might generate widespread public interest. Establishing a crisis team that can react quickly, develop appropriate messaging, display empathy for loss of life, open lines of dialogue with concerned community groups, and monitor social media and traditional

news outlets can be a tremendous asset. [See Section](#) on Crisis Communications for further considerations on how to develop a crisis communication plan and how to work with the press during a crisis.

## [Appendix](#)

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The Appendix includes the full text of the ABA Model Rules and a 50-state chart with links to each state's rules of professional responsibility. Sample media advisories and press releases for different stages of a case are included, along with a sample letter to law enforcement about public commentary and a sample public education strategic plan. Considerations for developing an internal social media policy can also be found in the Appendix.

# ETHICAL RULES AND GUIDELINES

## ABA Model Rules of Professional Conduct

The ABA Model Rules of Professional Conduct Rule 3.6 (Rules 3.6 and 3.8 will be referred to collectively in the paper as ABA Model Rules), published in 1983, established baseline ethical standards and responsibilities for all lawyers regarding trial publicity and extrajudicial statements. It is important to re-read the ABA Model Rules that have been adopted in some manner in every state.<sup>15</sup> [See Appendix](#) for a full copy of the relevant ABA Model Rules and comments, as well as the state Rules of Professional Responsibility that incorporate some or all these ABA Model Rules. These rules form the foundation of what prosecutors can say to the public.



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<sup>15</sup> See Appendix for a chart of 50 state Rules of Professional Responsibility Adopting ABA Model Rule 3.6 and 3.8 in whole or in part.

## ABA Rule 3.6 for All Lawyers

Rule 3.6 states:

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

(b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of 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 case, in addition to subparagraphs (1) through (6):
  - (i) the identity, 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 fact, time and place of arrest; and
  - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue 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.

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

#### ABA Rule 3.8 (f) for Prosecutors Only

In 2007, the ABA promulgated ABA Model Rule 3.8(f) that applies additional limitations solely on prosecutors:

“The prosecutor in a criminal case shall: . . .(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.”

The ABA Model Rules limit a prosecutor’s First Amendment right to free speech in the context of making extrajudicial statements to the public about any given case. The Supreme Court in 1991 held these limitations were constitutional in *Gentile v. State Bar of Nevada*.<sup>16</sup>

As of 2018, all fifty states and the District of Columbia have adopted ABA Model Rule 3.6 in whole or in part, and forty-five states and the District of Columbia have adopted ABA Model Rule 3.8(f) in whole or in part into their Rules of Professional

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<sup>16</sup> *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

Conduct.<sup>17</sup> While the ABA Model Rules serve as nonbinding suggestions, the Rules of Professional Conduct adopted in a particular state are legally enforceable against the lawyers of that state. Violation of a state’s Rules of Professional Conduct can result in sanctions ranging from reprimands to disbarment.<sup>18</sup> Despite the limitations placed on a prosecutor’s speech, courts have held that the Rules are consistent with the First Amendment.<sup>19</sup>

## What Prosecutors Cannot Say

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The ABA Model Rules do not provide much information about when lawyers generally, and prosecutors in particular, *should* discuss their cases in the media; instead, they focus on circumstances in which lawyers *may not* speak extrajudicially.<sup>20</sup> Under the ABA Model Rules, all lawyers, including prosecutors, may *not* make extrajudicial statements that they “know or reasonably should know will be disseminated to ...the public,”<sup>21</sup> and that would have a “substantial likelihood of materially prejudicing an adjudicative proceeding.”<sup>22</sup> Prosecutors, in particular, shall refrain from making extrajudicial comments that “have a substantial likelihood of heightening public condemnation of the accused.”<sup>23</sup>

ABA Model Rule 3.6(d) restricts all lawyers who are participating in the investigation or litigation of a case, including defense counsel. It also restricts investigators, paralegals, and other prosecution support staff.<sup>24</sup> ABA Model Rule 3.8(f) goes further and extends restrictions to law enforcement personnel associated with the criminal case.

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<sup>17</sup> See Appendix for a chart of 50 state Rules of Professional Responsibility Adopting ABA Model Rule 3.6 and 3.8 in whole or in part.

<sup>18</sup> See, e.g., *in re Giuliani*, No. 2021-00506 (N.Y. App. Div. 2021) (Suspending an attorney who was found to have violated New York ethical guidelines).

<sup>19</sup> Att’y Grievance Comm’n of Maryland v. Gansler, 835 A.2d 548, 560 (Md. 2003) (stating that an attorney’s speech is limited only “in a way that is consistent with the fundamental right to free expression under the First Amendment.”). See also, *Gentile v. State Bar of Nevada*, 501 U.S. at 1036 (“We are not called upon to determine the constitutionality of the ABA Model Rule of Professional Conduct 3.6 [...] but only Rule 177 as it has been interpreted and applied by the State of Nevada. Model Rule 3.6’s requirement of substantial likelihood of material prejudice is not necessarily flawed.”).

<sup>20</sup> Bruce A. Green, *Prosecutors in the Court of Public Opinion*, 57 DUQUESNE L. REV. 271, 282 (2019).

<sup>21</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(a) (Am. Bar Ass’n 1980).

<sup>22</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(a) (Am. Bar Ass’n 1980).

<sup>23</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.8(f) (Am. Bar Ass’n 1980).

<sup>24</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(d) (Am. Bar Ass’n 1980).

The Model Rules do not require a finding that an otherwise improper statement cause *actual* prejudice to a criminal defendant or to an adjudicative proceeding; they merely require that the statement cause a *substantial likelihood* of prejudice.<sup>25</sup> It does not matter whether a prosecutor’s statements did prejudice a defendant, instead the issue is whether the statements had the potential to prejudice an adjudicative proceeding. These constraints bind extrajudicial statements made regarding any adjudicative proceeding, and include all stages of an investigation, arrest, indictment, as well as civil and criminal trials, nonjury hearings, and even arbitration proceedings.<sup>26</sup>



The comments to the ABA Model Rules provide examples of subjects that more likely than not can have a material prejudicial effect on the proceeding, including:

**Character and Reputation:** “(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal

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<sup>25</sup> *Gentile v. State Bar of Nevada*, 501 U.S. at 1081 (1991) (noting that when reviewing the Nevada version of Model Rule 3.6, that even though there was no finding of actual prejudice, there was still a finding that the defense attorney’s statements were likely to substantially prejudice the trial); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) (showing of actual unfairness unnecessary when record shows saturation publicity of the accused’s pretrial confession).

<sup>26</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6 cmt. 3, 6 (Am. Bar Ass’n 1980) (discussing the prejudicial impact of statements in different kinds of adjudicative proceedings).

investigation or witness, or the identity of a witness, or the expected testimony of a party or witness.”<sup>27</sup>

**Sentence, Plea and Defendant Statements:** “(2) in a criminal case or proceeding 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.”<sup>28</sup>

**Examinations, Tests and Physical Evidence:** “(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.”<sup>29</sup>

**Opinion on Guilt or Innocence:** “(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration.”<sup>30</sup>

**Inadmissible Evidence:** “(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial.”<sup>31</sup>

**Defendant Presumed Innocent:** “(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.”<sup>32</sup>

The comments to the ABA Model Rules occasionally catch prosecutors by surprise. Rules that are regularly forgotten by the prosecutor or the police include not mentioning a defendant’s confession, not discussing a defendant’s prior criminal record, and failing to include language about the presumption of innocence in a press release. Also, though some state laws require that investigative grand jury information be kept confidential, some prosecutors are

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<sup>27</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6 cmt.5(1) (Am. Bar Ass’n 1980).

<sup>28</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6 cmt.5(2) (Am. Bar Ass’n 1980).

<sup>29</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6 cmt.5(3) (Am. Bar Ass’n 1980).

<sup>30</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6 cmt.5(4) (Am. Bar Ass’n 1980).

<sup>31</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6 cmt.5(5) (Am. Bar Ass’n 1980).

<sup>32</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6 cmt.5(6) (Am. Bar Ass’n 1980).

unaware of the state rule and have announced that an investigative grand jury is considering a matter.

As the comments to the ABA Model Rules recognize: “It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression.”<sup>33</sup>

## Responsibility for Statements by Law Enforcement

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Under Rule 3.8(f), prosecutors are not only responsible for their own statements, but they must also take “reasonable care” to prevent law enforcement partners from making the same prohibited statements.<sup>34</sup> This presents a challenge for prosecutors, as law enforcement often speaks to the press and have their own contacts with the media. Before a high-profile incident occurs, prosecutors should explain the ethical rules to their law enforcement partners and develop a means of coordinating when and how public statements will be made. This can be done through regular meetings with law enforcement or in an annual letter to law enforcement explaining the ethical limitations. See Section on [Crisis Communication](#) and Appendix for a [sample letter](#).

## “Safe Harbor” and “Fair Reply” Exceptions

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**Safe Harbor:** The ABA Model Rules provide exceptions, collectively known as “Safe Harbor” exceptions, where an attorney is permitted to make extrajudicial statements in certain circumstances. Rule 3.6(b) provides that “certain types of statements are permissible even though, under subsection 3.6(a), those statements might have a ‘substantial likelihood of materially prejudicing an adjudicative proceeding.’”<sup>35</sup> Subsection (b) provides a list of circumstances where an attorney, without risking discipline, may make extrajudicial statements.<sup>36</sup> For

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<sup>33</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6 cmt. 1 (Am. Bar Ass’n 1980)

<sup>34</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.8(f) (Am. Bar Ass’n 1980).

<sup>35</sup> Gansler, 835 A.2d at 556–57; See also Gentile, 501 U.S. at 1033 (describing the provisions of Nevada Supreme Court Rule 177(3), which are substantively identical to [MRPC 3.6\(c\)](#), as “safe harbors”).

<sup>36</sup> MODEL RULES OF PROFESSIONAL CONDUCT r. 3.6(b) (“Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue 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.”).

example, under subsection (b), a prosecutor is permitted to repeat information that is contained in a public record.<sup>37</sup>

**Fair Reply:** [ABA Model Rule 3.6\(c\)](#) is an exception to barred statements and allows prosecutors to make statements to mitigate adverse publicity “not initiated by the government” that a “reasonable lawyer would believe is necessary to protect the public from substantial and undue prejudice.”<sup>38</sup> However, any rejoinder *must be limited* to the information necessary to mitigate or redress the adverse publicity.<sup>39</sup> The “fair reply” exception as it applies to prosecutors is described in greater detail in the ABA Criminal Justice Standards for the Prosecution Function. Standard 3-1.10(f) states that “the prosecutor may respond to public statements from any source in order to protect the prosecution’s legitimate official interests, unless there is a substantial likelihood of materially prejudicing a criminal proceeding, in which case the prosecutor should approach defense counsel or a court for relief.”<sup>40</sup>

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<sup>37</sup> In re Brizzi, 962 N.E.2d at 1247 (noting that a probable cause affidavit falls under the definition of “public record” so long as it is on file with a government entity to which an ordinary citizen has lawful access).

<sup>38</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(c) (Am. Bar Ass’n 1980).

<sup>39</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(c) (Am. Bar Ass’n 1980).

<sup>40</sup> ABA PROSECUTION FUNCTION 3-1.10(f).

# DEVELOPING A COMMUNICATIONS STRATEGY

## Preparing for Communicating with the Media

Every chief prosecutor should have a communications strategy that creates a process for when and how to deal with the media. This requires a thorough review by the prosecutor about how to work with the media and who should do so. Ideally, the strategy should be in writing. This section outlines the issues that a prosecutor should consider as a media strategy is developed.

A prosecutor's relationship with the media is one of the most important, yet difficult, issues the chief prosecutor must face. It is an essential part of the job that will assist the prosecutor to explain prosecutorial decisions, the criminal justice system and to promote initiatives that enhance public safety. However, the media also has the potential to negatively impact a prosecutor's office and a prosecutor's reputation. As a result, the chief prosecutors should educate themselves on the ethical requirements and develop a strategy for working with the media.



Developing a communications strategy takes time and thought, but it is far better to create a plan than to respond during a crisis when no strategy has been developed. Controversial issues that require interaction with the media is an inevitable part of a chief prosecutor's work.

To develop a communications strategy, the following steps can be taken:

- **Identify Media:**

- **Local Media:** Identify the local media that reports in any way, either by print, television, radio, or social media. Local Penny Savers or neighborhood watch social media pages are also useful outlets.
- **Statewide and National Media:** Identify national or statewide media that have representatives covering the prosecutor's jurisdiction.



- **Contact Information:** Maintain an up-to-date list of reporters and contact information. This will allow the prosecutor to proactively reach out to reporters when needed and will also help identify reporters when an interview request is made. *Note:* Chief prosecutors may be ill advised to provide their cell phone number to reporters but should provide a way for the reporter to reach the prosecutor at any time.
- **Conduct a Survey:** A prosecutor can consider conducting a survey to learn how the public accesses information about the office and criminal justice matters.

- **Identify Issues and Prepare Responses:**
  - **Local Issues:** Identify local issues and challenges of the prosecutor’s jurisdiction. What are the major crime issues and what are the prevalent local controversies around the criminal justice system?
  - **National Issues:** Prepare responses on issues of national interest. For example, what is the prosecutor’s position on the legalization of marijuana, the elimination of bail, and other criminal justice reform proposals?
  - **Prosecutor Initiatives:** Pinpoint the key prosecutor initiatives and innovations that the public should know about. Also, list the plans and vision for the office, so the prosecutor can use the media to seek input on new proposals.
  - **Ethical Constraints:** Outline the restrictions imposed by ethical rules, so they can be explained to the media.

## Practice to Consider

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### *Developing a Communications Strategy Around an Issue*

The local jurisdiction has an increase in opioid abuse. The office can educate the community through presentations at schools, community groups and businesses. The office can work with local organizations such as Families Against Narcotics. And the prosecutor can meet with the press to do a news or feature story, or an opinion piece, about the crisis and the office’s related initiatives.

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- **Identify the Audience:** Identify the audience for the message, which may vary depending on the issue. The audience includes people directly impacted by an issue or policy, people with a high interest in the issue (such as law enforcement, local victim groups, politicians, etc.) and the public.
- **Identify Partners:** Identify allies and natural partners who can join in media outreach and collaborate on a media strategy. This can include police, victim groups, social service providers and community members.

- **Coordinate with the Police:** The office should work with local police departments to create a policy regarding when the prosecutor should be notified of a high-profile arrest.
- **Identify Method of Outreach:** Identify the various methods for making public statements, such as press conferences, press releases, social media, TV interviews, data dashboards, and op-ed pieces. [See Appendix](#) for sample press releases.
- **Create a Written Office Policy on Contact with the Press:** The chief prosecutor should outline who is authorized to speak to the press and when. Also, protocols should be in place for when the press calls for a comment. For example, if a reporter calls, the person taking the call should ask: “What would you like to discuss and what is the deadline?” Once a communications strategy is developed it should be in writing and shared with the office, so that all staff, legal and non-legal, are familiar with the policy. Aspects of the policy can be included in the office’s policy manual.
- **Create a Social Media Policy for Staff:** The office should develop a social media policy that outlines what staff can and cannot say through their personal social media outlets. Private postings by prosecutors have been unfortunate fodder for the media.<sup>41</sup> A full discussion of social media policies is beyond the scope of this article. [See Appendix](#) for Considerations for Developing a Social Media Policy.

## Managing Relationships with Reporters

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### Establishing Rapport Early

The degree of interaction between a prosecutor’s office and the media will depend in large part on the size of the jurisdiction, the nature of the media market, and the personality of the chief prosecutor. In a large jurisdiction encompassing a major media market, the prosecutor’s office will have contact with the media every week. In a small jurisdiction with no substantial media market, the prosecutor’s office may only interact with the media a few times per

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<sup>41</sup> See, e.g., Jackie Salo, *South Carolina Lawyer gets suspension after Facebook post about George Floyd*, N.Y. POST (Jun. 28, 2021), <https://nypost.com/2021/06/28/lawyer-gets-suspension-after-facebook-post-about-george-floyd/>; Elisha Anderson, *Asst. prosecutor resigns after ‘Shoot em’ Facebook post*, DET. FREE PRESS (May 1, 2015), <https://www.freep.com/story/news/local/michigan/wayne/2015/05/01/assistant-prosecutor-resigns-facebook-post/26709361/>; C. Isaiah Smalls II & Carli Teproff, *Broward prosecutor fired, two deputies placed on leave after social media posts*, Mia. Herald (Jun. 1, 2020), <https://www.miamiherald.com/news/local/community/broward/article243178151.html>.

year. In addition, the personal preferences of the chief prosecutor will drive some aspects of media contacts.

A newly elected or appointed prosecutor should meet with the reporters in the local media market, to review the priorities and procedures of the office, and to explain limitations imposed by the rules of professional conduct. The first meeting can be informal and done over coffee or lunch. If the prosecutor is in a major media market, a more formal meeting with all the media outlets may be necessary to ensure that the information is conveyed uniformly. The best initial contact for television stations is the news director as the on-air talent often rotate. For the local newspapers, the prosecutor should reach out to the one or two reporters assigned to the crime beat. After the first meeting, the prosecutor should be accessible and continue to meet with reporters on an ongoing basis.



The prosecutor can proactively provide information where appropriate and suggest other sources of publicly available information. Whether or not there is an active case of interest to the public, it is important to speak regularly with the press. Due to frequent turnover of reporters, prosecutors should plan to meet with local reporters at least once a year to talk about local crime issues, office priorities, innovative strategies, and the impact of crime on victims. During this discussion, the prosecutor can provide the reporter with various written materials

that explain the criminal justice system, give an overview of the prosecutor's office, and explain the Rules of Professional Conduct. These contacts develop good will and trust, which will be needed when a controversial topic inevitably arises. [See Section](#) on Communications Strategy for more detailed tips.

The chief prosecutor should treat all press outlets fairly and equally. A chief prosecutor may naturally develop a good relationship with certain reporters or outlets. However, it is unfair and eventually damaging to favor one outlet or reporter over others. All public releases should be made to every outlet at the same time.

### Who Should Speak with the Press?

Ideally, an office should have a full-time Public Information Officer (PIO), but this may not be feasible, especially in smaller offices. In the alternative, the chief prosecutor can consider authorizing a limited circle of people in the office to speak to the press. The various options for designating a press contact include:

- **The Prosecuting Attorney:** The chief prosecutor, as the leader of the office, can be the exclusive spokesperson with the press, and thus impart a consistent message to the media, control that relationship and determine the ongoing media strategy. However, this method can be time consuming and may not be possible in a large office with constant media demands, or in a small office where the prosecutor is also the primary trial attorney of serious cases. In addition, different messages require different messengers, for example, some believe that the district attorney should deliver good news, while someone else in the office should deliver bad news.
- **Public Information Officer (PIO):** A PIO employed by the prosecutor is the main point of contact with the media and the public. The PIO can be a full-time or part-time employee. A PIO can perform other tasks in a prosecutor's office including drafting the Annual Report, arranging meetings with legislators and community members, preparing speeches, and writing testimony for government committees. Some statewide prosecutor associations, such as Michigan and Pennsylvania, have a PIO who works with the association and prosecutors within the association.
- **Designated Press Contact:** If hiring a PIO is not possible, the chief prosecutor can identify one or more people in the office who can triage press contacts and determine how press requests will be handled and by whom. In larger

offices, this can be a senior attorney and in smaller offices, it may be the chief prosecutor.

- **Policy for Line Prosecutors:** The chief prosecutor should consider defining who can communicate with the press and who cannot. It is useful to have a limited number of press contacts so that messaging is consistent and a relationship with reporters can be developed. Some offices do not allow line prosecutors to talk to the press, while others permit line prosecutors to answer logistical or procedural statements, such as the spelling of their last name, or the date and time of a hearing.<sup>42</sup> One practice is for the chief prosecutor to give an initial statement at the time of charging and a statement at the time of conviction; allowing line prosecutors to speak only after sentencing.

**Training for the Designated Press Person:** Training on how to speak to the media should be provided to all personnel who are allowed to speak with the press. The secretary or receptionist who receives the initial call from the press should be trained in what to ask, such as the topic of the inquiry and the deadline. Prosecutors and staff who are not authorized to speak with the press should be instructed on how to politely respond to a press inquiry and how to refer it to the appropriate person. As part of annual training, all prosecutors in the office should be required to review and certify that they are familiar with [ABA Model Rules 3.6 and 3.8](#).

### [Anticipating and Preparing for Interactions with the Press](#)

It is important to identify news cycles and anticipate what reporters will request at those times. There are predictable stories that occur at various times of the year, such as drunk driving around the holidays and dedicated themes such as Domestic Violence Prevention month. It is also important to know the “sweeps weeks” periods for television (February, May, July, and November) as television reporters are particularly alert for stories during these four-week periods when Nielsen ratings are measured. National media trends can also lead to local stories, for instance a national article about violent crime spikes can lead to inquiries about local crime. Also, cases involving officer-involved fatalities, celebrities, animals, child abuse and protests are often of great interest to the press. The office should be on alert when one of these cases occurs, whether

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<sup>42</sup> Telephone Interview with Kati Cornell, PIO for the Office of Special Narcotics for the City of N.Y. (Oct. 31, 2019). Recording on file with PCE.

there is an arrest not, so that the prosecutor can prepare for possible press inquiries.

When the press is interested in a particular case, prosecutors should be ready and compile the following information to quickly respond to press inquiries:

- **Statutes:** Relevant statutes that apply to the case.
- **Ethical Rules:** Ethical rules that govern what a prosecutor can say to the press and when.
- **Verify the Facts:** The prosecutor should verify the information released, as incorrect information is common in the early stages of a case.
- **Criminal Justice System Process:** General information about the movement of a case through the criminal justice system, with particular emphasis on the role of the prosecutor. Also, information about plea bargaining, why pleas are offered, the workings of a grand jury and the purpose of a trial.
- **Public Information about Charges:** Information can be given in response to anticipated questions regarding the charges and indictment, including important pleadings and public transcripts.
- **Upcoming Court Proceedings:** Calendar of upcoming grand jury presentations, court dates, pending motions, response dates and past court filings.
- **Related Stories:** Press interest in a case could be triggered by a variety of national issues impacting criminal justice, such as George Floyd protests, bail reform or the opioid epidemic. The prosecutor should be prepared to discuss national issues related to the current local issue.

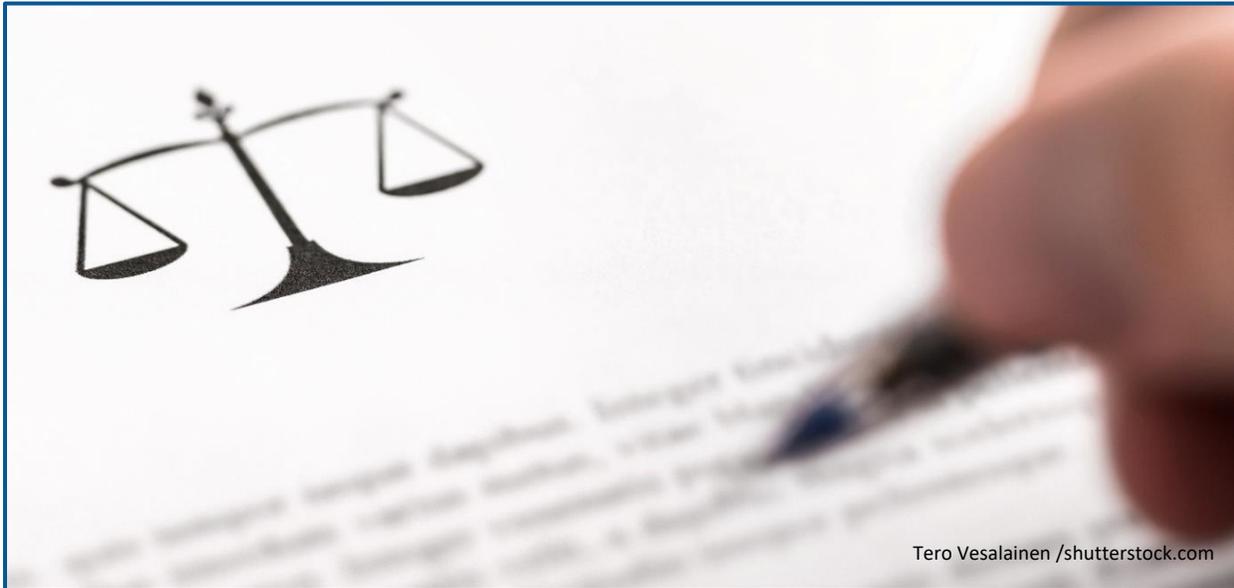
### Get Your Story Out First

A prosecutor does not want to delay communication once facts are known, and a message is developed. The media will craft the narrative that often controls public perception. Thus, whoever gets to the media first can define much of the story. Other media will follow the first story and include the first facts in the new story. Early contact with the press will prevent inaccurate facts from being repeated and gaining traction as the truth. However, getting the story out first is limited by the ethical rules that apply throughout the case. [See Section](#) on Special Considerations for Various Aspects of a Case.

Whether the prosecutor's office issues a press release or holds a press conference, the office also should engage with the multiple platforms of social media using consistent messaging. Short videos from the chief prosecutor may be

of interest to the press and can be used in social media and on the prosecutor's website. It is always important to have an up-to-date website that explains the prosecutor's office and highlights important cases, innovative initiatives, and community outreach.

Be aware that the media does not want detailed facts with nuances, instead the prosecutor should focus on providing clear and simple statements.



### Writing a Press Release

Writing a good press release can benefit a prosecutor, as some news outlets may use the press release as a basis for their story. Here are some points to consider:

- **Headlines:** Use a headline that succinctly gets to the point of the story. The headline should immediately convey why the news is important and thus entice the reader to look at the entire press release.
- **Lead Paragraph:** An effective lead paragraph should be the summary for the release and answer the basic questions about the news: who, what, where, when, why and how.
- **Inverse Pyramid:** The key to writing a good news release is to think of it as an "inverse pyramid." It can be written for people with attention spans as short as 30 seconds and as long as three minutes. Many people will only read an article by scanning the beginning and the headings. Details can be saved for the end of the press release.

- **Contact Information:** The press release should include complete contact information for someone who is authorized, available and capable of answering questions.
- **Keep it Short:** The maximum length of a press release should be two pages and not more than 500 words.
- **Know the Purpose:** Press releases can have a variety of purposes ranging from simply announcing an upcoming press conference to an announcement that explains a case or project where there will be no press conference.
- **Know the Media Deadlines:** There is now a 24-hour news cycle, particularly for the most sensational stories. However, if information has been requested by the press, they can provide their needed timeframe. “Weeklies”, such as magazines, often need the information one week in advance; whereas “dailies” often put the paper “to bed” between 11:00 am and 4:00 pm.
- **When to Release a Story:** If the chief prosecutor wants to draw attention to a story, then the press release or press conference should be on a Tuesday, Wednesday, or Thursday morning. Mondays are overly busy for the press as they catch up with weekend news and Friday’s result in news getting lost in the weekend. Finally, the prosecutor should pay attention to significant national and local news stories, such as a major election or a hurricane, as they will distract from the prosecutor’s release.

## Social Media

Social media is a means for prosecutors to provide information proactively to the public in real time. Social media also allows the prosecutors to give their statement and the position the office directly to the public. Once posted, social media content can easily find its way into other press.

Though social media has many benefits, it has pitfalls as well, particularly if done in haste or anger. It is important to remember that communication via social media by anyone in a prosecutor’s office must follow the same ethical standards of ABA Model Rules 3.6 and 3.8 that apply to other press statements and press releases.



Considerations for using social media include:

- **Review the Post Before Hitting Send:** A risk of using social media is that it is almost immediate. It is easy to react quickly and send an imprudent social media post. This can be problematic especially when responding to something upsetting or controversial. Any post from a prosecutor's office should be reviewed by another attorney in the office to verify that it meets ethical standards and that it provides an appropriate message. This will avoid the ethical pitfalls that can result in sanctions.
- **Photos, Videos and Podcasts:** It is helpful to have photos and videos included with social media posts, if they are part of the public record. "A picture is worth a thousand words" when it comes to drawing attention and increasing clicks to a social media release. *Note:* Any videos or photographs used should be permissible for use under the ethical rules.
- **Podcasts:** Podcasts by the prosecutor are an effective way of communicating with the public in a more detailed way and can be shared through social media.
- **Customizing Messages for Different Media Platforms:** Social media is constantly evolving and new means of communicating are emerging, each with their own rules. For example, Twitter has a 280-character limitation per tweet, so that when using Twitter it may be best to give a one line headline, such as "Charges issued against Portland man" with a link to the press release that follows the ethical guidelines.
- **Social Media Audiences:** Be mindful that social media platforms can attract specific audiences, for example some may be local neighborhood groups, while others may be frequented by a people with a particular interest or point of view. Social media messages can be tailored to the audience frequenting that platform.
- **Approach to Public Comment:** Public comment and individual users should not be deleted from social media sites such as Facebook. The courts have held that using a social media account for official purposes must allow for public discourse and interaction. Courts have ruled that the interactive portion of a public official's Facebook page is a "public forum" and therefore comments and individuals may not be blocked.<sup>43</sup> Obscene comments may be deleted, but the prosecutor should keep a record of what was removed.

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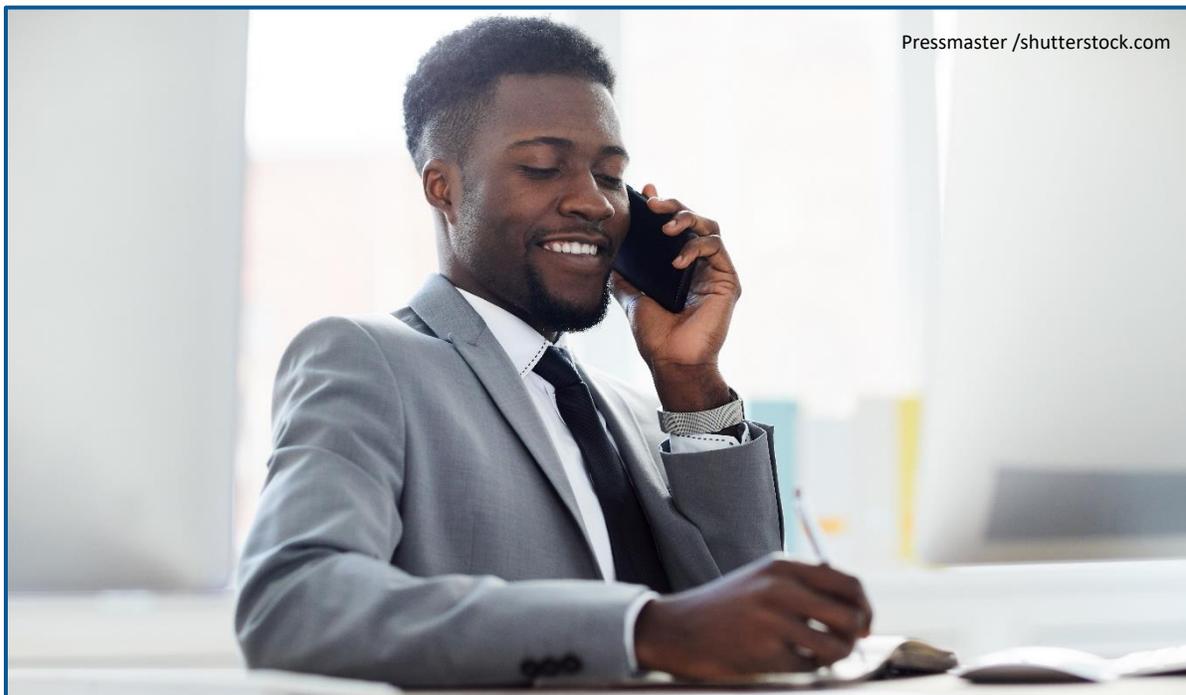
<sup>43</sup> See *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019); *Knight First Amendment Institute v. Trump*, 302 F.Supp.3d 541 (S.D.N.Y. 2018).

- **Responding to Individual Comments:** Responding to individual comments can create a destructive cycle of claims and counterclaims, which may then become the story. Also, others may resent that their posts did not receive a response. It is best to post official statements and resist responding to individual comments.
- **Social Media Policy for Prosecutors:** The office should develop a social media policy for its staff. For example, staff should not be allowed to create fake social media accounts to criticize other people or comment on stories. [See Appendix](#) for Considerations for Developing a Social Media Policy. A full discussion of this issue is beyond the scope of this article.

### Talking with a Reporter - General

After preparation and anticipation of possible questions, prosecutors should consider the following when speaking with a reporter.

- **Be Respectful:** Treat reporters with respect and be mindful of the responsibilities they have under the First Amendment and their time pressures to complete a story.



- **Preliminary Questions:** When a reporter calls for a story, the prosecutor should ask basic questions about the interview. Though the reporter may not

provide all the requested information, the reporter's response will provide some insight into the reporter's goals and approach. Preliminary questions include:

- **Name:** The name of the reporter, the outlet they represent and their contact information.
- **Topic:** The topic of the story and the scope of the issue the reporter wants to discuss.
- **Scope of Interview:** The length of the interview, pre-existing background information known to the reporter, format of the interview (recorded or not), and whether the interview is on or off the record.
- **Questions to be Asked:** The questions the reporter would like to ask.
- **Other Interviewees:** Whether other people have been interviewed or are being interviewed.
- **Deadline:** The deadline for the story.<sup>44</sup>
- **Set a Time for the Interview:** The call with a reporter should be scheduled for a set time, even if it is a short window. The prosecutor can say: "Let me call you back in 10 minutes so I can pull the materials I need to discuss it with you." This will give the prosecutor time to gather the relevant information and prepare key talking points before returning the call.
- **The Whole Interview Counts:** An interview starts with "Hello." From the moment the prosecutor speaks to the press, whether by phone or in person, the conversation is "on the record." The prosecutor should not say anything during the preliminary phase of the interview that is not wanted in tomorrow's paper. Even before the interview formally begins, or the cameras start rolling, the prosecutor's statements and demeanor may be part of the story.
- **Control the Interview:** It is acceptable to move the location of the interview, change the time for the interview (provided it is reasonably within the deadline) or to answer a different question than what is asked.
- **Be Aware of Your Role in the Story:** Reporters know that each story usually has a hero, a villain, a victim, and an expert. Reporters will try to slot the prosecutor in one of those roles. Most of the time the prosecutor should be the expert, and occasionally the hero.
- **Avoid Saying "No Comment":** Saying "No Comment" appears evasive and not appropriate for a public servant. If there is nothing that can be said ethically, the prosecutor can instead say, "While I cannot comment on the specifics of

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<sup>44</sup> KC STECKELBERG, THE MICHIGAN PROSECUTOR'S GUIDE TO COMMUNITY, MEDIA AND PUBLIC RELATIONS at 16 (Jan. 2017).

this case, I can say that my office takes these kinds of allegations very seriously...” The prosecutor can also explain aspects of criminal procedure that are relevant to the case without giving the facts of the case.

- **If You Don’t Know, Say So:** Do not be afraid to say, “I don’t know. Let me check and I’ll get back to you.” By doing so, impromptu mistakes can be avoided, and accurate information can be collected and verified. While there is a temptation to approximate an answer, the reporter and the camera will probably sense the uncertainty or the insincerity. Prosecutors will earn the trust of the media and the public by sticking to the facts, being accurate and appearing forthright.
- **Avoid Being Hostile and Defensive:** Regardless of the questions posed, prosecutors should not appear hostile or defensive. It is best to calmly provide facts and context to a story.
- **Review of Quotes:** Prosecutors should ask if, prior to publication, they can review quotes attributed to them in the interview. However, reporters do not have to grant this request and they often do not.
- **Explain Ethical Limitations:** Make sure the reporter understands a prosecutor’s professional, ethical obligations under ABA Model Rules 3.6 and 3.8(f).<sup>45</sup>
- **Allow Equal Access to All Media:** Press releases should be sent to all media, even outlets that may have given unfavorable coverage in the past.

### Setting the Terms for Speaking with a Reporter

When speaking with a reporter, **everything** is on the record, unless otherwise agreed upon. It is important to build relationships and trust with reporters to ensure that informal, verbal agreements are adhered to. Unfortunately, there have been instances when “off the record” interviews have been published. In discussing what can and cannot be on the record, the terminology most often used with reporters includes:

- **On the Record:** When speaking with a reporter, a prosecutor must be mindful that everything is “on the record,” unless otherwise agreed upon, and that the interview may be directly attributed to the person speaking. *Note:* Asking for comments to be “off the record” after the interview is over is not effective, and the request may not be considered retroactive.

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<sup>45</sup> KC STECKELBERG, THE MICHIGAN PROSECUTOR’S GUIDE TO COMMUNITY, MEDIA, AND PUBLIC RELATIONS at 11 (Jan. 2017).



- **Off the Record:** Reporters have different definitions of what this means. Prosecutors should explain their definition of “off the record” for the reporter and then ask the reporter to abide by that understanding. For example, a prosecutor could say, “I want this to be off the record. By that I mean, you cannot use this information in your story. It is guidance only. Will you keep this off the record?”
- **Not for Attribution:** Prosecutors can tell the reporter that something is “not for attribution,” and what that means. Most often it means that the content of the statement can be included in the story, but the source of the information cannot. Often, this term is used interchangeably with “on background.” Prosecutors will seldom use this tool, as most of what they say is either strictly on the record or strictly off the record.
- **On Background:** Background information typically means that statements can be used by a reporter but cannot be attributed to a prosecutor or their office. It can be used to give the reporter context for a story. The meaning of “on background” can vary from allowing the reporter to include the unattributed information in the story to not allowing any of the information to be included in the story. The prosecutor should clarify what is meant by “on background” and confirm the extent of the permission with the reporter. This is another tool seldom used by prosecutors because of the nature of their position.
- **Embargoed:** Information that is “embargoed” must be held for release until a specific time set by the prosecutor. Information is only embargoed when agreed to by the reporter. “Embargoed” is often used for an upcoming event, such as an announcement of a new initiative by the office. Providing the

information early allows the reporter to do research and obtain quotes ahead of the released story.

- **Exclusive:** In some situations, the prosecutor may wish to release information to one reporter only. That is called giving that reporter an “exclusive”. Given the public nature of the office, this tactic should be rarely used. Examples of when a prosecutor may use this option is an announcement about running for office or announcing an initiative that came out of a reporter’s prior story.

### Formulating the Message

Whether the interview is in print or on camera, the style and manner with which a message is provided can make or break the message. There is limited time to get a point across, so thought should be given to how use the time effectively. In formulating how to convey the message, the prosecutor should consider various issues:

- **Tone:** The prosecutor should decide what tone should be used. Should it be factual, empathetic, or concerned?
- **Demeanor:** The prosecutor’s demeanor should be serious and calm. The prosecutor should avoid the common mistake of making light-hearted jokes due to nervousness, smirking at unwelcomed questions, or talking while others are speaking. Also, if the prosecutor is upset about a result or defensive about an outcome, the prosecutor should take time to make the necessary adjustments to allow for a calm presentation before speaking to the press.



- **Optimism and Hope:** Where possible, focus on delivering the message with optimism and hope. Deliver plans for addressing a problem and outline the next steps that will be taken.
- **Create a Headline for the Message:** Be able to state the general message in one line. *Note:* Since the chief prosecutor represents the whole office, the prosecutor should use terms such as “we” or “our” rather than “I” or “mine.” For example:
  - “We are committed to truth, justice and equality.”
  - “Our office is the leader in seeking to end domestic violence in our community.”
  - “The prosecutor is the first defender of the innocent.”
- **Main Points:** Identify the three main points that are most important and make the points in layman’s terms and at the beginning of the presentation. Avoid legal jargon and do not assume that the public understands the criminal justice system.
- **Forbidden Areas:** It is often useful before a live appearance to outline with senior staff particular topics that should not be mentioned because of ethical rules or the need for confidentiality. Identifying these areas in advance prevents the speaker from inadvertently raising them or responding to a question with impermissible information.
- **What Does the Public Need to Hear:** The focus on information people need to hear, not what is of interest to the prosecutor’s office. Think about the issue from the audience’s perspective and explain how the issue impacts them. As an example, the prosecutor should focus on a conviction’s impact on public safety, rather than discussing the details of the trial.
- **Paint a Picture:** Tell a story to help the listener visualize the message. An anecdotal example can be useful. Have visuals if the interview is on camera.

## Practice to Consider

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### *Speaking with the Public in Mind*

*Speaking to the audience’s perspective can be as simple as picturing a specific individual in your mind and using terms you would expect them to understand. KC Steckelberg (Michigan) cites picturing her*

*85-year-old mother and figuring that if her mother would understand the information and the issues, so would the general public.*

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### Preparing for a Difficult Interview

Certain interviews are notoriously difficult, such as where a mistake in the prosecutor's office has occurred, the relationship with the reporter is hostile, or where the prosecutor cannot discuss the matters of interest to the reporter. It is essential to prepare in advance of such an interview by brainstorming with staff on possible difficult questions and formulating answers that can best address the issues. During the interview, the prosecutor should look at the reporter directly, maintain a neutral expression and keep a relaxed but alert posture. The prosecutor should acknowledge the issue rather than evade the question. Using phrases like, "Let me reiterate what the facts are," and "If I understand your question, what you are really asking is..." can help with steering the conversation in a more productive direction. The prosecutor should continue to return to the key message that explains the concerns raised in the negative press. [See Section](#) below on Incorrect and Negative Stories.

### The Press Conference

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Press conferences should be considered when an issue is truly newsworthy and timely, and where all media have a fair and equal chance to ask questions. While most prosecutors will hold press conferences a few times per year to announce charges or provide updates on criminal cases, there are occasional opportunities to partner with other local leaders for community-wide announcements. There should always be a good reason to hold a press conference with news that is timely and of current interest. If press conferences are held too often, the media and the public will lose interest.

### Planning for a Press Conference

When planning a press conference, the following issues should be considered:<sup>46</sup>

- **Goal:** What is the goal of holding the press conference?

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<sup>46</sup> KC STECKELBERG, THE MICHIGAN PROSECUTOR'S GUIDE TO COMMUNITY, MEDIA, AND PUBLIC RELATIONS at 11 (Jan. 2017).

- **Message:** What is the main message that the press conference should convey?
- **Location:** Decide where and when to hold the press conference. The location and time should make sense for media deadlines and be secure so that it is not open to the public.
- **Timing:** Determine when the press conference should be held and how timing can impact coverage.
- **Invitation List:** Decide which media outlets should be invited. Depending on the topic, the list can range from local to national media. Advance notice must be given to those on the list.



- **Number and Order of Speakers:** Usually only three or four speakers speak at the press conference. The speakers should be briefed so that the message is coordinated, the facts are reviewed and the plans going forward are consistent. Commonly the order of speakers for a prosecutor press conference has the chief prosecutor speaking first to cover the main points, then one or two law enforcement commanders to address specific issues and finally a line prosecutor with deep knowledge of the case to answer detailed questions about the case. The chief prosecutor, or the prosecutor's POI, should always maintain control of the press conference.
- **Structure:** Every press conference should begin with an introduction of less than one minute that captures the essence of what is being announced. After the introduction, the chief prosecutor should outline who is speaking, the

order of speakers, the topics covered and any ground rules such as whether questions will be allowed.

- **Length of Press Conference:** The planned remarks should collectively take no more than 15-20 minutes, with time for questions as necessary.
- **Media Questions:** The prosecutor should decide in advance whether media questions will be allowed during or following the statements and for how long.
- **Contact Person:** The prosecutor should designate a PIO or contact person for the press conference. This is usually not the chief prosecutor or the person making remarks at the press conference. It is helpful if this contact person is already known to the media. The contact person should distribute copies of the press release, handle media inquiries and coordinate briefings. The contact person should start the press conference by introducing the chief prosecutor and end the press conference when the time is up or if the questions are irrelevant, repetitive, or inappropriate.
- **Before or After the Press Conference:** Cameras or audio might be live without warning, even before or after the official time for the press conference. While in the presence of reporters, assume that your behavior will be scrutinized and always maintain a calm, neutral demeanor. It is best if the presenting team enters the press conference room together and leaves together to assure a controlled presentation.

## Practice to Avoid

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### *Letting Your Guard Down*

*Law enforcement and the District Attorney were on the side of the room waiting for the press conference to begin regarding an alleged serial child rapist. They were joking about a mutual friend while waiting, and the officers and prosecutor were laughing. The camera was shooting the room ahead of the press conference and got the joking on camera. Such conduct makes the prosecutor and law enforcement look callous and uncaring.*

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- **Law Enforcement Press Conference:** Even when a prosecutor is not involved in a press conference organized by law enforcement partners, for example,

when a suspect has yet to be apprehended, prosecutors can help in the formulation of the message if appropriate, adhering to the ethical guidelines in ABA Model Rules 3.6 and 3.8. [See Section](#) below on Special Considerations for Various Aspects of a Case.

### The Staging of a Press Conference

A properly presented press conference will present an appropriate tone and communicate professionalism. This is especially true for live camera interviews.

These include:

- **Background:** The speaker should be standing in front of a professional background that can include a law library, flags or a professionally produced media backdrop with the office logo. The background can be a solid color that is not white. If the message is serious, it can be undermined by an inappropriate setting, such as a golf course, or a messy office with joke posters.
- **Demonstrative Evidence:** It is helpful to have photos, diagrams, or physical objects to illustrate the matter at hand. However, the prosecutor must be careful not to present anything unless it is included in the probable cause affidavit or charging documents. Using actual evidence can be problematic as it may interfere with the chain of custody or be too incendiary, such as bloody clothing. In some instances, an exemplar of the evidence can be shown for reference. Law enforcement may have press conferences where recovered guns and drugs are displayed, but these are held in the law enforcement facility that has custody of that evidence.
- **Microphones:** The press conference should have a microphone that allows feeds to all media outlets present or a podium that has space for media to place their microphones.
- **Clothing:** The prosecutor should look professional and wear business attire that is simple and lawyerly. Blue shirts for men are often suggested. It is best to look in the mirror before going on camera to avoid embarrassing cosmetic or clothing issues. If law enforcement attends the press conference, they should wear their uniforms.
- **Non-Verbal Cues:** Body language, such as tone of voice, body language, and facial expressions, can convey meaning that is contrary to the desired message. Standing at a podium with relaxed and professional body language demonstrates expertise. Some hand movements are expected but should not

be excessive. For most prosecutors who are trial lawyers, such presentation skills will come naturally.

## Correcting the Record

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### Negative Story

When a prosecutor is faced with a negative story, such as criticism for not charging a case, the question is whether to respond. Often the best response is **no response**. A negative story can run for one day but if the prosecutor responds and attacks, it can turn into a multi-day story: the initial story, the response, the counter-story, and the editorial. Prosecutors can be frustrated when a publication only reports on one side of an issue and does not ask for input that could reveal countervailing facts or opinions. However, it may be best to ignore negative articles and comments as there may be no hope of changing the opinion of the writer. If prosecutors feel it is necessary to convey their position, prosecutors can talk to another reporter, seek a different media outlet, or use social media.

### Inaccurate Story

If the prosecutor finds an error in the media *and* if it is important enough to be corrected, the prosecutor should start by calling the reporter to determine if a correction can be made. If unsatisfied with the reporter's response, the prosecutor should evaluate again if the error is important enough to be corrected. If so, the prosecutor can call the reporter's editor. It is best not to paint the reporter in a negative light, but instead frame the situation positively, for example: "In your article today on drug courts, it stated that any drug case was eligible. I'm concerned that people who are convicted of these crimes will think they can automatically get drug court. Can we do a second story that includes an interview with one of the graduates of the drug court, and clarify the issue?"

If a reporter continually misrepresents the statements or information provided by an office, the prosecutor has additional options:

- **Improving the Relationship:** The office could work to improve communications with the reporter by meeting with the reporter off the record, alerting the reporter of the office's concerns, and asking the reporter if there is anything the office can do to enhance collaboration in the future.

- **Request a New Reporter:** In certain markets, a new reporter may be requested to work with the office. Equally, reporter turnover can be high, and it may be a matter of waiting until a new reporter is assigned to the criminal or governmental beat.
- **Limit Contact and Creating a Record:** To create a record of what the prosecutor says, the office can choose to only provide written statements to a media outlet, or it can video and audiotape the interview. If inaccuracies continue, the prosecutor has a record of what was given to the reporter that can be discussed with the editor.
- **Social Media:** The prosecutor has direct control of social media, which can be used to provide correct information. However, the prosecutor should be careful to only provide facts and to avoid being defensive, angry, or snarky.

## SPECIAL CONSIDERATIONS FOR VARIOUS ASPECTS OF A CASE

Criminal cases are favorite topics for the media, and throughout the pendency of the case the media will pressure prosecutors to comment. Prosecutors need to decide when to speak to the press and which topics are appropriate. What a prosecutor ethically can say to the media varies depending on the stage of the case. However, regardless of the stage of the case, prosecutors may always share information such as dates, times, and locations of future proceedings, as well as explanations of certain procedural issues, such as “what is a grand jury?”.

The following addresses each stage of a criminal case and discusses what prosecutors can ethically say during that stage.

### Active Investigation

Every case begins with an investigation to discover whether a crime occurred, who the suspects are and what evidence exists. At this stage, the case is primarily in the realm of the police. Prosecutors should be guarded and generally wait to speak publicly until after charges have been filed. However, there are some topics that prosecutors can address during this stage:



- **Investigation is On-Going:** Particularly in a highly publicized case, it may be appropriate for the prosecutor to assure the public that an active investigation is on-going. However, the prosecutor cannot provide details of the investigation or pre-judge its outcome.<sup>47</sup>

## Practice to Consider

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### *Commenting on an On-Going Investigation*

*While an investigation is on-going, the following phrases may be useful:*

*“This is an ongoing investigation, and I will keep the public informed as we move forward.”*

*“I’d like to highlight the work of our (insert department name) for making such a commitment...”*

*“It’s unethical for me to comment on an ongoing case, but I can tell you...”*

- **Coordinating with Law Enforcement:** Since the rules of professional conduct extend to law enforcement, it is important for the prosecutor to work with law enforcement to advise them on what information can be released. Some prosecutors send a letter to law enforcement outlining these limitations. [See Appendix](#) for a sample letter.
- **Locating a Suspect:** While a suspect is at large, prosecutors may make public statements and public safety warnings that will assist in the suspect’s apprehension and protect the public if the suspect is dangerous. These can include, but are not limited to, the suspect’s identity, address, occupation, and family status.<sup>48</sup> If a prosecutor decides to make additional public statements at this phase, statements should be limited to:
  - **Nature of the Offense:** The nature of the offense and identity of person involved—without opinion or commentary.<sup>49</sup>

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<sup>47</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(b)(3) (Am. Bar Ass’n 1980).

<sup>48</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(b)(7)(i), (ii) (Am. Bar Ass’n 1980).

<sup>49</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(b)(1) (Am. Bar Ass’n 1980).

- **Public Safety Warnings:** If public safety is an issue during the investigation, the prosecutor can give warnings to the public where reasonable fear exists.<sup>50</sup>

## Practice to Avoid

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### *Pressuring Suspects through the Press*

*Ten days after a woman raised allegations against members of the Duke lacrosse team, the district attorney assumed responsibility for all criminal charges and informed the police that he would be leading the investigation. Within hours of receiving an initial briefing from his investigative partners and before any arrests were made, the DA stated to a reporter that “the lacrosse team players denied the rape accusations ... and that members were not cooperating with the authorities.” Shortly thereafter, he told ABC 11 TV News that he was considering charging other players for not coming forward with any additional information, stating “my guess is that some of this stonewall of silence that we have seen may tend to crumble once charges start to come out,” and later commenting to the New York Times, “I’m disappointed that no one has been enough of a man to come forward.” He subsequently made comments to the press regarding several players’ refusal to cooperate, adding that he would consider bringing “aiding-and-abetting” and other charges against the team members.*

*The DA also made conclusory statements, such as “the guilty will stand trial”; “there’s no doubt a sexual assault took place”; and “I am satisfied that she was sexually assaulted at this residence.” He also editorialized in speaking with the press, “And one would wonder why one needs an attorney if one was not charged and had not done anything wrong,” and “They don’t want to admit to the enormity of what they have done.”*

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<sup>50</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(b)(6) (Am. Bar Ass’n 1980).

*A Disciplinary Hearing Committee found that these statements were extrajudicial statements that the DA knew would be disseminated by means of public communication and had a substantial likelihood of materially prejudicing any adjudicative proceeding, in violation of ABA Model Rule 3.6. The Committee also found that these statements had a substantial likelihood of heightening public condemnation of the accused, in violation of ABA Model Rule 3.8(f). As a result of these actions, as well as evidence tampering, lying and other prosecutorial misconduct, the DA was disbarred.<sup>51</sup>*

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- **Locating Additional Victims and Evidence:** The prosecutor can ask for assistance in obtaining evidence or additional information. In some instances, a prosecutor has asked additional victims of a particular suspect to come forward.<sup>52</sup>

## Practice to Consider

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### ***Requesting Information from the Public***

*In the investigation of a former priest who was dismissed from the clergy for child sex abuse allegations, former Circuit Attorney Jennifer Joyce issued a public statement, asking for witnesses or victims to step forward with relevant information. At the time of the investigation, the suspect worked as an elementary school counselor. Joyce had reason to believe, given the suspect's background, that there were other victims who hadn't reported the crimes against them.<sup>53</sup>*

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<sup>51</sup> North Carolina State Bar v. Michael Nifong, 06 DHC 35 (N.C. July 24, 2007).

<sup>52</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(b)(5) (Am. Bar Ass'n 1980).

<sup>53</sup> Telephone interview with Jennifer Joyce, former Circuit Attorney for the City of St. Louis, Missouri (Sept. 26, 2019). Notes on file with PCE. The Attorney General of Michigan similarly called for victims of Dr. Nassar, the physician who sexually assaulted Olympic gymnasts, to come forward. *AG – Schuette charges Gymnastics Doctor Larry Nassar with Sexual Abuse of Female Athletes*, SOM – STATE OF MICHIGAN, <https://www.michigan.gov/ag/0,4534,7-359--405498--,00.html> (Feb. 22, 2017).

- **Photos/Videos:** The release of photographs or videos of the suspect engaged in the crime or other identifying photographs may be used.

## Practice to Consider

### *Identifying the Suspect*



### After Arrest and Before Charging

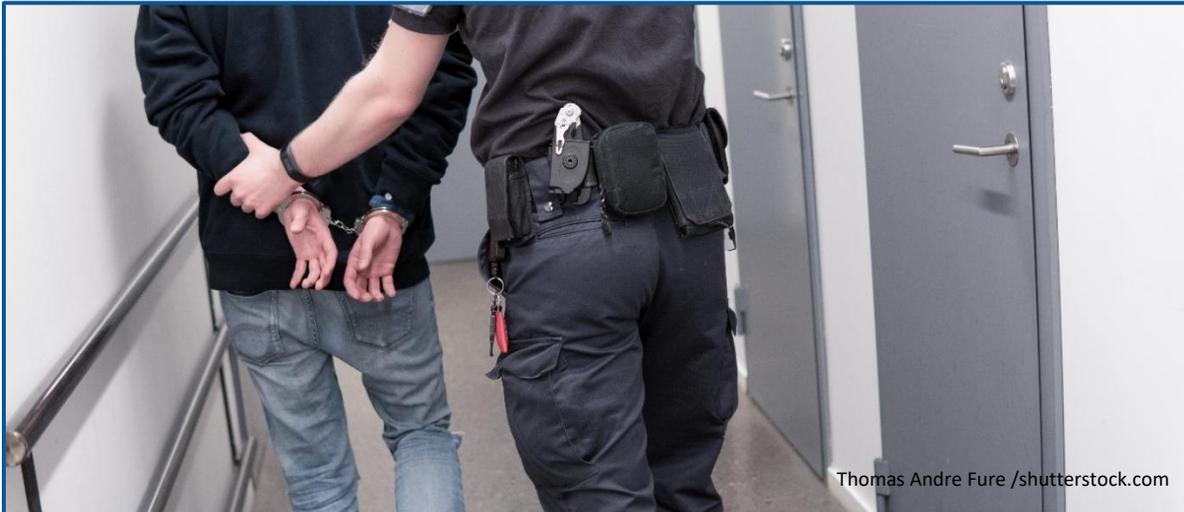
Typically, a prosecutor does not speak about an arrest until the suspect has been charged.

A prosecutor may consider the following when making public statements after an arrest and before charging:

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<sup>54</sup> Michelle Williams Ambrozaitis, Clare County Prosecutor, Michigan, FACEBOOK. (Post is no longer on Facebook as the case is resolved.)

- **Coordinate with the Police:** The prosecutor and the police should coordinate on who is speaking to the press and what information can be released. At this stage, the police are the most likely agency to be speaking with the press.
- **Comment Only After Probable Cause Has Been Established:** The prosecutor should not release information about the arrest until probable cause has been found by the judge or magistrate.
- **Limited Information About the Arrest:** If the prosecutor chooses to speak, the time and place of arrest, the scope of the investigation (without details), the investigating agencies and the name of the arresting officers can be provided to the media.<sup>55</sup>
- **Identifying the Person Arrested:** It is permissible for the prosecutor to furnish the name, age, residence, and employment of the arrestee.



## After Charging or Preliminary Hearing

Depending on the jurisdiction, the initial charging of a crime is done either by the police or by the prosecutor. Prosecutors may obtain felony charges by going to the grand jury or by conducting a preliminary hearing. Regardless of the procedures for charging an offender, once the case is charged the prosecution team should control the public messaging and coordinate with law enforcement, so they speak with one voice. Considerations for commenting after charging include:

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<sup>55</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(b)(7) (iii, iv) (Am. Bar Ass'n 1980).

- **Public Comments Limited to Court Documents:** Prosecutors can only comment on what is on file with the court and accessible to the public and cannot elaborate beyond those boundaries.<sup>56</sup> After charging, prosecutors may offer the following:
  - **Basic Information:** The prosecutor can provide pertinent, basic information, such as the name of the defendant, the charges, and the next stage of the case.
  - **Information in Court Documents:** If a prosecutor intends to comment about particular facts in an investigation or arrest, those facts should be included in the charging document.<sup>57</sup> The prosecutor’s office should review the charging document with the police before it is filed to confirm the facts. The prosecutor can only comment on what is on file with the court and accessible to the public.<sup>58</sup> The prosecutor cannot elaborate beyond quotations from or references to the contents of the public record.<sup>59</sup>
  - **Photographs and Video Recordings:** If the prosecutor wishes to release photographs of the crime or video recordings in a press conference or press release, such photographs or recordings must already be incorporated in public documents.
  - **Qualifying Statement of Innocent Until Proven Guilty:** When the prosecutor states that a person is charged with a crime, the prosecutor should include language that notes “the charge is merely an accusation, and that the defendant is presumed innocent until and unless proven guilty.”<sup>60</sup> This should be done, even if the press often will not publish the qualifying statement.
- **What Not to Say:** There are things that the prosecutor cannot say as they violate ethical rules. [See Section](#) on What Prosecutors Cannot Say for more. For example:

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<sup>56</sup> Att’y Grievance Comm’n of Maryland v. Gansler, 835 A.2d 548, 568 (Md. 2003) (“Gansler did not violate [MRPC 3.6](#) by commenting on the sneaker print matches in Cook’s case because, shortly before Gansler’s extrajudicial comments, a television reporter had broadcast an account of that evidence nearly mirroring Gansler’s version. Additionally, in the Lucas case, Gansler made statements to the media about a shoe print at the crime scene that matched shoes Lucas had been observed wearing. This information was already public as recorded in the statement of charges filed by the police the day before.”); Muex v. State, 800 N.E.2d 249 (Ind. Ct. App. 2003) (Finding that no cogent argument supported assertion that prosecutor violated Prof. Cond. R. 3.6 and 3.8. by public disclosure of DNA test results contained in probable cause affidavit).

<sup>57</sup> Att’y Grievance Comm’n of Maryland v. Gansler, 377 Md. 656, 690 (Md. 2003).

<sup>58</sup> See Muex v. State, 800 N.E.2d 249 (Ind.Ct.App.2003) (Finding that no cogent argument supported assertion that prosecutor violated Prof. Cond. R. 3.6 and 3.8. by public disclosure of DNA test results contained in probable cause affidavit).

<sup>59</sup> Att’y Grievance Comm’n of Maryland v. Gansler, 377 Md. 656, 687 (Md. 2003).

<sup>60</sup> MODEL RULES OF PROFESSIONAL CONDUCT r. 3.6 cmt. (5)(6) (Am. Bar Ass’n 1980).

- **Statements by Defendant:** The comment to ABA Rule 3.6 specifically states that the prosecutor cannot mention a statement made by the defendant.<sup>61</sup> However, if a public document references the statement, then the prosecutor can call attention to that document without repeating the statement.
- **Defendant’s Refusal to Make a Statement or Submit Evidence:** A prosecutor is barred from discussing the failure of the defendant to make a statement, or the defendant’s refusal to submit to evidentiary tests such as polygraphs, DNA, or fingerprinting.<sup>62</sup>
- **Defendant’s Criminal History:** Prosecutors may *not* provide the press with a defendant’s record of prior arrests or convictions. However, there is a tension between the ethical rules that bind prosecutor’s statements and what happens in the courtroom. While prosecutors are not allowed to speak to the press about the accused’s prior arrests and convictions, prosecutors discuss criminal history with the court during bail hearings. Bail hearings are usually open to the public, and reporters may choose to write about any information discussed in court.<sup>63</sup>
- **Prosecutor’s Own Opinion:** “The prosecutor must make clear that what is being disclosed is, in fact, the contents of a probable cause affidavit or other identified public document so the statements cannot be misunderstood to be the prosecutor's own opinion about the evidence or the suspect's guilt.”<sup>64</sup>
- **Outcome of the Case:** The prosecutor cannot discuss the possibility that the defendant may plead guilty or the prosecutor’s desired outcome of the case.<sup>65</sup>

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<sup>61</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6 cmt. (5)(2) (Am. Bar Ass’n 1980).

<sup>62</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6 cmt. (5)(3) (Am. Bar Ass’n 1980).

<sup>63</sup> Telephone interview with Bridget Brennan, the Special Narcotics Prosecutor for the City of New York (Oct. 31, 2021).

<sup>64</sup> *In re Brizzi*, 962 N.E.2d 1240, 1247 (Ind. 2012).

<sup>65</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6 cmt. (5)(4) (Am. Bar Ass’n 1980) (Defendant materially prejudiced if an attorney expresses “any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration.”).

## Practice to Avoid

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### ***Opinions Concerning the “Right” Punishment and Editorializing About the Probable Cause Affidavit***

*In the prosecution of Desmond Turner and James Stewart, a county prosecutor issued a press release stating the following: “According to the probable cause affidavit, Desmond Turner and James Stewart thought there was a large amount of money and drugs at 560 North Hamilton Street. They weren't going to let anyone, or anything get in the way of what they believed to be an easy score. There was no money in that house. There were no drugs. Seven bodies were carried out, including those of three children. I would not trade all the money and drugs in the world for the life of one person, let alone seven. Turner deserves the ultimate penalty for this crime”; as well as “The evidence is overwhelming. There are several aggravators present, any one of which would merit the death penalty. To do otherwise would be a travesty.”*

*In the case of Turner and Stewart, while the court acknowledged that no actual prejudice occurred, the press release issued by the prosecutor (a) went beyond the four corners of the probable cause affidavit; (b) did not include the “required explanation that a charge is merely an accusation and that the defendant is still presumed innocent until proven guilty”; and (c) contained opinionated, conclusory language that is “rebuttably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding.” Thus, the Court found the prosecutor in violation of ABA Model Rules 3.6 and 3.8(f) and imposed a public reprimand.<sup>66</sup>*

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<sup>66</sup> In re Brizzi, 962 N.E.2d 1240 (Ind. 2012).

## After Charges Are Announced and Before Trial

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After a prosecutor announces that charges are filed, prosecutors should remain cautious about speaking to the press or public about the case or related matters until after the matter is resolved, whether through plea, acquittal, or conviction. The prosecutor can give updates about the timing of public court appearances and can explain procedural matters which may arise while the case awaits trial. However, the prosecutor should refrain from making extrajudicial comments which serve to heighten condemnation of the accused.<sup>67</sup>

### Practice to Avoid

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#### ***Inciting the “Outrage” of the Public After Arraignment***

*Following Oliver Jovanovic’s arraignment in 1996, an ADA made the following comments to the press: “He terrorized this young woman to the point that she was too frightened to call the authorities until weeks after it happened”; “He tortured and sexually abused the woman, burning her with candle wax, biting her, sexually assaulting her and threatening to dismember her as Jeffrey Dahmer, the serial killer, had done with his victims”; “He was so prepared for this and carried it off so smoothly”; “We believe this was not the first time he did something like this”; and “We believe there are other victims.” These comments made the headlines of every local newspaper. After the Appellate Division found numerous trial errors, Jovanovic’s conviction was reversed and remanded for a new trial. Twenty-three months later, all charges were dismissed with prejudice.*

*Three years after the dismissal of the indictment, Jovanovic sued the ADA and the arresting officer for false arrest, malicious prosecution, malicious abuse of process and denial of his right to a fair trial. Jovanovic alleged that the ADA made damaging extrajudicial statements to the press in an effort to secure a conviction against him, which denied his right to a fair trial.*

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<sup>67</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.8(f) (Am. Bar Ass’n 1980).

*The court found that the ADA “made a number of statements to ... the press ... that can reasonably be described as beyond the scope of her official duties as a prosecutor,” and refused to dismiss the complaint. Ultimately, and only after years of litigation, the court granted summary judgement in favor of the ADA, because “her extrajudicial statements — even if unwise and/or improper — did not in fact deprive Jovanovic of a fair trial.”<sup>68</sup>*

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## Trial Stage

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As the start of trial nears, prosecutors must be even more careful about making public statements concerning the case or any arguably related matter. The information shared should continue to comport with the ABA Model Rules 3.6 and 3.8, and be limited to publicly available information. Many appellate courts, including the United States Supreme Court, have held that publicity closer to a trial has a higher likelihood of denying a defendant a fair trial and, likewise, a higher chance of having a guilty verdict being overturned on appeal.<sup>69</sup> Prosecutors should always abstain from criticizing the court, defense counsel or a jury, even inferentially.<sup>70</sup>

## Practice to Avoid

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### ***Commenting Anonymously About Ongoing Case***

*During an ongoing federal trial of police officers who shot unarmed people following a natural disaster, two senior federal prosecutors*

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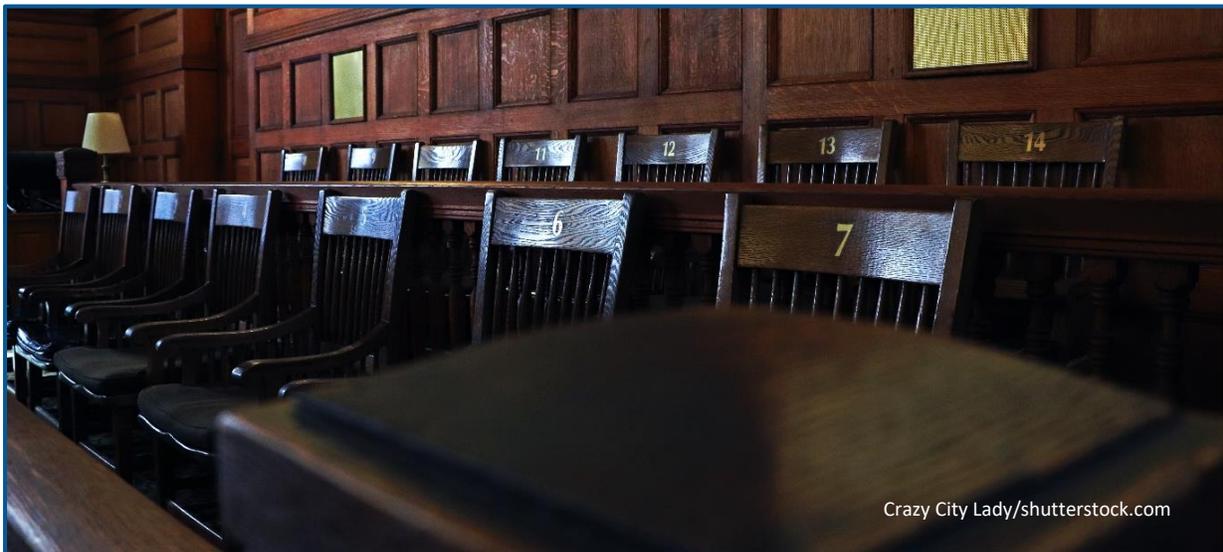
<sup>68</sup> *Jovanovic v. City of New York*, 04 CV 8437 (PAC) (S.D.N.Y. Aug. 17, 2006); (S.D.N.Y. Feb. 7, 2008); (S.D.N.Y. Sept. 28, 2010).

<sup>69</sup> *Jones v. Davis*, 890 F.3d 559, 572-73 (5th Cir. 2018) (Finding that a 6-month span between publicity and trial weighs against prejudice); *Murray v. Schriro*, 882 F.3d 778, 805 (9th Cir. 2018) (Finding that media pretrial publicity did not “utterly corrupt” the fairness of the trial); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1044 (1991) (“Exposure to the same statement six months prior to the trial would not result in prejudice, the content fading from memory long before the trial date”); *United States v. Coast of Maine Lobster Co.*, 538 F.2d 899, 902 (1<sup>st</sup> Cir. 1976) (“Statements that a prosecutor makes while a trial is pending and which foreseeably may be made public while the trial is pending, however, stand on a different footing. Because of the prosecutor's sensitive position and his duty to ensure a fair trial, we think that any statements made under such conditions must be carefully examined.”).

<sup>70</sup> American Bar Association Standard, Criminal Justice Standards for the Prosecution Function: Standard 3-6.2: Civility with Courts, Opposing Counsel, and Others, November 12, 2018.

*posted on a local newspaper's website anonymously through the use various pseudonyms.<sup>71</sup> These comments included opinions of guilt, desired outcomes for the defendants, complaints about the defense attorney and unfavorable comments about the local police. While the prosecutors who posted on the website were not trying the case, they were in a supervisory position within the office.*

*After the jury returned a guilty verdict, the court was informed of the online comments and ordered an investigation. The court reversed the convictions and granted their motions for new trial, citing "grotesque prosecutorial misconduct."<sup>72</sup> As a result of the online comments, one of the federal prosecutors<sup>73</sup> was disbarred and the U. S. Attorney resigned.<sup>74</sup> Subsequently, most of the defendants accepted plea deals for lesser charges with less severe punishments.<sup>75</sup>*



During trial, the rules of what can and cannot be shared with the media do not change. While impartial and open-minded jurors may have been empaneled, the

<sup>71</sup> In Re Salvador R. Perricone, 263 So.3d 309 at 311 (La. Dec. 5, 2018).

<sup>72</sup> *Id.* at 313.

<sup>73</sup> *Id.* at 319.

<sup>74</sup> Sean Horowitz, *New Orleans U.S. Attorney Resigns Amid Scandal Over Anonymous Online Postings*, WASH. POST (Dec. 6 2012), [https://www.washingtonpost.com/world/national-security/new-orleans-us-attorney-resigns-amid-scandal-over-anonymous-online-postings/2012/12/06/c95c0d4a-3ef1-11e2-bca3-aadc9b7e29c5\\_story.html](https://www.washingtonpost.com/world/national-security/new-orleans-us-attorney-resigns-amid-scandal-over-anonymous-online-postings/2012/12/06/c95c0d4a-3ef1-11e2-bca3-aadc9b7e29c5_story.html).

<sup>75</sup> U.S. v. Bowen, 799 F.3d 336 (5th Cir. 2015).

danger of tainting the jury with media exposure remains. Unless the jury is sequestered, even the most well-intentioned jury may catch a glimpse of a newspaper headline or a flash of a television news report.<sup>76</sup> For many offices, the practice is not to make any comments during a trial. In high-profile cases, a court's decision to impose a gag order will ultimately decide the matter and such orders must be scrupulously followed for all types of media, including social media.<sup>77</sup>

## Practice to Avoid

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### *Speaking Out During Trial*

*After a week-long mail and wire fraud trial, and the night before the case would be sent to the jury for deliberations, the prosecuting U.S. Attorney appeared on a local television broadcast. He stated that “people who commit so-called white-collar crimes are not considered very apt candidates for much time in jail.”<sup>78</sup> The next morning, the widely read local newspaper banner headline read: “Mills: White Collar Criminals Get Off Easy.” The article discussed “Mills’ opinion that white collar criminals, such as those convicted of income tax evasion, received inadequate jail sentences.”<sup>79</sup> Further, “while expressing his ‘utmost respect’ for the district judge, Mills felt he could properly make known his differences.”<sup>80</sup> The court questioned the jurors and found that “seven or eight jurors” admitted to seeing the headlines in the paper the day deliberations were to commence.<sup>81</sup>*

*The Court of Appeals held that the U.S. Attorney’s statement, which called for tougher treatment on the type of criminal case that the*

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<sup>76</sup> U.S. v. Coast of Maine Lobster, 538 F.2d 899, 900–01 (1st Cir. 1976).

<sup>77</sup> Some violations of gag orders can result in contempt of court hearings. See Tom Steele, *Dallas County DA John Creuzot faces contempt hearing over interview about Amber Guyger’s case*, DALLAS MORNING NEWS (Oct 4th, 2019), <https://www.dallasnews.com/news/2019/10/04/dallas-county-da-john-creuzot-faces-contempt-hearing-interview-amber-guygers-case/>.

<sup>78</sup> *United States v. Coast of Maine Lobster Co.*, 538 F.2d 899, 900 (1st Cir. 1976).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 901.

*jury was being called upon to decide, impugned the integrity of the trial.<sup>82</sup> Therefore, the judgment was vacated, and the new trial was ordered.<sup>83</sup>*

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## After a Conviction

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Following a conviction, prosecutors should consider whether a press release or press conference is appropriate for the case and the office.<sup>84</sup> There will be times when press releases and conferences are essential, especially when there is significant public interest in the case. Considerations vary depending on whether the press release will be before or after sentencing.



- **Before Sentencing:** After conviction but before sentencing, the prosecutor may want to address the public in a few circumstances, such as when there is a conviction in a violent crime of concern to the public or when there are aspects of the trial evidence that can explain the guilty verdict. Press releases

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<sup>82</sup> *Id.* at 902.

<sup>83</sup> *Id.* at 903.

<sup>84</sup> For example, the U.S. Attorney's Office for D.C. appears to have a press release for every charge, conviction, and sentencing. In contrast, the Manhattan District Attorney's office is more selective which cases are appropriate for press release. See U.S. Attorney's Office, D.C.: News, U.S. Dept. of Justice, <https://www.justice.gov/usao-dc/pr> (last viewed: 11/2/2019); News: Press Releases, Manhattan District Attorney's Office, <https://www.manhattanda.org/category/news/press-release/> (last viewed 11/2/2019).

may also be an opportunity to provide information about the criminal justice system and how the prosecutor's office serves the public. The prosecutor can thank the trial team, law enforcement, victim advocates and other who helped with the trial. On the other hand, the use of phrases such as "justice was served" are to be avoided in favor of phrases such as, "we hope this verdict gives the victim (and/or family) a sense of peace." Prosecutors must be mindful of the possibility of appeal and that statements made at this stage can be used in litigation. This means that a post-verdict press conference or press release should not be "too incendiary."

- **After Sentencing:** After sentencing, prosecutors may be allowed more latitude while addressing the public given that ABA Model Rules 3.6 and 3.8 focus on statements prior to conviction. At this stage, a press release is also appropriate, however, it should not include statements about what the prosecution "wanted" in terms of punishment but instead it should recognize the court's role and authority. In addition, thanks should be given to law enforcement, other attorneys, and others who helped with the successful prosecution.

## After an Acquittal, Dismissal or Decision Not to Charge

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**Acquittal or Dismissal:** After an acquittal or dismissal, the best media strategy for a prosecutor is silence.<sup>85</sup> Any statements that have the effect of suggesting that the acquitted person is guilty are inappropriate.<sup>86</sup> Instead, prosecutors may consider updating any earlier press releases to reflect that the defendant was acquitted. If pressed for a public statement, at most, the prosecutor's office may want to respond with: "The office respects the jury's verdict."

It is strongly advised that prosecutors do not express disappointment with a judge's rulings or handling of a case: "[w]hile the prosecutor may publicly express respectful disagreement and an intention to pursue lawful options for review, the prosecutor should refrain from public criticism of any participant."<sup>87</sup> Aside from

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<sup>85</sup> Telephone interview with Jennifer Joyce, fmr. Circuit Att'y for the City of St. Louis (Sept. 26, 2019) (Notes on file with PCE).

<sup>86</sup> American Bar Association Standard, Criminal Justice Standards for the Prosecution Function: 3-6.10 Comments by Prosecutor After Verdict or Ruling, November 12, 2018 ("The prosecutor should respectfully accept acquittals.").

<sup>87</sup> ABA PROSECUTION FUNCTION 3-6.10.

ethical guidelines, there are practical reasons for not criticizing the judge as the prosecutor's office usually continues to appear before that judge.

## Practice to Avoid

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### *Publicly Criticizing Judicial Decisions*

*The prosecutor was investigating the illegal sale of prescription drugs in New York by individuals operating a pharmacy in Florida. After five separate indictments were dismissed by the court, the DA sent the following statements to media outlets: “[The judge’s] decision is a get-out-of-jail-free card for every criminal defendant in New York State. His message to defendants is: ‘if your DA is being too tough on you, sue him, and you can get a new one.’ The Court’s decision undermines the criminal justice system and the DA’s who represent the interest of the people they serve. We are seeking immediate relief from [the judge’s] decision and to close this dangerous loophole that he created.”*

*The New York Supreme Court censured the DA, finding that he violated the New York Rules of Professional Conduct and engaged in conduct that was prejudicial to the administration of justice.<sup>88</sup>*

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**Not Charging a Case:** Prosecutors who have decided not to charge a case, or where the grand jury has returned a bill of no indictment “may make a public statement explaining why criminal charges have been declined or dismissed, but must take care not to imply guilt or otherwise prejudice the interests of victims, witnesses or subjects of an investigation.”<sup>89</sup> Even if charges are not filed, prosecutors should still be careful not to reveal confidential information such as a sexual assault victim’s name, a juvenile’s name, or grand jury testimony.

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<sup>88</sup> In re P. David Soares, 947 NYS.2d 233 (NY App. Div. 2012).

<sup>89</sup> ABA PROSECUTION FUNCTION 3-1.10(c).

## New Trial Granted After Appeal

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There is the possibility of the trial or appellate court granting a new trial under certain circumstances. If the case is remanded for a new trial, ethics rules dictate that the prosecutor continue to refrain from extrajudicial statements described in [ABA Model Rule 3.6](#).

## Practice to Avoid

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### *Commenting on Judicial Ruling Before the Retrial of a Case*

*As part of his reelection, a county state's attorney ran a large press campaign including an ad in a local newspaper that featured his photograph with the following comments: "In 1976 I prosecuted State v. George Hohman and he was convicted of murder. The conviction was overturned because the judge allowed evidence to be improperly admitted, not because of prosecutorial misconduct ... The Hohman case is the most important case pending ... If I am re-elected, I will vigorously prosecute Hohman and obtain a second conviction." Although the court determined that these statements prejudiced the plea-bargaining stages of the proceedings, the jury's verdict cured this prejudice. While the court was "unable to find any instance in which the bias of the prosecutor touched the trial itself," it strongly condemned the state's attorney's statements, stating, "the awesome power to prosecute ought never to be manipulated for personal or political profit."<sup>90</sup>*

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## Victims and the Press

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### Victim's Right to Confer with the Prosecutor

All states have victim rights statutes or constitutional amendments that call for the victim to be treated with fairness, dignity, and respect throughout the criminal process. At the federal level and in several states, victims have the right

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<sup>90</sup> State v. Hohman, 138 Vt. 502, 505 (Vt. 1980).

to confer with the prosecutors regarding their case.<sup>91</sup> There is varied guidance on what “confer” or “consult” can mean.<sup>92</sup> In some jurisdictions, the right to confer with the prosecutor arises only after a charge has been initiated; while in others, the victim’s right may arise sooner. Prosecutors should assess their state statutes and constitution to ascertain both the timing of when the victim’s right to conferral attaches and the scope of the victim’s right to conferral.

The prosecutor should be aware that any details provided to a victim could be repeated by the victim to others, including the media. The ABA Model Rules and state Rules of Professional Responsibility could apply with equal strength to disclosing the details of a case to a victim as it does to disclosing information to the media. This is especially true if the prosecutor “knows or reasonably should know [the information] will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”<sup>93</sup>

The prosecutor should develop an office policy that considers the victim’s right to conferral in light of the ethical rules.

### Protecting Victim Confidentiality

When issuing a public statement prosecutors should be careful not to reveal the victim’s identity without the consent of the victim. This is particularly important in sensitive cases such as sex crimes, child abuse or domestic violence. Though the victim’s name may have been revealed in public documents or in court, the prosecutor should be mindful that release of a victim’s name in a press statement may cause additional trauma to the victim.

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<sup>91</sup> “One of the most significant rights for crime victims is the right to be heard during critical criminal justice proceedings that affect their interests. Such participation is the primary means by which victims play a proactive role in the criminal justice process”. See, <https://victimlaw.org/victimlaw/pages/victimsRight.jsp>; [https://www.ncjrs.gov/ovc\\_archives/bulletins/legalseries/bulletin7/2.html](https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin7/2.html); and <https://law.lclark.edu/live/files/16341-11-0813-644-pub-toolkit-on-conferralpdf> (last viewed on 9/20/2021).

<sup>92</sup> See, [https://www.ncjrs.gov/ovc\\_archives/bulletins/legalseries/bulletin7/2.html](https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin7/2.html) (last viewed on 9/20/2021).

<sup>93</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(a) (Am. Bar Ass’n 1980).

## Crisis Communications

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### General Considerations

Crises come without warning. They can range from mass shootings to officer involved fatalities to criminal conduct by public officials. A prosecutor's office may come under the spotlight of national media attention in an instant. When a crisis occurs, several factors can happen at once: the public may be worried about their personal safety; some groups may be angry about the criminal justice system; misinformation may have been released; and law enforcement officials or elected officials may engage in inconsistent approaches to the crisis. These events are fast moving and chaotic. Thus, it is prudent for a prosecutor office to develop a crisis communication plan in advance. The ethical rules provide some guidance on what a prosecutor can do in such a circumstance, including releasing information that can aid the law enforcement process, promote public safety, dispel widespread concern, quell unrest, or promote confidence in the criminal justice system.<sup>94</sup>



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<sup>94</sup> NATIONAL DISTRICT ATTORNEYS ASSOCIATION, National Prosecution Standards (Third Edition), <https://ndaa.org/wp-content/uploads/NDAANPS-3rd-Ed.-w-Revised-Commentary.pdf>; MODEL RULES OF PROFESSIONAL CONDUCT r.3.8 (f) (Am. Bar Ass'n 1980) (Allowing statements that serve a legitimate law enforcement purpose).

The following are considerations for developing a crisis communication plan.

- **Quick Reaction:** The first message and information to reach the public arena usually determines the narrative. Given the 24-hour news cycle, someone else will define the issue if the prosecutor does not comment first. The first response to the public should be within 24 to 48 hours, even if all the information is not yet available. The prosecutor can let the public know that the case is evolving and that officials are still in the information-gathering stage. The prosecutor can also start by giving a time for the “first update,” such as “DA Smith will hold a press conference today at 4:00 p.m.” If the first statement is a live press conference, and the prosecutor wants there to be no questions, this should be made clear at the time the press conference is scheduled. The media usually will honor this request in their rush to get their stories out immediately. In addition, the prosecutor can choose a location that allows for an immediate exit after making the initial statement.
- **Community and Law Enforcement Contact Information:** To prepare for a crisis **before** a crisis arises, prosecutors, law enforcement and relevant elected officials should exchange contact information, including cell phone numbers, for the person within each agency who should be notified if an emergency occurs. This will allow quick coordination and a means of exchanging information between the entities communicating with the press. The prosecutor should also have contact information for community leaders, clergy, and leaders of advocacy groups so they can be contacted and updated.
- **Media Contact Information:** Though this should be a standard practice, maintaining a list of key media contacts is essential for a crisis that is ever evolving. The prosecutor should collect contacts for all varieties of local and national media: newspapers, social media, online news services and relevant websites. [See Section](#) above on Preparing for Communicating with the Media.
- **The Communication Team:** In times of crisis, the chief prosecutor is usually the spokesperson. The prosecutor should be prepared and calm. This will convey the gravity of the situation, give the public confidence that the prosecutor is engaged and inspire trust that matters will be handled properly. However, in a crisis there is much to be done and the office should designate a backup spokesperson and a point person for gathering information and arranging logistics. The communication team must be flexible and resilient, as

the communications needs will inevitably quickly evolve. Media training for the communications team, *in advance* of a crisis, is the best course of action.<sup>95</sup>

- **The Message:** While each crisis has its own distinct message, there are some common approaches to consider:
  - **Describe the Procedural Steps:** Describe the issue or situation and the procedural steps that are being taken. For example: “Today we have requested an independent investigation of the shooting of Mr. Smith. An independent investigation involves... Once this investigation is completed, we will review the results and keep you informed about the process.”
  - **Victim:** Express compassion for the victim(s) and provide help where possible.
  - **Ethics:** Explain the rules of ethics and comply with those rules.
- **On-Going Communication Outside the Office:** The prosecutor should make clear that they will keep an open line of dialogue with the media and will provide a timeline for release of information. The prosecutor, PIO or press contact should update the media as often as practical, with information that can be publicly shared. Media conference calls or regularly scheduled briefings at a single location are the most effective methods of providing information in times of crisis.
- **On-Going Communication Within the Office:** The head prosecutor should communicate regularly with the office’s staff, so they are apprised of ongoing issues, such as upcoming trials, the possibility of press being outside the office or potential protests. Blind copying the staff on press releases and other media announcements is an easy way to keep the office advised of current information, both in a crisis and for regular public releases. In some instances, safety precautions will need to be taken on behalf of the staff.
- **Media Monitoring:** A designated employee in the prosecutor’s office should track media, social media, and public communications from all sources regarding the crisis, both while the crisis is on-going and when the crisis appears to be over. The prosecutor should be prepared to issue further information, especially if the monitoring reveals that questions have been left unanswered or if there is misinformation about procedural issues.

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<sup>95</sup> Media training for prosecutors is available from the National District Attorney’s Association, see, <https://ndaa.org/training-courses/> and the Vera Causa Group, see <https://www.veracausagroup.com/>. See NATIONAL DISTRICT ATTORNEY’S ASSOCIATION, Training Courses, <https://ndaa.org/training-courses/> (last viewed on 8/8/2021); VERA CAUSA GROUP, <https://www.veracausagroup.com/> (last viewed on 8/8/2021).

## Officer-Involved Fatalities

The death of a person at the hands of a police officer creates challenging issues for prosecutors. This is a divisive topic that is likely to make headlines,<sup>96</sup> may spark national and international attention and can trigger protests in the community.<sup>97</sup> The prosecutor must not only investigate the case and decide whether to charge the officer, but the prosecutor must also determine how to communicate these decisions to the public. Unfortunately, there is little understanding by the public or the media about the statutes governing the prosecution of such cases and the ethical rules that constrain prosecutors from commenting. This will put the prosecutor's crisis communication strategy to the test.

There are many overlapping aspects of handling an officer involved shooting that can be intertwined with press inquiries, including dealing with protests, addressing community relations, and conducting an investigation. These are beyond the scope of this article. However, some overarching principles apply, that are included below.



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<sup>96</sup> See P.R. Lockhart, *Why Police Violence Needs to be Treated as a Public Health Issue*, Vox (Aug. 14, 2019), <https://www.vox.com/identities/2019/8/14/20803872/police-violence-mortality-public-health-black-men-rutgers>.

<sup>97</sup> See Richard Johnson, *Dispelling Myths Surrounding Police Use of Lethal Force*, DOLAN CONSULTING GROUP (July 2016), <https://www.dolanconsultinggroup.com/wp-content/uploads/2019/02/Dispelling-the-Myths-Surrounding-Police-Use-of-Lethal-Force.pdf>; Amina Khan, *Getting Killed by Police is a leading cause of death for young black men in America*, L.A. Times (Aug. 16, 2019), <https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men>.

### ***Before the Charging Decision is Made***

An officer-involved death is a common example of a high-profile event that requires preparation and strategy. Here are some steps that prosecutors can consider for their interaction with the press and the community as they are investigating such a case:

- **Advise the Press About Process and Timing:** Explain to the press the applicable statutes, the applicable ethics rules, and the process for the investigation. The prosecutor should convey that they are taking the matter seriously and will conduct a fair and impartial investigation. If an independent agency is conducting the investigation, this should be stressed. The press should be briefed regularly on these procedural matters.
- **Reach Out to Community Leaders:** The prosecutor can reach out to community leaders to let them know the process for investigating the case and when a decision may be forthcoming.
- **Reach Out to Members of the Victim’s Family:** The prosecutor can meet with the victim’s family to explain the process, ask for any information they may have and provide a timeline for the investigation.
- **Releasing Evidence Before Charging Decision is Made:** One controversial issue is whether to release police body worn camera footage in advance of a charging decision. A strict reading of ABA Model Rules 3.6 and 3.8 could prohibit prosecutors from releasing the recordings at this stage.<sup>98</sup> If the officer is charged, releasing the body worn camera footage, or other evidence, could be considered an ethics violation. However, to quell community unrest, the police often release video footage soon after the high-profile incident. Before such an event occurs, the prosecutor should work with the police to establish guidelines for the release of video evidence.

### ***After the Charging Decision Is Made***

If the officer is charged, the prosecutor must follow the ethical guidance governing pending cases. This is discussed in detail in the sections above.

If the officer is not charged, the prosecutor can provide a detailed explanation of why the office was found to be legally justified. A full explanation of the

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<sup>98</sup> Thomas Hogan, *Prosecutors Can Take Refuge in the Law*, CITY JOURNAL (Jun. 3 2021), <https://www.city-journal.org/should-prosecutors-release-videos-of-officer-involved-shootings>.

prosecutor's decision is helpful to assuage community concerns. Prosecutors are increasingly preparing reports and demonstrative evidence, including the release of videos and other recordings, that explain the evidence, outline the law, and reconcile conflicting information. The prosecutor must convey that the office is guided by adherence to objective standards, applicable laws and pre-existing processes that govern the criminal justice system and inform prosecutorial decision making.<sup>99</sup>

## Practice to Consider

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### ***Navigating High-Profile Cases: An Opportunity to Teach the Public***

*In response to many protests and media scrutiny after a grand jury failed to indict a police officer for shooting an unarmed man, a group of prosecutors from various offices were trained through the Missouri Office of Prosecution Services to prepare briefings for the press. They received advance copies of the grand jury transcripts that were made available to the public and synthesized the materials so they could explain the facts to the news outlets anxious for information. They also prepared documents that explained the procedures mandated by Missouri law, such as "Grand Jury 101" and "Officer-Involved Shootings 101." These summaries outlined the legal issues and judicial processes relevant to the case and were used to educate the public and the media.<sup>100</sup>*

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<sup>99</sup> A full discussion of how prosecutors can report their decision regarding an officer involved fatality is outside the scope of this paper. *See also*, Thomas P. Hogan, *Officer-Involved Shooting Investigations Demystified: Slashing through the Gordian Knot*, 13 DREXEL L. REV. 1 (2020).

<sup>100</sup> Telephone interview with Jennifer Joyce, former Circuit Attorney for the City of St. Louis (Sept. 26, 2019) (Notes on file with PCE).

## CONCLUSION

Modern prosecutors must be prepared to engage with the press and the public. The 24-hour news cycle and explosion of social media do not allow prosecutors the luxury of remaining silent. Prosecutors must listen to the public and respond to their concerns within the strictures of what is ethically allowed. This requires preparation, planning, and an understanding of the ethical rules. Though addressing the public is rendered more challenging by the various restrictions, prosecutors can nevertheless effectively communicate their message. As prosecutors increase their outreach, the public's faith in the criminal justice system will grow. In turn, this will encourage innovative and effective partnerships to emerge. The public deserves no less.

# APPENDIX

## Selected ABA Model Rules Governing Extrajudicial Statements Made by Prosecutors

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### Rule 3.6: Trial Publicity

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

(b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of 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 case, in addition to subparagraphs (1) through (6):
  - (i) the identity, 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 fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue 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.

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

***Comments:***

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a

proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration. These subjects relate 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 case or proceeding 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 case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that 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.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

#### Rule 3.8(f): Special Responsibilities of a Prosecutor

3.8(f): Except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

#### **Comments:**

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation

of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

#### Rule 4.1: Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person.

#### Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make

reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

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

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

### Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

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

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

## Rule 8.2: Judicial & Legal Officials

8.2(a): A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

## Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(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;

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

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

## Sample of Communication Materials

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### Sample Press Release of an Arrest

#### **(City) Man Arrested for Child Abuse 1<sup>st</sup> Degree and 2<sup>nd</sup> Degree**

(County Name) Prosecuting Attorney (Name) has charged (name) of (city) with one count of child abuse 1<sup>st</sup> degree, one count of child abuse 2<sup>nd</sup> degree and as a habitual 3<sup>rd</sup> offender. Mr. P is presumed innocent until proven guilty.

On October 6, 2020, Officers from the Police Department were dispatched to a residence in the city of \_\_\_ to assist in a potential child abuse investigation. During the course of the investigation, it was learned that a one-year-old victim suffered severe injuries. The young victim was airlifted to Bronson Hospital in critical condition, whereat she was treated for her serious injuries.

The investigation completed by the Police Department resulted in the arrest of (name), DOB 11/19/1994, on January 7, 2021 after charges were authorized by Prosecuting Attorney (Name), charging Mr. P with one count of child abuse 1<sup>st</sup> degree, which carries a maximum penalty of life in prison, and one count of child abuse 2<sup>nd</sup> degree, which carries a maximum penalty of 10 years in prison, all as a habitual 3<sup>rd</sup> offender, which doubles the potential maximum penalty.

Mr. P was arraigned on January 8, 2021. The preliminary examination for the matter is schedule for \_\_\_\_\_, 2021.

The (\_\_) County Prosecuting Attorney's office would like to thank the Police Department, Child Protective Services, Bronson Hospital, and Promedica Hospital for their investigation and care in this matter.

## Sample Press Release of a Sentence

HALL OF JUSTICE  
330 WEST BROADWAY  
SAN DIEGO, CA 92101  
(619) 531-4040  
SanDiegoDA.com



DAVID P. GREENBERG  
ASSISTANT DISTRICT ATTORNEY

September 28, 2020  
For Immediate Release

Contact: [Steve Walker](#) (619) 531-3890  
[Tanya Sierra](#) (619) 531-3315  
*En Español* [Barbara Medina](#) (619) 531-3305

# Man Sentenced to One Year in Jail for Shooting Out Windows of Black-Owned Business

## *Steve Soto Used a BB Gun in Shooting Spree in North County*

San Diego County District Attorney [Summer Stephan](#) announced today that a 23-year-old man has been sentenced to one year in jail after pleading guilty to felony vandalism, a misdemeanor hate crime, and an unrelated felony assault charge. San Diego Superior Court Judge Harry Elias handed down the sentence, which was previously stipulated when the defendant, Steve Soto, pleaded guilty on August 28.

During a Black Lives Matter protest in early June, Soto drove by an Oceanside café with a BLM and black-owned sign posted and shot out the front window of the business with a BB gun.

“We want the public to know that we will fight hate in all its forms,” DA Summer Stephan said. “Hate Crimes impact the entire community and erode our right to equality and fairness.”

In 2019 and 2018, the District Attorney’s Office filed hate crime charges against 30 people. The number represents a continued increase from cases filed in previous years. Historically, race-based hate crimes make up between 50 and 60 % of all hate crimes in the County.

Earlier this year, the District Attorney’s Office set up a new online form and hotline where the public can report suspected hate crime they’ve witnessed in San Diego County. The tool is partly in response to reports of hate-related incidents aimed at the Asian community across the nation in the wake of the COVID-19 pandemic, as well as the arrest of a 66-year old man in San Diego, who physically attacked a man he perceived to be Chinese-American.

“We know that people often don’t report hate crimes because of fear or shame, and we wanted to provide a direct avenue to encourage victims or witnesses to hate crimes to report,” DA Stephan said. “People can and should continue to report hate crimes to their local police departments and Sheriff’s

Follow the District Attorney’s Office on     

Department. This additional reporting mechanism will act as a safety net and help ensure reports are reviewed and shared by law enforcement.”

The ***online reporting form*** can be found on the District Attorney’s website ***here***. The Hate Crimes Hotline number is 619-515-8805.

Anyone submitting information about a suspected hate crime will be contacted with information about the DA’s review of the report and any action that may be taken. The public is reminded that hate speech in and of itself often does not rise to the level of a hate crime, but it could escalate to criminal behavior. By law, a hate crime is a criminal act committed against another person that is motivated by prejudice against a person’s race, ethnicity, religion, gender, sexual orientation or disability.

###

***About the San Diego County District Attorney’s Office***

*The San Diego County DA’s Office prosecutes all felony crimes in the county and misdemeanor crimes committed outside the City of San Diego. The office files about 40,000 criminal cases a year and balances prosecution with numerous crime prevention programs. District Attorney Summer Stephan leads the office of more than 1,000 dedicated employees who pursue fair and equal justice, and support victims daily across San Diego County.*

## Sample Press Release on a Guilty Plea

### **DA SINI: BELLPORT MAN PLEADS GUILTY IN CONNECTION WITH 2019 FATAL MOTOR VEHICLE CRASH IN MIDDLE ISLAND**

(SUFFOLK COUNTY, N.Y.) – Suffolk County District Attorney Timothy D. Sini today announced the guilty plea of a Bellport man in connection with a fatal motor vehicle crash in Middle Island on Feb. 9, 2019.

“This was a tragic incident; three people lost their lives because of the reckless, dangerous actions of the defendant,” District Attorney Sini said. “Today’s conviction holds him responsible for those deaths and provides justice for the victims and their families.”

Nahriek Belford, 19, pleaded guilty today to Assault in the First Degree, a B violent felony; two counts of Manslaughter in the Second Degree, a C felony; and Unlawful Fleeing of a Police Officer in the First Degree, a D felony.

At approximately 11:45 p.m. on Feb. 9, 2019, Belford, while driving a 2015 Nissan Rogue that had been reported stolen two days prior, was observed by a Suffolk County Police officer failing to stop at a stop sign at the intersection of Yaphank Avenue and Main Street in Yaphank. The officer attempted to initiate a traffic stop.

Belford fled from the police officer at a high rate of speed, driving recklessly through several residential neighborhoods in an attempt to evade the officer.

At approximately 11:50 p.m., as Belford was traveling westbound on Middle Country Road/Route 25 in Middle Island, he struck a 2009 Honda CRV that was attempting to make a left turn onto Birchwood Park Drive. Belford was driving at a speed of 106 mph immediately prior to the crash. The force of the impact caused the Honda to be cut in half.

The passengers in the Honda, Jerome Weingarten, 74, and his wife, Randee Weingarten, 71, of Middle Island, were both pronounced dead at the scene by a physician assistant from the Office of the Suffolk County Medical Examiner. Belford’s brother, Angelo Belford, 19, of Bellport, who was a passenger in the Nissan, was also pronounced dead at the scene.

Belford is scheduled to be sentenced by Suffolk County Supreme Court Justice Fernando Camacho on March 25. He is being represented by the Legal Aid Society.

This case is being prosecuted by Jacob Delauter, of the Vehicular Crime Bureau.

## Sample Press Release on a Racial Justice Initiative

### **Director of Racial Justice Initiatives Appointed by Middlesex District Attorney Marian Ryan**

In the First-of-Its-Kind Role, Director will Identify and Address Potential Issues and Help Drive Policy around Racial Bias, Equity and Inclusion in Middlesex County  
POSTED ON: MARCH 4, 2021 - 9:25AM

WOBURN – Middlesex District Attorney Marian Ryan today announced the hiring of Antonia Soares Thompson as the newly created Director of Racial Justice Initiatives in the Middlesex District Attorney’s Office. In this role, Soares Thompson will deepen and expand the Office’s commitment to racial justice and the fairness of its prosecutorial work, create and implement trainings and education initiatives and develop policies related to racial equity across communities in Middlesex County.

“With this new role, we will continue to put addressing issues of race in our communities at the forefront of our work, leading the way in reimagining how a prosecutor’s office addresses issues of racial justice. Antonia has a rich and deep reservoir of experience working on the issues about which the Middlesex District Attorney’s Office cares deeply. Antonia is a recognized leader and we are thrilled to welcome her,” said District Attorney Ryan.

Soares Thompson will be an integral part of the Office’s work in engaging staff and other law enforcement partners through training. Soares Thompson’s duties will include: ensuring that the Office’s prosecutors are meaningfully conversant in issues of racial justice; leading conversations around policies and practices that can improve relations between the County’s police departments and the communities that they serve; and, providing a critically important voice in District Attorney Ryan’s ongoing efforts to identify and eliminate racial bias within the Office’s administration of criminal justice in Middlesex County. Thompson will also serve as a member of the Office’s Anti-Hate, Anti-Bias Task Force - which addresses the increase of hateful, biased and racist incidents -in our local communities.

“I am excited to join the team of Middlesex County District Attorney’s office. I look forward to the transformative work of Diversity, Equity and Inclusion on the County’s Criminal Justice System. The work of racial justice within our county must be approached with context, courage, compassion and community if we want honest and impactful progress. I know DA Ryan is committed to asking tough questions, having difficult conversations and creating equity as well as justice for all the residents in Middlesex County,” Soares Thompson continued.

Previously Soares Thompson worked as the Restorative Justice Project Coordinator at the Stamford Mayor's Youth Services Bureau promoting restorative justice practices and engaging stakeholders in meaningful conversations to promote change within the juvenile justice system.

**Soares Thompson** also brings to the role experience helping individuals, families and communities achieve positive outcomes. She has worked as a public defender and an educator at both the Suffolk University Juvenile Justice Center and Brooklyn College. Soares Thompson received her law degree from Boston College.

Creating this role is a meaningful piece of District Attorney Ryan's commitment to addressing issues of systemic racism and bias across the County. The office has already taken steps to reform past policies that disproportionately impacted communities of color including eliminating cash bail to prevent incarceration solely due to a lack of financial resources and supporting the elimination of mandatory minimums for certain non-violent, low-level drug offenses.

## Sample Media Advisory

### **Prosecuting Attorney to Provide Update on the Bantom Street Police Shooting**

**City** – Today, Prosecuting Attorney will provide an update regarding the police shooting of November 9<sup>th</sup>.

**WHO:** Prosecutor Name

**WHAT:** Press Conference

**WHEN:** Monday, December 7<sup>th</sup> at 2:30 PM

**WHERE:** *Please see RSVP Information below.*

#### **Satellite Coordinates:**

Galaxy 17 K14 Slot 4

UL Frequency: 14283 H

DL Frequency: 11983 V

FEC  $\frac{3}{4}$

Symbol: 4.0

8PSK

DVB-S2

*Satellite coordinates provided by WLNS-TV 6*

*The satellite window will open at 2:20 PM.*

#### **LIVE STREAM FOR PUBLIC VIEWING:**

#### **RSVP DIRECTIONS FOR MEDIA ONLY:**

To RSVP and attend the press conference **virtually**, please email (email address) with your first and last name and outlet.

RSVPs will be considered in the order they are received, and space is limited.

**To be considered, RSVPs must be received by 1:00 PM, TODAY.**

If your participation is confirmed, you will receive a confirmation email from our office with further directions.

## **MEDIA ADVISORY**

### **District Attorney Todd Spitzer, Assemblywoman Cottie Petrie-Norris to Hold Press Conference to Announce Unemployment Fraud Prosecutions; Losses Exceeded more than \$500,000**

***Petrie-Norris chairs Assembly Accountability and Administrative Review Committee and has been a leader in discussion of how the state of California will address widespread unemployment fraud***

**WHO:** Orange County District Attorney Todd Spitzer and Assemblywoman Cottie Petrie-Norris (D-Laguna Beach)

**WHAT:** The Orange County District Attorney's Office will be joined by Assemblywoman Cottie Petrie-Norris, chair of the Assembly Accountability and Administrative Review Committee, at a press conference to announce the prosecution of individuals in three separate investigations related to the filing false of unemployment claims with California's Employment Development Department to defraud taxpayers of more than \$500,000.

**WHEN:** **Monday, January 25, 2021 at 10 a.m.** Doors will open at 9:30 a.m.

**WHERE:** Orange County District Attorney's Office, 401 Civic Center Drive W., Santa Ana, CA 92701, first floor Law Library and via Zoom for credentialed media.

The press conference will also be live streamed on Facebook – [facebook.com/ocdatoddspitzer](https://www.facebook.com/ocdatoddspitzer)

Credentialed members of the media can register to participate via Zoom by accessing this link:

[https://us02web.zoom.us/webinar/register/WN\\_xJLFIF8\\_Ryy-V7DggHWhAA](https://us02web.zoom.us/webinar/register/WN_xJLFIF8_Ryy-V7DggHWhAA)

In-person attendance is also permitted. Social distancing and face coverings will be required.

## Sample Letter to Law Enforcement Re: Scope of Public Comment

Dear County Chiefs,

Please know that we appreciate your dedication and commitment to protecting the citizens of X County. We know that you and the dedicated men and women of your departments are doing a fine job.

I am writing in the spirit of cooperation to address issues regarding pre-trial publicity that I have noticed in X County. These issues are certainly not confined to X County and are occurring in other jurisdictions. As prosecutors, we must constantly balance the public's right to know about crimes that occur in our community while following our ethical mandate to ensure that we do not prejudice the accused or influence jurors who will sit as finders of fact in a trial. As a result, we are asking that your department limit some of its pre-trial remarks to the press.

The reason behind this request is my obligation under the Rules of Professional Conduct in our state, which require the prosecutor to:

*"...exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under [ABA] Rule 3.6 or [the state's Rules of Professional Conduct]." (Emphasis supplied).*

Over the years I have heard references to a suspect's confession, witness statements and details of forensic reports revealed to the press. In some circumstances these statements can violate the rules of ethics. Here are just a few examples of comments from local law enforcement agencies that have come to my attention and may be problematic:

**Criminal Sexual Conduct Case** – An Assistant Prosecuting Attorney requested 911 tape containing audio of the crime in progress during the warrant review process. It was not received but was given to a local TV station and played in part on the news.

**Homicide Dismemberment Case** – Comments regarding the suspect's confession and evidence while the case was being investigated.

**Marijuana Seizure Case** – After the search warrant was executed, a public official walked through the crime scene with cameras filming the site.

**Child Abduction Case** – Comments detailing the entire admissions/false exculpatory confession of the defendant at the location of the crime scene while the case remains under investigation. Also, bodily fluids were allowed to be photographed as they were being taken from the home.

**Fatal Arson/Felony Murder Case** – Comments detailing the admissions of the suspect and letting the media know when, where and why a search warrant was being executed. The comments of the reporter made it clear he had specific information contained in the search warrant prior to its execution in each instance.

**Child Abuse Case** – Comments detailing a four-year-old child’s verbatim statement to the police. Official quoted directly from a forensic report.

**References to Forensic Reports** – There have been various references to toxicology, medical, DNA and other scientific testing that should not be revealed to the media.

**Reference to Polygraph Examinations** – Under state law, there can be no reference to polygraph examinations to the media. Once in the court file, the investigator’s report is something the press may obtain. This information should never be contained in the body of the investigator’s report.

The Rules of Professional Conduct state simply:

A lawyer shall not make an extra judicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyers know, or reasonably should know, that it will have a substantial likelihood of materially prejudicing an adjudicative procedure.

Pursuant to this rule the following matters are presumptively prejudicial and should not be disclosed by the prosecutor or law enforcement. I would ask your departments to avoid discussing these matters as well.

- The character, credibility, reputation, or criminal record of a defendant, suspect or witness.
- The identity of a witness, or the expected testimony of a witness.

- The possibility of a plea of guilty to the offense.
- 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.
- The performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test.
- The identity or nature of physical evidence expected to be presented.
- An opinion as to the guilt or innocence of a defendant or suspect.
- Information that the lawyer knows, or reasonably should know, is likely to be inadmissible as evidence in a trial.

On the other hand, it is permissible to disseminate:

- The identity, occupation, and family status of the accused.
- If the accused has not been apprehended, information necessary to aid in apprehension of that person.
- The fact, time and place of arrest.
- The identity of investigating and arresting officers or agencies and the length of the investigation.
- The general nature of the claim or defense.
- The information contained in a public record.
- That an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved.
- The scheduling or result of any step-in litigation.
- A request for assistance in obtaining evidence and information necessary thereto.
- 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.

Thank you for your attention to the important issue of permissible pre-trial publicity. We welcome any comments or questions you may have.

Please contact....

**DOMESTIC VIOLENCE AWARENESS  
PUBLIC EDUCATION PLAN OVERVIEW**

***DRAFT***

***\*Note: Plans are evolving documents with more plans added as implementation begins.***

Background:

Domestic violence advocacy groups have reported decreased victim reporting of domestic violence and of victim participation in court proceedings. This office will partner with the advocacy groups, local shelters, and local media to create public awareness and to convey support for victims.

Audiences:

Shelter staff and community advocates  
Prosecution staff  
Law enforcement  
Community groups  
Media  
General public

Plan 1: Shelter Staff and Community Advocates

Partner with training and communication strategy by March 29.

- Work with Sheila to establish coordinated response training.
- Work with Sheila and staff to develop print materials.
- Develop speaking resource team with 1 prosecutor and 1 advocate.
- Develop detailed public education campaign.

Plan 2: Prosecution Staff

Increase training and awareness throughout the office, including advocate and clerical staff on domestic violence issues and the purpose of the plan.

*Execution:*

- All staff rollout on April 6.
- Family Violence and victim advocates conduct 30-minute presentation on

“Family Violence 101.” Taped for on-demand viewing.

- All staff encouraged to recommend audiences for communication based on their community involvement.

### Plan 3: Law Enforcement

Increase training and roll-out of model Domestic Violence Blueprint for Public Safety.

- JW to schedule 1 day coordinated response training by April 30 with advocates, shelters and LE.
- PA to meet open discussion at LE chiefs meeting on priority and ways to communicate to the public.
- Develop print material for LE handout, referral to 1-800 number.

### Plan 4: Community Groups

- Develop standard 20-minute presentation and PowerPoint.
- Through summer, present to groups identified by Safe Place and PA staff.
- Develop video for social media

### Plan 5: Media

- Family Violence Team to identify potential feature interviews for media (LE, victim, advocate, PA, Researcher).
- Conduct training for media feature individuals.
- Pitch media coverage, including specific features for October (National DV month).
- Conduct editorial board meetings/reporter meetings.

### Plan 6: General Public

- Develop Op Eds and identify authors.
- Roll out “Did You Know” campaign on social media



### Prosecuting Attorneys Association of Michigan

#### BEST PRACTICES RECOMMENDATION SOCIAL MEDIA

Given the predominance of social media within society, it is understandable that prosecutors and staff will participate in its use. In the rapidly expanding world of electronic communication, social media can mean many things. Social media includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal website, social networking or affinity website, web bulletin board, or a chat room, as well as any other form of electronic communication.

It is essential for participants in social media to be aware that all communications made via social media are public in nature. As such, it is recommended that every prosecutor office adopt a policy addressing social media, which includes the following recommendations:

- All social media posts must comport with standards relating to ethics, harassment, discrimination, and case confidentiality. Those guidelines arise from applicable law, ethical rules, as well as individual office policies, mission and values.
- Applicable office policies include, but are not limited to, those pertaining to sexual harassment, victim's rights, confidentiality and disclosure, media policy, and those relating to the use of equipment and services, including internet policy. Posts should not disclose confidential or proprietary information, particularly regarding current or anticipated cases, or other office information.
- All social media behavior must comport with the Michigan Rules of Professional Conduct. Including but not limited to, MRPC 3.6 – Trial Publicity and MRPC 3.8 – Special Responsibilities of a Prosecutor.
- The highest level of professionalism is expected from prosecutors using social media. As with all public interactions, prosecutors must apply common sense. Posts should be appropriate, and contain respectful content. It is unacceptable to use ethnic slurs, personal insults, obscenity, or engage in conduct via social media that would reflect negatively on the prosecutor's office, and/or otherwise embarrass the County.
- Prosecutor staff should not utilize office logos and/or images, including those of staff members, unless authorized to do so.

- Posts should be honest, accurate, and express only personal opinions. Prosecutor staff should not represent themselves as a spokesperson for their office. All media inquiries should be forwarded to the appropriate supervisor or designated staff member. Posts should be clear that any views do not represent the views of the elected Prosecutor, the county, and/or fellow co-workers.

A best practices recommendation by the Prosecuting Attorneys Association of Michigan (PAAM) is the product of careful consideration of experienced prosecuting attorneys. However, it is only a recommendation. A best practices recommendation may or may not be feasible or desirable to implement in every jurisdiction. There may be other methods in local jurisdictions to reach the same or similar objectives.

Date approved by PAAM: April 13, 2018

## Chart of State Rules of Professional Responsibility Adopting ABA Model Rule 3.6 in Whole or in Part

State	Link to State Rule of Professional Responsibility re: <b>ABA Model Rule 3.6</b>	Page #	Notes
Alabama	<a href="https://judicial.alabama.gov/docs/library/rules/con_d3_6.pdf">https://judicial.alabama.gov/docs/library/rules/con_d3_6.pdf</a>		Slight deviation from ABA rule wording
Alaska	<a href="http://doa.alaska.gov/opa/pdfs/20121010_conference_criminal/rule-prof-conduct-AK-34-38-41.pdf">http://doa.alaska.gov/opa/pdfs/20121010_conference_criminal/rule-prof-conduct-AK-34-38-41.pdf</a>	p. 4	ABA rule verbatim
Arizona	<a href="https://tools.azbar.org/RulesofProfessionalConduct/ViewRule.aspx?id=43">https://tools.azbar.org/RulesofProfessionalConduct/ViewRule.aspx?id=43</a>		ABA rule verbatim
Arkansas	<a href="https://rules.arcourts.gov/w/ark/current-arkansas-rules-of-professional-conduct#!fragment/zoupi0-Toc25229348/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zgCYBWDjgTgDMAFgAcASgA0ybKUIQAIokK4AntADk6iREJhcCRcrWbtu-SADKeUgCE1AJQCiAGUcA1AIIA5AMKOJpGAARtCk7GJiQA">https://rules.arcourts.gov/w/ark/current-arkansas-rules-of-professional-conduct#!fragment/zoupi0-Toc25229348/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zgCYBWDjgTgDMAFgAcASgA0ybKUIQAIokK4AntADk6iREJhcCRcrWbtu-SADKeUgCE1AJQCiAGUcA1AIIA5AMKOJpGAARtCk7GJiQA</a>		Slight deviation from ABA rule wording
California	<a href="http://www.calbar.ca.gov/Portals/0/documents/rules/Rule_3.6-Exec_Summary-Redline.pdf">http://www.calbar.ca.gov/Portals/0/documents/rules/Rule_3.6-Exec_Summary-Redline.pdf</a>		Slight deviation from ABA rule wording

State	Link to State Rule of Professional Responsibility re: <b>ABA Model Rule 3.6</b>	Page #	Notes
Colorado	<a href="https://www.cobar.org/For-Members/Opinions-Rules-Statutes/Rules-of-Professional-Conduct/Rule-36-Trial-Publicity">https://www.cobar.org/For-Members/Opinions-Rules-Statutes/Rules-of-Professional-Conduct/Rule-36-Trial-Publicity</a>		ABA rule nearly verbatim
Connecticut	<a href="https://www.jud.ct.gov/publications/PracticeBook/PB.pdf">https://www.jud.ct.gov/publications/PracticeBook/PB.pdf</a>	p. 43	
Delaware	<a href="https://courts.delaware.gov/ODC/Digest/dlrpc.aspx">https://courts.delaware.gov/ODC/Digest/dlrpc.aspx</a>		ABA rule verbatim
District of Columbia	<a href="https://www.dcbbar.org/For-Lawyers/Legal-Ethics/Rules-of-Professional-Conduct/Advocate/Trial-Publicity">https://www.dcbbar.org/For-Lawyers/Legal-Ethics/Rules-of-Professional-Conduct/Advocate/Trial-Publicity</a>		
Florida	<a href="https://www-media.floridabar.org/uploads/2021/04/Ch-4-2021_10-APR-RRTFB-4-15-2021.pdf">https://www-media.floridabar.org/uploads/2021/04/Ch-4-2021_10-APR-RRTFB-4-15-2021.pdf</a>	p. 123	Numbered 4-3.6
Georgia	<a href="https://www.gabar.org/Handbook/index.cfm#handbook/rule80">https://www.gabar.org/Handbook/index.cfm#handbook/rule80</a>		
Hawaii	<a href="https://www.courts.state.hi.us/docs/court_rules/rules/hrpcond.htm#Rule%203.6">https://www.courts.state.hi.us/docs/court_rules/rules/hrpcond.htm#Rule%203.6</a>		ABA rule verbatim
Idaho	<a href="https://isb.idaho.gov/wp-content/uploads/irpc.pdf">https://isb.idaho.gov/wp-content/uploads/irpc.pdf</a>	p. 44	ABA rule verbatim
Illinois	<a href="https://ilcourtsaudio.blob.core.windows.net/antilles">https://ilcourtsaudio.blob.core.windows.net/antilles</a>		ABA rule verbatim

State	Link to State Rule of Professional Responsibility re: <b>ABA Model Rule 3.6</b>	Page #	Notes
	<a href="https://resources/resources/a191b291-6103-48a8-b7f0-e7e7d0984080/RULE%203.6.pdf">resources/resources/a191b291-6103-48a8-b7f0-e7e7d0984080/RULE%203.6.pdf</a>		
Indiana	<a href="https://www.in.gov/courts/rules/prof_conduct/#_Toc59012635">https://www.in.gov/courts/rules/prof_conduct/#_Toc59012635</a>		ABA rule verbatim
Iowa	<a href="https://www.legis.iowa.gov/docs/publications/ICRC/32.pdf">https://www.legis.iowa.gov/docs/publications/ICRC/32.pdf</a>	p. 56	Numbered 32:3.6 -- includes an addition to the ABA rule
Kansas	<a href="https://www.kscourts.org/Rules-Orders/Rules/3-6-Advocate-Trial-Publicity#:~:text=(a)%20A%20lawyer%20who%20is,l ikelihood%20of%20materi ally%20prejudicing%20an">https://www.kscourts.org/Rules-Orders/Rules/3-6-Advocate-Trial-Publicity#:~:text=(a)%20A%20lawyer%20who%20is,l ikelihood%20of%20materi ally%20prejudicing%20an</a>		ABA rule verbatim
Kentucky	<a href="https://cdn.ymaws.com/www.kybar.org/resource/resmgr/ethics_opinions/Ethics2000Report/Rule_3_6.pdf">https://cdn.ymaws.com/www.kybar.org/resource/resmgr/ethics_opinions/Ethics2000Report/Rule_3_6.pdf</a>		Numbered SCR 3.130(3.6)
Louisiana	<a href="https://www.ladb.org/Material/Publication/ROPC/ROPC3-6.pdf">https://www.ladb.org/Material/Publication/ROPC/ROPC3-6.pdf</a>		ABA rule verbatim
Maine	<a href="https://mebaroverseers.org/regulation/bar_rules.html?id=88226">https://mebaroverseers.org/regulation/bar_rules.html?id=88226</a>		
Maryland	<a href="https://govt.westlaw.com/mdc/Document/N421BAD103C0211E69A7981745F9F9D8A?viewType=FullText&amp;originationContext=do">https://govt.westlaw.com/mdc/Document/N421BAD103C0211E69A7981745F9F9D8A?viewType=FullText&amp;originationContext=do</a>		ABA rule verbatim

State	Link to State Rule of Professional Responsibility re: <b>ABA Model Rule 3.6</b>	Page #	Notes
	<a href="#">cumenttoc&amp;transitionType=CategoryPageItem&amp;contextData=(sc.Default)</a>		
Massachusetts	<a href="https://www.mass.gov/supreme-judicial-court-rules/rules-of-professional-conduct-rule-36-trial-publicity#:~:text=A%20lawyer%20who%20is%20participating,likelihood%20of%20materially%20prejudicing%20an">https://www.mass.gov/supreme-judicial-court-rules/rules-of-professional-conduct-rule-36-trial-publicity#:~:text=A%20lawyer%20who%20is%20participating,likelihood%20of%20materially%20prejudicing%20an</a>		Slight addition to ABA rule
Michigan	<a href="https://courts.michigan.gov/courts/michigansupremecourt/rules/documents/michigan%20rules%20of%20professional%20conduct.pdf">https://courts.michigan.gov/courts/michigansupremecourt/rules/documents/michigan%20rules%20of%20professional%20conduct.pdf</a>	p. 70	
Minnesota	<a href="https://www.revisor.mn.gov/court-rules/pr/subtype/cond/id/3.6/">https://www.revisor.mn.gov/court-rules/pr/subtype/cond/id/3.6/</a>		
Mississippi	<a href="https://courts.ms.gov/research/rules/msrulesofcourt/rules%20of%20professional%20conduct.pdf">https://courts.ms.gov/research/rules/msrulesofcourt/rules of professional conduct.pdf</a>	p. 86	
Missouri	<a href="https://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dc b8/d27252ac99159f4386256ca600521228?OpenDocument">https://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dc b8/d27252ac99159f4386256ca600521228?OpenDocument</a>		ABA rule verbatim

State	Link to State Rule of Professional Responsibility re: <b>ABA Model Rule 3.6</b>	Page #	Notes
Montana	<a href="https://cdn.ymaws.com/www.montanabar.org/resource/resmgr/attorney_rules_and_regulations/rules_of_prof_conduct.pdf">https://cdn.ymaws.com/www.montanabar.org/resource/resmgr/attorney_rules_and_regulations/rules_of_prof_conduct.pdf</a>	p. 272	ABA rule verbatim
Nebraska	<a href="https://supremecourt.nebraska.gov/supreme-court-rules/chapter-3-attorneys-and-practice-law/article-5-nebraska-rules-professional-33">https://supremecourt.nebraska.gov/supreme-court-rules/chapter-3-attorneys-and-practice-law/article-5-nebraska-rules-professional-33</a>		Numbered 3-503.6 -- ABA rule verbatim
Nevada	<a href="https://www.leg.state.nv.us/courtrules/rpc.html">https://www.leg.state.nv.us/courtrules/rpc.html</a>		ABA rule verbatim
New Hampshire	<a href="https://www.courts.state.nh.us/rules/pcon/pcon-3_6.htm">https://www.courts.state.nh.us/rules/pcon/pcon-3_6.htm</a>		ABA rule verbatim
New Jersey	<a href="https://www.njcourts.gov/attorneys/assets/rules/rpc.pdf">https://www.njcourts.gov/attorneys/assets/rules/rpc.pdf</a>	p. 27	
New Mexico	<a href="https://nmonesource.com/nmos/nmra/en/5699/1/document.do">https://nmonesource.com/nmos/nmra/en/5699/1/document.do</a>	p. 149	Numbered 16-306
New York	<a href="https://www.nycourts.gov/ad3/AGC/Forms/Rules/Rules%20of%20Professional%20Conduct%2022NYCRR%20Part%201200.pdf">https://www.nycourts.gov/ad3/AGC/Forms/Rules/Rules%20of%20Professional%20Conduct%2022NYCRR%20Part%201200.pdf</a>	p. 154	
North Carolina	<a href="https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-36-trial-publicity/">https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-36-trial-publicity/</a>		Some addition to ABA rule
North Dakota	<a href="https://www.ndcourts.gov/legal-">https://www.ndcourts.gov/legal-</a>		ABA rule verbatim

State	Link to State Rule of Professional Responsibility re: <b>ABA Model Rule 3.6</b>	Page #	Notes
	<a href="#">resources/rules/ndrprofconduct/3-6</a>		
Ohio	<a href="https://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf">https://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf</a>	p. 122	ABA rule verbatim
Oklahoma	<a href="https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=435148">https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=435148</a>		
Oregon	<a href="https://www.osbar.org/docs/rulesregs/orpc.pdf">https://www.osbar.org/docs/rulesregs/orpc.pdf</a>	p. 21	Some addition to ABA rule
Pennsylvania	<a href="https://www.padisiplinaryboard.org/for-attorneys/rules/rule/3/the-rules-of-professional-conduct#rule-170">https://www.padisiplinaryboard.org/for-attorneys/rules/rule/3/the-rules-of-professional-conduct#rule-170</a>		ABA rule verbatim
Rhode Island	<a href="https://www.ribar.com/UserFiles/Rhode%20Island%20Disciplinary%20Rules%20of%20Professional%20Conduct%20.pdf">https://www.ribar.com/UserFiles/Rhode%20Island%20Disciplinary%20Rules%20of%20Professional%20Conduct%20.pdf</a>	p. 192	ABA rule verbatim
South Carolina	<a href="https://www.sccourts.org/courtReg/displayRule.cfm?ruleID=407.0&amp;subRuleID=RULE%203%2E6&amp;ruleType=APP">https://www.sccourts.org/courtReg/displayRule.cfm?ruleID=407.0&amp;subRuleID=RULE%203%2E6&amp;ruleType=APP</a>		ABA rule verbatim
South Dakota	<a href="https://sdlegislature.gov/Statutes/CodifiedLaws/2044876">https://sdlegislature.gov/Statutes/CodifiedLaws/2044876</a>		ABA rule verbatim
Tennessee	<a href="https://www.tncourts.gov/rules/supreme-court/8">https://www.tncourts.gov/rules/supreme-court/8</a>		ABA rule verbatim
Texas	<a href="https://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-">https://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-</a>		Rule is numbered 3.07

State	Link to State Rule of Professional Responsibility re: <b>ABA Model Rule 3.6</b>	Page #	Notes
	<a href="#">Professional-Conduct/III--ADVOCATE/3-07-Trial-Publicity</a>		
Utah	<a href="https://www.utcourts.gov/resources/rules/ucja/view.html?title=Rule%203.6.%20Trial%20publicity.&amp;rule=ch13/3_6.htm">https://www.utcourts.gov/resources/rules/ucja/view.html?title=Rule%203.6.%20Trial%20publicity.&amp;rule=ch13/3_6.htm</a>		ABA rule verbatim
Vermont	<a href="https://www.vermontjudiciary.org/sites/default/files/documents/VermontRulesofProfessionalConduct.pdf">https://www.vermontjudiciary.org/sites/default/files/documents/VermontRulesofProfessionalConduct.pdf</a>	p. 105	ABA rule verbatim
Virginia	<a href="https://www.vsb.org/pro-guidelines/index.php/rules/advocate/rule3-6/">https://www.vsb.org/pro-guidelines/index.php/rules/advocate/rule3-6/</a>		
Washington	<a href="https://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_03_06_00.pdf">https://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_03_06_00.pdf</a>		ABA rule verbatim
West Virginia	<a href="http://www.courtswv.gov/legal-community/court-rules/professional-conduct/rule3.html#rule3.6">http://www.courtswv.gov/legal-community/court-rules/professional-conduct/rule3.html#rule3.6</a>		ABA rule verbatim
Wisconsin	<a href="https://www.wicourts.gov/courts/offices/docs/olrsc_r20annotated.pdf">https://www.wicourts.gov/courts/offices/docs/olrsc_r20annotated.pdf</a>	p. 152	Some addition to ABA rule
Wyoming	<a href="https://www.courts.state.wy.us/wp-content/uploads/2017/05/RULES-OF-PROFESSIONAL-CONDUCT-FOR-">https://www.courts.state.wy.us/wp-content/uploads/2017/05/RULES-OF-PROFESSIONAL-CONDUCT-FOR-</a>	p. 81	ABA rule verbatim

State	Link to State Rule of Professional Responsibility re: <b>ABA Model Rule 3.6</b>	Page #	Notes
	<a href="#">ATTORNEYS-AT-LAW-8_05.pdf</a>		

## Chart of State Rules of Professional Responsibility Adopting ABA Model Rule 3.8 in Whole or in Part

State	Link to State Rule of Professional Responsibility re <b>ABA Model Rule 3.8</b>	Page #	Notes
Alabama	<a href="https://judicial.alabama.gov/docs/library/rules/conduct3.8.pdf">https://judicial.alabama.gov/docs/library/rules/conduct3.8.pdf</a>		
Alaska	<a href="http://doa.alaska.gov/opa/pdfs/20121010_conference_criminal/rule-prof-conduct-AK-34-38-41.pdf">http://doa.alaska.gov/opa/pdfs/20121010_conference_criminal/rule-prof-conduct-AK-34-38-41.pdf</a>		
Arizona	<a href="https://tools.azbar.org/RulesofProfessionalConduct/ViewRule.aspx?id=45">https://tools.azbar.org/RulesofProfessionalConduct/ViewRule.aspx?id=45</a>		ABA rule verbatim
Arkansas	<a href="https://rules.arcourts.gov/w/ark/current-arkansas-rules-of-professional-conduct#!fragment/zoupiO-Toc25229352/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zgCYBWDjgTgDMPAJQAaZNIKEIARUSFcAT2gByFaliEwuBHIXK1GrTpABIPKQBCygEoBRADJ2AagEEAcgGE7o0mABG0KTswsJA">https://rules.arcourts.gov/w/ark/current-arkansas-rules-of-professional-conduct#!fragment/zoupiO-Toc25229352/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zgCYBWDjgTgDMPAJQAaZNIKEIARUSFcAT2gByFaliEwuBHIXK1GrTpABIPKQBCygEoBRADJ2AagEEAcgGE7o0mABG0KTswsJA</a>		

State	Link to State Rule of Professional Responsibility re <b>ABA Model Rule 3.8</b>	Page #	Notes
California	<a href="https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_3.8.pdf">https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_3.8.pdf</a>		Includes a provision prohibiting associates from making extrajudicial statements
Colorado	<a href="https://www.cobar.org/For-Members/Opinions-Rules-Statutes/Rules-of-Professional-Conduct/Rule-38-Special-Responsibilities-of-a-Prosecutor">https://www.cobar.org/For-Members/Opinions-Rules-Statutes/Rules-of-Professional-Conduct/Rule-38-Special-Responsibilities-of-a-Prosecutor</a>		ABA rule verbatim
Connecticut	<a href="https://www.jud.ct.gov/publications/PracticeBook/PB.pdf">https://www.jud.ct.gov/publications/PracticeBook/PB.pdf</a>	p. 45	Includes a provision prohibiting associates from making extrajudicial statements
Delaware	<a href="https://courts.delaware.gov/ODC/Digest/dlrpc.aspx">https://courts.delaware.gov/ODC/Digest/dlrpc.aspx</a>		ABA rule verbatim
District of Columbia	<a href="https://www.dcbar.org/For-Lawyers/Legal-Ethics/Rules-of-Professional-Conduct/Advocate/Special-Responsibilities-of-a-Prosecutor">https://www.dcbar.org/For-Lawyers/Legal-Ethics/Rules-of-Professional-Conduct/Advocate/Special-Responsibilities-of-a-Prosecutor</a>		
Florida	<a href="https://www-media.floridabar.org/uploads/2021/04/Ch-4-2021_10-APR-RRTFB-4-15-2021.pdf">https://www-media.floridabar.org/uploads/2021/04/Ch-4-2021_10-APR-RRTFB-4-15-2021.pdf</a>	p. 126	Numbered 4-3.8

State	Link to State Rule of Professional Responsibility re <b>ABA Model Rule 3.8</b>	Page #	Notes
Georgia	<a href="https://www.gabar.org/Handbook/index.cfm#handbook/rule83">https://www.gabar.org/Handbook/index.cfm#handbook/rule83</a>		ABA rule verbatim
Hawaii	<a href="https://www.courts.state.hi.us/docs/court_rules/rules/hrpcond.htm#Rule%203.8">https://www.courts.state.hi.us/docs/court_rules/rules/hrpcond.htm#Rule%203.8.</a>		
Idaho	<a href="https://isb.idaho.gov/wp-content/uploads/irpc.pdf">https://isb.idaho.gov/wp-content/uploads/irpc.pdf</a>	p. 46	ABA rule verbatim
Illinois	<a href="https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/f666b1cf-3509-4cf8-935e-ead5a1bb270d/RULE%203.8.pdf">https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/f666b1cf-3509-4cf8-935e-ead5a1bb270d/RULE%203.8.pdf</a>		Adds a "good faith judgement" exception in part (i)
Indiana	<a href="https://www.in.gov/courts/rules/prof_conduct/#_Toc59012637">https://www.in.gov/courts/rules/prof_conduct/#_Toc59012637</a>		
Iowa	<a href="https://www.legis.iowa.gov/docs/publications/ICRC/32.pdf">https://www.legis.iowa.gov/docs/publications/ICRC/32.pdf</a>	p. 59	ABA rule verbatim
Kansas	<a href="https://www.kscourts.org/Rules-Orders/Rules/3-8-Advocate-Special-Responsibilities-of-a-Prosecu">https://www.kscourts.org/Rules-Orders/Rules/3-8-Advocate-Special-Responsibilities-of-a-Prosecu</a>		Omits (g) and (h) from ABA rule
Kentucky	<a href="https://cdn.ymaws.com/www.kybar.org/resource/resmgr/ethics_opinions/Ethics2000Report/Rule_3_8.pdf">https://cdn.ymaws.com/www.kybar.org/resource/resmgr/ethics_opinions/Ethics2000Report/Rule_3_8.pdf</a>		

State	Link to State Rule of Professional Responsibility re <b>ABA Model Rule 3.8</b>	Page #	Notes
Louisiana	<a href="https://www.ladb.org/Material/Publication/ROPC/ROPC3-8.pdf">https://www.ladb.org/Material/Publication/ROPC/ROPC3-8.pdf</a>		Omits (g) and (h) from ABA rule
Maine	<a href="https://mebaroverseers.org/regulation/bar_rules.html?id=88228">https://mebaroverseers.org/regulation/bar_rules.html?id=88228</a>		
Maryland	<a href="https://govt.westlaw.com/mdc/Document/N386912303C0211E69A7981745F9F9D8A?viewType=FullText&amp;originationContext=documenttoc&amp;transitionType=CategoryPageItem&amp;contextData=(sc.Default)&amp;bhcp=1">https://govt.westlaw.com/mdc/Document/N386912303C0211E69A7981745F9F9D8A?viewType=FullText&amp;originationContext=documenttoc&amp;transitionType=CategoryPageItem&amp;contextData=(sc.Default)&amp;bhcp=1</a>		Omits (e), (g) and (h) from ABA rule
Massachusetts	<a href="https://www.mass.gov/supreme-judicial-court-rules/rules-of-professional-conduct-rule-38-special-responsibilities-of-a">https://www.mass.gov/supreme-judicial-court-rules/rules-of-professional-conduct-rule-38-special-responsibilities-of-a</a>		
Michigan	<a href="https://courts.michigan.gov/courts/michigansupremecourt/rules/documents/michigan%20rules%20of%20professional%20conduct.pdf">https://courts.michigan.gov/courts/michigansupremecourt/rules/documents/michigan%20rules%20of%20professional%20conduct.pdf</a>	p. 73	Includes a provision prohibiting associates from making extrajudicial statements, and some other minor changes

State	Link to State Rule of Professional Responsibility re <b>ABA Model Rule 3.8</b>	Page #	Notes
Minnesota	<a href="https://www.revisor.mn.gov/court_rules/pr/subtype/cond/id/3.8/">https://www.revisor.mn.gov/court_rules/pr/subtype/cond/id/3.8/</a>		Includes a provision prohibiting associates from making extrajudicial statements, and some other minor changes
Mississippi	<a href="https://courts.ms.gov/research/rules/msrulesofcourt/rules_of_professional_conduct.pdf">https://courts.ms.gov/research/rules/msrulesofcourt/rules_of_professional_conduct.pdf</a>	p. 90	Includes a provision prohibiting associates from making extrajudicial statements
Missouri	<a href="https://www.courts.mo.gov/courts/ClerkHandbookSP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dc b8/83a96f1961a98e5086256ca6005211d0?OpenDocument">https://www.courts.mo.gov/courts/ClerkHandbookSP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dc b8/83a96f1961a98e5086256ca6005211d0?OpenDocument</a>		Omits (g) and (h) from ABA rule
Montana	<a href="https://cdn.ymaws.com/www.montanabar.org/resource/resmgr/attorney_rules_and_regulations/rules_of_prof_conduct.pdf">https://cdn.ymaws.com/www.montanabar.org/resource/resmgr/attorney_rules_and_regulations/rules_of_prof_conduct.pdf</a>	p. 272	ABA rule verbatim
Nebraska	<a href="https://supremecourt.nebraska.gov/supreme-court-rules/chapter-3-attorneys-and-practice-law/article-5-nebraska-rules-professional-35">https://supremecourt.nebraska.gov/supreme-court-rules/chapter-3-attorneys-and-practice-law/article-5-nebraska-rules-professional-35</a>		Omits (g) and (h) from ABA rule

State	Link to State Rule of Professional Responsibility re <b>ABA Model Rule 3.8</b>	Page #	Notes
Nevada	<a href="https://www.leg.state.nv.us/courtrules/rpc.html">https://www.leg.state.nv.us/courtrules/rpc.html</a>		Omits (g) and (h) from ABA rule
New Hampshire	<a href="https://www.courts.state.nh.us/rules/pcon/pcon-3_8.htm">https://www.courts.state.nh.us/rules/pcon/pcon-3_8.htm</a>		Omits (g) and (h) from ABA rule
New Jersey	<a href="https://www.njcourts.gov/attorneys/assets/rules/rpc.pdf">https://www.njcourts.gov/attorneys/assets/rules/rpc.pdf</a>	p. 29	Omits (g) and (h) from ABA rule
New Mexico	<a href="https://nmonesource.com/nmos/nmra/en/5699/1/document.do">https://nmonesource.com/nmos/nmra/en/5699/1/document.do</a>	p. 155	Alters (g) and omits (h)
New York	<a href="https://www.nycourts.gov/ad3/AGC/Forms/Rules/Rules%20of%20Professional%20Conduct%2022NYCR%20Part%201200.pdf">https://www.nycourts.gov/ad3/AGC/Forms/Rules/Rules%20of%20Professional%20Conduct%2022NYCR%20Part%201200.pdf</a>	p. 161	
North Carolina	<a href="https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-38-special-responsibilities-of-a-prosecutor/">https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-38-special-responsibilities-of-a-prosecutor/</a>		Alters (g) and (h)
North Dakota	<a href="https://www.ndcourts.gov/legal-resources/rules/ndrprofconduct/3-8">https://www.ndcourts.gov/legal-resources/rules/ndrprofconduct/3-8</a>		ABA rule verbatim
Ohio	<a href="https://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf">https://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf</a>	p. 128	
Oklahoma	<a href="https://www.oscn.net/applications/oscn/DeliverDo">https://www.oscn.net/applications/oscn/DeliverDo</a>		

State	Link to State Rule of Professional Responsibility re <b>ABA Model Rule 3.8</b>	Page #	Notes
	<a href="http://www.osbar.org/docs/rulesregs/orpc.pdf">cument.asp?CiteID=481037</a>		
Oregon	<a href="https://www.osbar.org/docs/rulesregs/orpc.pdf">https://www.osbar.org/docs/rulesregs/orpc.pdf</a>	p. 22	
Pennsylvania	<a href="https://www.padisciplinaryboard.org/for-attorneys/rules/rule/3/the-rules-of-professional-conduct#rule-172">https://www.padisciplinaryboard.org/for-attorneys/rules/rule/3/the-rules-of-professional-conduct#rule-172</a>		Omits (e), (g) and (h) from ABA rule
Rhode Island	<a href="https://www.ribar.com/UserFiles/Rhode%20Island%20Disciplinary%20Rules%20of%20Professional%20Conduct%20.pdf">https://www.ribar.com/UserFiles/Rhode%20Island%20Disciplinary%20Rules%20of%20Professional%20Conduct%20.pdf</a>	p. 200	Omits (e), (g) and (h) from ABA rule
South Carolina	<a href="https://www.sccourts.org/courtReg/displayRule.cfm?ruleID=407.0&amp;subRuleID=RULE%203%2E8&amp;ruleType=APP">https://www.sccourts.org/courtReg/displayRule.cfm?ruleID=407.0&amp;subRuleID=RULE%203%2E8&amp;ruleType=APP</a>		Omits (g) and (h) from ABA rule
South Dakota	<a href="https://sdlegislature.gov/Statutes/Codified_Laws/2044876">https://sdlegislature.gov/Statutes/Codified_Laws/2044876</a>		ABA rule verbatim
Tennessee	<a href="https://www.tncourts.gov/rules/supreme-court/8">https://www.tncourts.gov/rules/supreme-court/8</a>		ABA rule verbatim
Texas	<a href="https://www.texasbar.com/AM/Template.cfm?Section=Home&amp;ContentID=27271&amp;Template=/CM/ContentDisplay.cfm">https://www.texasbar.com/AM/Template.cfm?Section=Home&amp;ContentID=27271&amp;Template=/CM/ContentDisplay.cfm</a>	p. 71	Rule is numbered 3.09
Utah	<a href="https://www.utcourts.gov/resources/rules/ucja/view.html?title=Rule%203.8.%20Special%20responsibil">https://www.utcourts.gov/resources/rules/ucja/view.html?title=Rule%203.8.%20Special%20responsibil</a>		

State	Link to State Rule of Professional Responsibility re <b>ABA Model Rule 3.8</b>	Page #	Notes
	<a href="#">ities%20of%20a%20prosecutor.&amp;rule=ch13/3_8.htm</a>		
Vermont	<a href="https://www.vermontjudiciary.org/sites/default/files/documents/VermontRulesofProfessionalConduct.pdf">https://www.vermontjudiciary.org/sites/default/files/documents/VermontRulesofProfessionalConduct.pdf</a>	p. 110	Omits (g) and (h) from ABA rule
Virginia	<a href="https://www.vsb.org/pro-guidelines/index.php/rules/advocate/rule3-8/">https://www.vsb.org/pro-guidelines/index.php/rules/advocate/rule3-8/</a>		
Washington	<a href="https://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_03_08_00.pdf">https://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_03_08_00.pdf</a>		Adds a "good faith judgement" exception in part (i)
West Virginia	<a href="http://www.courtsww.gov/legal-community/court-rules/professional-conduct/rule3.html#rule3.8">http://www.courtsww.gov/legal-community/court-rules/professional-conduct/rule3.html#rule3.8</a>		ABA rule verbatim
Wisconsin	<a href="https://www.wicourts.gov/courts/offices/docs/olrscr20annotated.pdf">https://www.wicourts.gov/courts/offices/docs/olrscr20annotated.pdf</a>	p. 157	ABA rule verbatim
Wyoming	<a href="https://www.courts.state.wy.us/wp-content/uploads/2017/05/RULES-OF-PROFESSIONAL-CONDUCT-FOR-ATTORNEYS-AT-LAW-8_05.pdf">https://www.courts.state.wy.us/wp-content/uploads/2017/05/RULES-OF-PROFESSIONAL-CONDUCT-FOR-ATTORNEYS-AT-LAW-8_05.pdf</a>	p. 84	ABA rule verbatim