

Utah Prosecutors Best Practices

November 14, 2023

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

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

Enacted January 10, 2020

1. General Standards

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1-1 Office Policies and Their Promulgation

1-1.0 Office Policies and Their Promulgation.

a. Each prosecutor’s office is encouraged to develop written statements of policies and procedures that guide the exercise of prosecutorial discretion with the objective of achieving the fair, efficient, and effective enforcement of the criminal law within the prosecutor’s jurisdiction.

b. These policies and procedures should be accessible to relevant staff and regularly reviewed and updated.

c. Policies and procedures guiding the exercise of prosecutorial discretion should be made available to the public.

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1-2 Improper Bias Prohibited

1-2.0 Improper Bias Prohibited.

a. A prosecutor should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status.

- b. A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion.
- c. A prosecutor should strive, within the scope of the prosecutor's authority, to eliminate implicit biases and act to mitigate any improper bias or prejudice when credibly informed that it exists.
- d. A prosecutor's office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work.
- e. A prosecutor's office should be proactive in seeking to create an office culture of inclusivity and diversity.
- f. A prosecutor's office should regularly assess the impacts of its policies on communities within the prosecutor's jurisdiction, and eliminate those impacts that cannot be properly justified.

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1-3 Conflicts of Interest

1-3.0 Conflict Avoidance

A prosecutor should not hold an interest or engage in activities that conflict, have a significant potential to conflict, or are likely to create a reasonable appearance of conflict with the duties and responsibilities of the prosecutor's office.

Enacted September 13, 2023

1-3.1 Conflicts with Private Legal Practice

In jurisdictions that permit private legal practice by a prosecutor:

- a. Prosecutors in their private legal practice should not represent a defendant in any criminal or quasi criminal related matters, regardless of the jurisdiction where the case is pending.
- b. Prosecutors should not represent to private clients or to prospective clients that the status of the prosecutor could be an advantage in the private representation.
- c. Prosecutors should not indicate their status as a prosecutor on any letterhead, announcement, advertising, or other communication involved in the private practice.
- d. Prosecutors should recuse themselves from the investigation and prosecution of any current or former client of the prosecutor and, if applicable, should withdraw from any further representation of that client.
- e. Prosecutors should not use the resources of the prosecutor's office for the purpose of supporting private practice activities unless authorized by law and by the prosecutor's employer.
- f. Prosecutors engaging in private practice should disclose to their employer the nature and extent of the private practice.

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1-3.2 Specific Conflicts

In all jurisdictions, including those prohibiting private practice by prosecutors:

- a. Prosecutors should recuse themselves from the investigation and prosecution of any former client involving or substantially related to the subject matter of the former representation, unless, after full disclosure, the appropriate government office and the former client give informed written consent permitting the prosecutor's involvement in the investigation or prosecution.
- b. Prosecutors should recuse themselves from the investigation and prosecution of any matter where information known to the prosecutor by virtue of a prior representation and subject to the attorney-client privilege would be pertinent to the criminal matter, unless, after full disclosure, the appropriate government office and the former client give informed written consent permitting the prosecutor's involvement in the investigation or prosecution.

- c. Prosecutors should recuse themselves from the investigation and prosecution of any person who is represented by a lawyer related to the prosecutor as a grandparent, parent, child, sibling, spouse, or domestic partner.
- d. Prosecutors should recuse themselves from any investigation, prosecution, or other matter where personal interests of the prosecutor would cause a fair-minded, objective observer to conclude that the prosecutor's impartiality, judgment, or ability to administer the law in an objective manner may be compromised. These may include investigations or prosecutions involving anyone who has a significant personal, political, financial, professional, business, property, or other similar relationship with the prosecutor.
- e. Prosecutors should not negotiate for private employment with an accused or the target of an investigation in a matter in which the prosecutor is participating personally and substantially, or with an attorney or agent for such accused or target.
- f. If a prosecutor is a candidate for election to public prosecution office, the prosecutor should not accept or should return campaign donations from individuals, corporations or organizations who the prosecutor knows are under investigation or being prosecuted for a crime by the prosecutor's office or by the jurisdiction of the office sought.
- g. If an assistant or deputy prosecutor learns of a potential, alleged or actual conflict of interest, the prosecutor should immediately report the matter to the chief prosecutor or a designee thereof. If the chief prosecutor or designee determines that the prosecutor should nevertheless continue to act in the matter, the prosecutor and supervisor should consider whether any disclosure to a court or defense counsel should be made, and make such disclosure if appropriate. Close cases should be resolved in favor of disclosure.

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1-3.3 Officer Involved Critical Incident Investigations

- a. The elected attorney general and each county and district attorney should ensure that their jurisdiction has a formally established and organized procedure to ensure that each officer involved critical incident is investigated in a manner reasonably free from conflicts of interest as specified herein, and that each investigation is provided with resources adequate to conduct a thorough investigation.
- b. If a prosecutor with primary jurisdiction believes that the prosecutor's relationship with the involved law enforcement officer or agency would impact the prosecutor objectively handling the case, then the prosecutor should consider recusal.
- c. If a prosecutor believes that public perception of the integrity of the prosecutor's office and public confidence in the handling of the case would negatively be impacted by a potential or alleged conflict of interest, the prosecutor should consider recusal.
- d. If a prosecutor recuses, the prosecutor should appoint or seek the appointment of a special prosecutor or should refer the matter to another appropriate governmental authority for prosecution.
- e. If a prosecutor involves the use of a Grand Jury to make the charging decision, in order to ensure fairness and a complete review, the prosecutor should make certain that all available evidence is presented, including exculpatory evidence and including testimony from law enforcement officers, alleged victims, the grand jury subject or target, experts (including use of force experts), lay witnesses and family members.
- f. Prosecutors should be aware of and comply with specific statutory disclosure obligations in officer involved critical incident investigations.

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1-3.4 Conflict Handling

Each prosecutor's office should establish procedures for handling actual or potential conflicts of interest. These procedures should include, but are not limited to:

- a. The creation of firewalls and/or taint or filter teams to ensure that prosecutors with a conflict are not improperly exposed to information or improperly disclose information.
- b. Methods to accurately document the manner in which conflicts were handled to ensure public trust and confidence in the prosecutor's office.

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1-3.5 Special Prosecutors

Where an actual or potential conflict of interest exists that would prevent a prosecutor's office from investigating or prosecuting a criminal matter, the prosecutor's office should appoint or seek the appointment of a special prosecutor, or should refer the matter to another appropriate governmental authority for prosecution. Under circumstances where a special prosecutor is appointed:

- a. The special prosecutor should be a member of the state bar in good standing, with appropriate experience in the subject matter of the appointment, and should be perceived as having sufficient detachment from the prosecutor's office so as not to be influenced by any actual or potential conflict.
- b. The special prosecutor should have full authority over the case or cases for which the prosecutor is appointed.
- c. Subject to the need to avoid the appearance of a conflict, the prosecutor's office should give all appropriate assistance, cooperation, and support to a special prosecutor.
- d. After appointment of the special prosecutor or referral to another governmental authority, the prosecutor and the prosecutor's staff should avoid communicating with the special prosecutor or other governmental authority about the investigation or prosecution, excepting procedural matters and matters pertaining to the appointment or referral, or to any assistance, cooperation or support needed.

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1-4 Training Programs

1-4.0 Training Programs.

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

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1-5 Ethical Guidelines

1-5.1 The Right Thing.

- a. *A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.*

Comment, Utah Rule of Professional Conduct 3.8

- b. *The prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty...whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that*

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

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

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

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

f. It means we seek the truth, tell the truth, and let the chips fall where they may. We serve our client’s interest when we respect the rights of the accused, when we leave no stone unturned in our search for truth, and when the jury’s verdict reflects the available evidence. When we obtain a guilty verdict, we can sleep at night because the outcome – with its awesome consequences – is the product of our best effort and the fairest system humans have ever devised. When we lose, we can sleep at night for the same reason.

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

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

i. It means that senior prosecutors and staff must set the tone, emphasize ethical conduct, teach junior prosecutors these principles, and monitor compliance.

j. These core principles, which at once define what it means to be a prosecutor and make it the best of jobs, are also reflected in mandatory rules of professional conduct. Violations can ruin the lives and reputations of innocent suspects, cheat victims of their chance at justice, and endanger the public. Such dire consequences to others justify dire consequences to prosecutors who act unethically. Ethical violations expose prosecutors to formal discipline including: public reprimand, suspension and disbarment; case-specific sanctions, such as reversal of convictions, suppression of evidence, and dismissal of charges; and employment sanctions, including damaged reputation, loss of effectiveness, demotion, and termination. Fortunately, compliance with ethical rules requires only that we know the rules, recognize that they define rather than restrain our mission, and anticipate challenges. These guidelines were created to help us meet these challenges.

Enacted September 22, 2020

1-5.2. Unethical Conduct: Consequences for Others.

a. The Defendant. *The prosecutor ...enters a courtroom to speak for the People and not just some of the People. The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all of the People. That body of 'the People' includes the defendant and his family and those who care about him.* Lindsey v. State, 725 P.2d 649 (Wyoming 1986) (quoting *Commentary on Prosecutorial Ethics*, 13 Hastings Const LQ 537-539 (1986)).

i. A prosecutor's worst nightmare is not losing a major crime or watching a dangerous criminal go free, it's convicting an innocent person. Nothing is more repugnant to our core principles of truth and justice. Unethical behavior by a prosecutor increases the risk that an innocent person will be convicted. The consequences for the defendant are obvious: incarceration, destruction of reputation, separation from family and friends, and damage to employability.

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

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

c. The Victim and the Victim's Family

i. Unethical behavior by a prosecutor can re-victimize crime victims, the very people we strive to protect. Convicting an innocent person means that the guilty person is left unpunished and any sense of "closure" is a sham. Convicting a guilty person by unethical means subjects victims and their families to the agony of seeing the conviction overturned, being dragged through a second, painful trial, or even watching the perpetrator go free.

ii. Crime forces people from outside the court system into a strange and frightening world in the role of "victims." Some have already suffered horrific losses. The ordeal of appearing in court, facing the perpetrator, risking retaliation, describing the crime to strangers, being cross-examined, having their credibility attacked, and waiting in suspense through jury deliberations may be the second-most harrowing experiences of victims' lives. It leaves many victims and their families thinking, "I never want to go through that again." Now imagine having to call the victims or their families to tell them that, because of your own unethical behavior or that of another prosecutor in our office, the wrong person was convicted, or the right person was convicted but will now get a second chance to evade responsibility. Worse yet, imagine having to explain that, because of the gravity of the prosecutorial misconduct, there will be no retrial, only a dismissal with prejudice, and that the perpetrator will go free.

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

i. Conviction of an innocent person leaves the community exposed to future crimes by the guilty person. In addition, the conviction will usually be seen by the police as "closing the book" on the crime, making it much less likely that the guilty person will be found.

- ii. Conviction of a guilty person, if tainted by unethical prosecutorial behavior, exposes the community to the tremendous expense, waste, and risk of reversal and retrial.
- iii. But the damage potentially caused to the community by a prosecutor's unethical behavior goes beyond the particular case. The public's trust in the integrity of the criminal justice system is impaired when there is a perception that law enforcement does not follow basic rules of fairness. Witnesses may refuse to come forward or may feel justified in withholding evidence or giving false testimony, if they feel that prosecutors are corrupt. Jurors may be reluctant to serve or may bring with them into the deliberation room a crippling mistrust of the law enforcement community.

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1-5.3. Unethical Conduct: Consequences for the Prosecutor. Prosecutors hold people accountable for their actions. Prosecutors in turn are accountable for theirs. In the criminal justice system, with its multitude of actors, motivated by adversaries, high stakes, and sentences lasting years, any unethical behavior by a prosecutor is likely to be exposed. Violations of your ethical obligations will expose you, your office, and the County Attorney to dire consequences. Unethical behavior by one prosecutor, if unpunished, can poison the atmosphere in an entire office. Moreover, a deputy's unethical conduct can cause the County Attorney public embarrassment and possible electoral defeat. Just as there are many levels of culpability for professional misconduct, there are many consequences for unethical actions.

a. The prosecutor may be admonished, reprimanded, suspended, or disbarred. Violations of ethical rules governing the conduct of attorneys, including prosecutors, are overseen by the Utah Supreme Court. Rule 14-501. The Rules Governing the Utah State Bar provide that "[t]he purpose of lawyer sanctions is to ensure and maintain the high standard of professional conduct required of those who undertake the discharge of professional responsibilities as lawyers, and to protect the public and the administration of justice from lawyers who have demonstrated by their conduct that they are unable or unlikely to discharge properly their professional responsibilities." Rule 14-602.

b. The prosecutor may lose employment. You are not expected to obtain a guilty verdict in every case, but you are expected to conduct yourself ethically in every case. Your unethical conduct can lead to your dismissal, demotion, or written discipline.

c. The prosecutor's case may suffer a variety of sanctions. These include damaging delays, suppression of evidence, negative inference instructions to the jury, dismissal with prejudice, and reversal of a conviction.

d. The prosecutor may be criminally prosecuted. You could be prosecuted under state law, for example, for suborning perjury, obstructing justice, or official misconduct; or under federal law for deprivation of rights under color of law. (*See* 18 U.S.C. § 242; *Dennis v. Sparks*, 449 U.S. 24 (1980); *United States v. Otherson*, 637 F.2d 1276 (9th Cir. 1980) *cert. denied*, 454 US 840 (1981).

e. The prosecutor may be sued civilly for damages. To ensure their independent judgment and zealous advocacy, the law gives prosecutors absolute immunity from civil liability when acting as advocates for the state. But, prosecutors may have only qualified immunity when acting outside their role as an advocate (for example, when performing investigative functions). Since unethical behavior is by definition contrary to the requirements of your job, you may be personally liable. And, even if you are personally immune from civil liability, such immunity does not diminish your ethical responsibilities or shield you from potential criminal liability.

f. The prosecutor will damage his or her reputation and effectiveness. Prosecutors spend years building their reputations for integrity with their colleagues, judges, defense attorneys, police, and the public, including potential jurors. A single act of unethical behavior can destroy a life's reputation. With diminished reputation comes diminished effectiveness. Judges have a hundred ways to punish a prosecutor whom they suspect of unethical conduct; they don't need to prove it or even accuse you, and most times there will be no appeal. Your credibility with members of the defense bar will affect your

ability to negotiate a settlement. Your reputation will affect the civility of your practice and your enjoyment of the job. No case is worth destroying your reputation.

g. The prosecutor will know. None of us became prosecutors to get rich or take the easy path. We did it because we want to do what is right. If you are tempted to cut an ethical corner, remember that even if no one else ever finds out, *you will know*. Cheating will rob you of the self-esteem that is this job's most valuable reward.

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1-5.4. Rules of Fairness and Ethical Conduct.

a . Our ethical duties arise from many sources, including the Utah Rules of Professional Conduct, Ethics Advisory Opinions, case law and statutes. For example, the *Brady* and *Giglio* doctrines enforce a defendant's constitutional right to a fair trial. The Utah Rules of Criminal Procedure govern general discovery obligations. The Rules of Professional Conduct govern a prosecutor's special obligations to the public and the media. To be sure, not every mistake made by a prosecutor in applying these doctrines, and not every error in judgment, can fairly be deemed a breach of ethical obligations. But deliberate violations of these rules of fairness, or willful ignorance of them, are ethical failures.

b. The Rules of Professional Conduct. All attorneys in Utah are governed by the Utah Rules of Professional Conduct. However, Rule 3.8 specifically covers the "Special Responsibilities of a Prosecutor:" The prosecutor in a criminal case shall:

- (a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) Make reasonable efforts to ensure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (e) Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting with 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. (Trial Publicity)

i. The complete Rules of Professional Conduct are available online at

www.utcourts.gov/resources/rules/. If you confront specific issues involving any of these mandatory ethical rules, you should review the text of the rule itself and relevant advisory opinions.

ii. For day-to-day practice, however, most ethical principles underlying the Rules can be distilled to a few common sense principles of fairness, professionalism and civility:

1. Be prepared. You must acquire "the legal knowledge, skill, thoroughness and preparation necessary for the representation." Rule 1.1.

2. Be on time. You must "act with reasonable diligence and promptness." Rule 1.3. You must "make reasonable efforts to expedite litigation." Rule 3.2 "No professional shortcoming is more widely resented than procrastination." Comment, Rule. 1.3.

3. Tell the truth. You must be candid about the facts and the law with judges, opposing counsel, and others. You must not "make a false statement of material fact or law to a third person." Rule 4.1 You must not "knowingly ... make a false statement of fact or law to the tribunal or fail to correct a false statement of material fact or law [you] previously made to the tribunal." Rule 3.3. You must not "fail to disclose to the tribunal controlling legal authority not already cited by opposing counsel" or "offer evidence [you] know to be false." Rule 3.3. If you learn of false testimony or fraud upon the court, you must "take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3.

In an ex parte proceeding, you must disclose to the court all material facts, including adverse facts that will enable the court to make an informed decision. Rule 3.3. When dealing with unrepresented persons, you must not misrepresent your role in the matter. Rule 4.3. It is professional misconduct “to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” Rule 8.4.

4. Keep secrets. With certain exceptions, you must not “reveal information relating to the representation of the client unless the client gives informed consent....” Rule 1.6. When prosecuting crimes, our client is the State of Utah, our county and/or our city. While the rule appears to contemplate the relationship between private practitioner and client, maintaining confidentiality is even more important for prosecutors than private attorneys. Careless or unauthorized disclosure of the sensitive information we routinely acquire can cost lives, compromise investigations, and ruin reputations.

5. Don’t prosecute without probable cause. As prosecutors, we are specifically forbidden from “prosecuting a charge that [we] know is not supported by probable cause.” Rule 3.8(a). If you come to know that a pending charge is not supported by probable cause, you must act appropriately to dismiss or reduce the charge, regardless of who caused the charge to be instituted. Rule 5.2.

6. Don’t make frivolous arguments. You should not “bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.” Rule 3.1. An action is frivolous if you are “unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification or reversal of existing law.” Comment, Rule 3.1.

7. Comply with court rules. You must not “knowingly disobey an obligation under the rules of the tribunal.” Rule 3.4.

8. Don’t become a witness. In trial, you must not “allude to any matter that [you do] not reasonably believe is relevant or that will be supported by admissible evidence, assert personal knowledge of the facts..., or state a personal opinion....” Rule 3.4(e). During argument and questioning, we must not act as an unsworn witness or assert personal knowledge of material facts. Rule 3.4(e).

9. Disclose all evidence. We must disclose to the defense all evidence or information known to us that tends to negate the guilt of the accused or mitigates the offense. In connection with sentencing, we must disclose all unprivileged mitigating information known to us. Rule 3.8(d)

10. Be fair. We must not encourage a witness to hide or avoid testifying or knowingly use false evidence or testimony. 3.4(a). We must not pay or offer to pay compensation to a witness contingent on the content of the witness’s testimony or outcome of the case. We must not communicate with someone represented by counsel about the case. Rule 4.2.

11. Be courteous and respectful. We must treat all counsel, parties, judges, witnesses, and other participants in a courteous and dignified manner. Civility Rule 1.

12. Protect the integrity of courts and juries. We must not engage in unauthorized ex parte communication with judges or their staff regarding the merits of a case. During a trial – regardless of whether any of us is a participant – we must not engage in prohibited communication with a juror or a juror’s family members. After a trial, we must not communicate with a juror if it prohibited by court order, a juror has expressed a desire not to communicate, or if the purpose of the communication is to mislead, coerce, or harass. Rule 3.5.

13. Try the case in court – not the media. The public’s interest in crimes committed in our communities is often reflected in media attention to our cases. As public servants, we have to balance the public’s right to know with our obligation to do justice for the victims and defendants. Excessive pretrial publicity may taint a jury pool or result in litigation regarding changing venue.

a. Rule 3.6 says that we should not make an “extrajudicial statement” that we reasonably know will be “disseminated by means of public communication” and will have “a substantial likelihood of materially prejudicing” a case. The comments outline a list of presumptively prejudicial statements. We should

read this rule and its comments frequently before speaking to the media and conform our statements to its guidelines.

b. We must also exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with us from making “extrajudicial statements” that we cannot make. Rule 3.6(e).

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

15. Keep doing justice after a conviction. Our ethical duties don’t end when a defendant is convicted. Prosecutors must act appropriately upon learning of new evidence indicating that an innocent person was convicted, keeping in mind that no person or system is infallible and that exonerating the innocent is as important as convicting the guilty.

16. Obey the law. Attorneys are ethically bound to avoid deceit and misconduct in their personal as well as their professional activities. We must not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. We must not commit a criminal act that reflects adversely on our honesty, trustworthiness, or fitness as a lawyer in other respects. Rule 8.4

17. When in doubt, reach out. The ethical principles summarized here, although straightforward in theory, may prove difficult to apply in complex factual circumstances we often confront. We must stay watchful for ethical issues that may arise in subtle ways. When in doubt, seek guidance from supervisors, colleagues, the State Bar, advisory opinions, and other resources.

a. A subordinate lawyer does not violate the Rules of Professional Conduct if the lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of a question of professional duty. But, the lawyer is nevertheless bound by the rules. Rule 5.2.

18. Provide guidance. The prosecutor’s office administration must make reasonable efforts to ensure that all lawyers in the office conform to the Rules of Professional Conduct, and must “adequately supervise” the work of all employees. Senior and supervisory lawyers have an ethical duty to “make reasonable efforts” to ensure that attorneys and support staff act ethically. Rules 5.1 and 5.3.

Enacted September 22, 2020

1-5.5. *Brady* and *Giglio*: The Constitutional Right to a Fair Trial (See Standard 3.4 for more specific guidance).

a. In *Brady v. Maryland*, 373 US 83, 87 (1963), the Supreme Court held that the prosecution in a criminal case must disclose to the defense, upon request, material information that is favorable to the accused. Failure to disclose such information may violate due process if the evidence is material to either guilt or punishment, “irrespective of the good faith or bad faith of the prosecution.” In *Giglio v. United States*, 405 US 150, 174 (1972), the Court made clear that *Brady* information includes evidence not only directly related to the crime, but also, under some circumstances, information that would negatively affect the credibility of a prosecution witness.

b. In *United States v. Agurs*, 427 U.S. 97 (1976), the Court held that the prosecution must disclose *Brady* information even if the defense has not specifically requested it. In *Kyles v. Whitley*, 514 U.S. 419, 437

(1995), the Court held that prosecutors have an affirmative duty to learn of, as well as disclose, favorable evidence known to “others acting on the government’s behalf in the case, including the police.” This duty to disclose pertains to all exculpatory and impeachment “information,” including oral information, and not merely to written materials or documents.

c. The failure to disclose impeachment or exculpatory information, when constitutionally required, can result in the reversal of a conviction, or other sanctions. A knowing or willful failure to disclose such information is an ethical violation. (See Rule 3.4(a) “a lawyer shall not...unlawfully conceal a document or other material having potential evidentiary value”; Rule 3.8(d) “the prosecutor in a criminal case shall...make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense...”).

d. Innumerable judicial decisions and scholarly articles have sought to define what information is “material” within the meaning of the *Brady* doctrine, what is exculpatory, at what juncture in the case disclosure must be made, how rigorously the prosecutor must seek out exculpatory information, how damaging the impeachment information or important the prosecution witness must be to invoke *Giglio’s* disclosure requirement, and what sanctions will be imposed for various failures to disclose. Obviously, particularized research and factual analysis are required to address the specifics of each prosecution.

Enacted September 22, 2020

1-5.6. Conclusion.

a. Many of us became lawyers because we wanted to do the right thing. As prosecutors, we have the privilege and the responsibility to serve as ministers of justice. The ethical rules do not burden the cause of justice – they are the essence of making sure that justice is fair for everyone.

Enacted September 22, 2020

2. Prosecutorial Relationships

2-1 Officer Involved Critical Incidents

5-2 Victim Assistance and Protection

5-3 Children’s Justice Centers

2-1 Officer Involved Critical Incidents.

This part addresses best practices for the investigation and handling of critical incidents involving peace officers, as defined by Utah Code Section 53-13-102. Under Utah Code Section 76-2-408, an officer involved critical incident (“OICI”) means any of the following:

- a. An officer's use of deadly force;
- b. An officer's use of a dangerous weapon against an individual who causes injury to any individual;
- c. Death or serious bodily injury to any individual, other than the officer, resulting from an officer's:
 - i. Use of a motor vehicle while the officer is on duty; or
 - ii. Use of a government vehicle while the officer is off duty.
- d. The death of an individual who is in custody, but excluding a death that is the result of disease, natural causes, or conditions that have been medically diagnosed prior to the individual's death; or
- e. the death of or serious bodily injury to an individual not in custody, other than an officer, resulting from an officer's attempt to prevent an individual's escape from custody, to make an arrest, or otherwise to gain physical control of an individual.

Enacted November 13, 2023

2-1.1 Trust and Confidence of the Public.

OICIs implicate the public's trust and confidence in both police and prosecutors. While OICIs are rare in comparison to the number of interactions law enforcement and prosecutors have with the public, these investigations and charging decisions can be complex and have profound social, civil, administrative and criminal consequences. Therefore, the prosecutor should:

- a. Resolve or mitigate any conflicts of interests in both the investigation and prosecution functions (see Standard 1-3 Conflicts of Interest);
- b. Remove or mitigate any appearance of bias (see Standard 1-2 Improper Bias Prohibited);
- c. Subject to the Utah Rules of Professional Conduct and to the rights of any accused and victims, ensure the public is timely informed of the status of an OICI investigation and of the prosecutor's charging decision;
- d. Render a timely charging decision.

Enacted November 13, 2023

2-1.2 Trust and Confidence of Law Enforcement.

OICIs also implicate law enforcement's trust and confidence in prosecutors. Therefore, the prosecutor should:

- a. Ensure that OICIs are investigated professionally, thoroughly, and impartially;
- b. Ensure involved officers are treated with dignity and respect;
- c. Timely inform the involved law enforcement agency or agencies and involved officers of the status of the investigation and of the prosecutor's charging decision; and
- d. Render a timely charging decision.

Enacted November 13, 2023

2-1.3 County and District Attorney Duty to Screen for Criminal Charges.

- a. Each county and district attorney has the duty to screen for criminal charges each OICI that occurs in the attorney's jurisdiction.
- b. When screening an OICI for criminal charges, the county or district attorney should apply the same standards used for all criminal cases in the attorney's office (see Standard 3-2 Charging).
- c. The county or district attorney has no duty to make factual findings or render a legal opinion regarding whether an officer's conduct in an OICI should result in (i) an agency's civil liability, or (ii) an agency's administrative action against an officer. In other words, the county or district attorney's duty is to screen for criminal charges the conduct of individuals involved in an OICI; the attorney has no duty to render an opinion on whether any individual's use of force was otherwise lawful.

Enacted November 13, 2023

2-1.4 Investigations.

- a. OICI investigations are governed by Utah Code Section 76-2-408.
- b. Each county should have a written protocol on how OICIs are investigated (a "protocol").
- c. The county or district attorney should work jointly with all municipal, county and college or university law enforcement agencies in the prosecutor's jurisdiction to develop the protocol. If possible, the county or district attorney should also work to develop the protocol with state and federal law enforcement agencies regularly operating in the attorney's jurisdiction.
- d. The protocol should be memorialized in memorandums of understanding or interlocal agreements with the county or district attorney and all participating law enforcement agencies.
- e. All parties to the protocol should regularly review and update the protocol.
- f. The protocol should specify the roles and functions of investigators, prosecutors, and other public officials involved in OICIs. Among other things, the protocol should:
 - i. Identify policies and establish standard operating procedures;

- ii. Specify how an independent investigating agency or team will be selected and identify the general structure of the investigating team;
 - iii. Ensure investigatory and prosecutorial independence (e.g., removing and mitigating conflicts of interest);
 - iv. Ensure responsible public transparency (balancing public transparency, the privacy of the victims and officers, and the integrity of investigation);
 - v. Ensure procedural fairness to officers, suspects and victims;
 - vi. Ensure the criminal investigation has investigative priority over the administrative investigation and the criminal and administrative investigations remain partitioned and bifurcated;
 - vii. Ensure the criminal investigation has access to all resources necessary to conduct a thorough, fair and professional investigation.
- g. The protocol may provide for an expedited investigation of OICIs when an officer's use of a motor vehicle, as specified in Section 2-1(c), did not result in the death of any individual.
- h. The county or district attorney should publish the protocol on the office's public website.

Enacted November 13, 2023

2-1.5 Officer Interviews.

- a. The county or district attorney should ensure that OICI investigators make all reasonable efforts to interview each officer involved in an OICI.
- b. Interviews with officers involved in an OICI should be video recorded.
- c. When a critical witness, including an officer, refuses to submit to an interview or provide a detailed and sworn written statement, the attorney may consider the use of investigative subpoenas, grants of immunity, and requesting a grand jury, if reasonably available.
- d. The attorney should ensure that OICI investigators' conduct and interviews with involved officers do not implicate the protections of Garrity (See generally *Garrity v. New Jersey*, 385 U.S. 493 (1967)).
- e. The attorney should ensure that the agencies of officers involved in an OICI are notified of the procedures necessary to partition or bifurcate the criminal investigation from the administrative investigation.
- f. For release of reports and statements made pursuant to Garrity, see Utah Code Section 63G-2-305(84).
- g. The attorney should ensure that OICI investigators are aware that the county or district attorney is the only individual authorized to grant immunity to a witness.

Enacted November 13, 2023

2-1.6 Communication With the Media.

- a. Throughout an OICI investigation and any resulting prosecution the county or district attorney should ensure responsible public transparency, subject to Utah Rules of Professional Conduct 3.6 and 3.8.
- b. Additionally, as noted in 2-1.1 Trust and Confidence of the Public, the public's right to know what occurred in an OICI must be balanced with the requirements of the investigations and with the rights of the involved individuals.
- c. The prosecutor's office should have a designated spokesperson for an OICI.
- d. For release of law enforcement videos to the media, see Utah Code Section 77-7a-107(3).

Enacted November 13, 2023

2-1.7 Communication with the Family of the Deceased.

- a. The county or district attorney should, as soon as practicable, contact the family of any deceased individuals from an OICI. The attorney should provide information to the family regarding the OICI

process and the role and responsibility of the attorney. The attorney should provide information to the family about available support resources.

b. The county or district attorney's office should, if practicable, contact the family of any deceased individuals from an OICI before announcing the attorney's charging decision.

Enacted November 13, 2023

2-1.8 County or District Attorney's Findings.

a. The county or district attorney should comply with the requirements specified in Utah Code Section 76-2-408.

Enacted November 13, 2023

2-1.9 Maintaining Relationships with Stakeholders.

a. If practicable, the county or district attorney should establish and maintain lines of communication with leaders from underrepresented communities in the attorney's jurisdiction. This can be done in conjunction with prosecutor and/or police advisory boards, if existing.

b. If practicable, the county or district attorney should establish and maintain lines of communication with representatives from any police unions representing a significant number of officers in the attorney's jurisdiction.

Enacted November 13, 2023

3. Pre-Trial Considerations

3-1 Jailhouse Informants

3-1.0 Jailhouse Informant Definition and Overview

3-1.1 Obtaining an Inmate's Confession

3-1.2 Corroborating the Informant's Testimony

3-1.3 Disclosures

3-1.4 Victims

3-2 Charging

3-2.0 Prosecutorial Responsibility to Charge

3-2.1 Filing and Maintaining Criminal Charges

3-2.2 Factors to Consider When Screening and Charging a Case

3-2.3 Factors Not to Consider When Screening and Charging a Case

3-3 Grand Jury

3-4 Discovery

3-4.0 Prosecutorial Responsibility to Provide Discovery

3-4.1 Open File Policy

3-4.2 Obtaining Evidence from Law Enforcement

3-4.3 Redacting Information

3-4.4 Reciprocal Discovery

3-4.5 Brady/Giglio Evidence

3-4.6 Brady/Giglio Evidence, Definitions

3-4.7 Brady/Giglio Evidence, Gathering Evidence

3-4.8 Brady/Giglio Evidence, Disclosing Evidence

3-4.9 Brady/Giglio Evidence, Admission of Evidence

3-4.10 Brady/Giglio Evidence, Other Issues

3-5 Plea Negotiation and Agreements

3-5.0 General Guidelines

3-5.1 Conditional Offer

- 3-5.2 Presence of Defense Counsel and Unrepresented Defendants**
- 3-5.3 Factors to Consider**
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- 3-5.5 Collateral Consequences**
- 3-5.6 Factual Basis for Plea**
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- 3-5.10 Limits of Authority**
- 3-5.11 Fulfilling the Plea Agreement**
- 3-5.12 Rights of Others to Address the Court**
- 3-5.13 Notification of Media**
- 3-5.14 Record of Plea Agreement and Reasons for Dismissal of Charges**

3.6 Search Warrant Review

3-1 Jailhouse Informants

3-1.0 Jailhouse Informant Definition and Overview.

- a. A jailhouse informant is an inmate at a jail or prison who claims to have received or claims to be able to obtain an admission from another inmate who is under investigation or awaiting trial.
- b. Jailhouse informant testimony is problematic because there is normally only one thing to which a jailhouse informant can testify: that a fellow inmate confessed. This is significant because confession evidence is widely acknowledged to possess unique potency. *See Bruton v. United States*, 391 U.S. 123, 139 (1968) (White, J., dissenting). The U.S. Supreme Court has observed that confessions are "probably the most probative and damaging evidence that can be admitted." *Id.*
- c. Jailhouse informants have much to gain and little to lose—thereby creating an incentive to fabricate evidence. In many instances, an informant claims he is seeking little or nothing for his testimony and law enforcement is thereby inclined to believe the informant’s claims. However, it is easy for law enforcement and prosecutors to misunderstand what types of incentives can induce a lie from someone who is incarcerated, particularly on a long-term commitment. Requests for a different status or classification in the facility, the opportunity to work in a particular shop or area within the facility, a move to another facility closer to home, a simple letter acknowledging cooperation—all of these may seem relatively insignificant to a law enforcement officer or prosecutor but can be very significant motivators for an informant. This is particularly true when the informant will receive little or no consequence if the informant’s statements are false.
- d. Jailhouse informants take significant risk when they cooperate with law enforcement. Other inmates may retaliate against the informant and this retaliation can include risk to the informant’s life. This risk to the informant creates two problems a prosecutor must address: First, the informant may not assume the risk of informing unless he is provided a significant incentive to inform--which in turn produces a compelling motive to fabricate evidence. And second, the prosecutor must take reasonable measures to ensure the safety of the informant from retaliation.

Enacted November 15, 2022

3-1.1 Obtaining an Inmate’s Confession.

- a. The process of law enforcement obtaining an inmate’s confession from another inmate can be Constitutionally precarious. If law enforcement or a prosecutor intends to use a jailhouse informant for testimonial purposes, the prosecutor should become familiar with relevant 5th and 6th Amendment case

law pertaining to investigations involving an in custody defendant. See, e.g., *Massiah v. United States*, (1964) 377 U.S. 201; *Illinois v. Perkins*, 496 U.S. 292 (1990); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).

b. A prosecutor should not deliberately place or advise the placement of an informant in a manner that would violate a defendant's 5th or 6th Amendment rights.

Enacted November 15, 2022

3-1.2 Corroborating the Informant's Testimony.

a. Due to the nature of jailhouse informant evidence, a prosecutor should be cautious when filing and prosecuting charges against a defendant based on an informant's testimony. Factors a prosecutor should consider include:

i. Whether, independent of the informant's testimony, there is reasonable evidence that the defendant committed the charged crime(s).

ii. Whether the informant's testimony consists primarily or solely of information available to the public or the informant's testimony is simply that the defendant admitted to committing a crime.

iii. Whether non-publicly available details described in the confession can be corroborated by evidence independent of the confession.

iv. Whether the informant had a reasonable opportunity to receive the confession as described.

b. Other examples of corroborating information a prosecutor may obtain include:

i. When and where did the confession occur?

ii. Were the informant and confessor in the same cell or location when the claimed confession occurred? Are there video recordings in the institution demonstrating the defendant and inmate were together when the confession occurred?

iii. Does the informant have details about the crime that are unavailable through the media, family members, a court record search, etc.?

iv. Why would the confessor confess to the informant? Is there evidence of a relationship between the defendant and the inmate?

c. A prosecutor should strongly encourage law enforcement to record all conversations with the informant.

d. Additionally, prosecutors and law enforcement investigators should consider doing the following:

i. Review jail calls, emails and other communication methods available to the informant to see if there is contact between the inmate and other persons who may have information about the defendant or the crime(s).

ii. Collect all of the informant's and the defendant's email, telephone calls, written mail, etc. The collection should start, if possible, at or prior to the date the informant had access to the suspect and should not end until acquittal or sentencing.

Enacted November 15, 2022

3-1.3 Disclosures.

a. Using a jailhouse informant directly implicates a prosecutor's Brady/Giglio obligations. See Section 3-4 Discovery.

b. Knowledge in the possession of anyone on the prosecution team of potentially exculpatory or impeaching evidence related to the in custody informant will be imputed to the prosecutor whether or not it was known by the prosecutor. "Brady suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor." *Youngblood v. West Virginia* (2006) 547 U.S. 867, 869-870.

- c. A prosecutor has a duty to learn of and disclose any inducements made to a prosecution witness to testify that are known to others acting on the government's behalf, including those made by the custodial institution. See *Weary v. Cain*, 577 U.S. 385, 136 S.Ct. 1002, 194 L.Ed.2d 78 (2016).
- d. All benefits or promises made to the informant should, when feasible, be disclosed in writing to defense counsel. Similarly, all promises, inducements, benefits and incentives, and all requests from the informant for some benefit or promise should be memorialized in writing with the informant.
- e. A prosecutor should take a broad view of what an informant may view as a promise, inducement, benefit or incentive. These can include, but are not limited to, any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, benefit, immunity, financial assistance, reward, or amelioration of current or future conditions or locations of incarceration in return for, or in connection with, the informant's testimony.

Enacted November 15, 2022

3-1.4 Victims.

- a. Using a jailhouse informant may implicate the rights of a crime victim. Specifically, providing an incentive to a jailhouse informant may implicate the interests of any victims of the informant's crimes. Prosecutors must be cognizant of and comply with Utah Constitution Article I, Section 28 and with Utah Code Title 77, Chapter 37.

Enacted November 15, 2022

3-2 Charging

3-2.0 Prosecutorial Responsibility to Charge.

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

Enacted January 10, 2020

3-2.1 Filing and Maintaining Criminal Charges.

- a. A prosecutor should not file or maintain charges if the prosecutor reasonably believes the accused is innocent.
- b. A prosecutor should file and maintain criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge or maintain charges is in the interests of justice.
- c. A prosecutor should only file and maintain charges in number and degree than are reasonably necessary to fairly reflect the gravity of the offense or deter similar conduct.
- d. In the event that a prosecutor learns of previously unknown information that could affect a screening decision previously made, the prosecutor should reevaluate that earlier decision in light of the new information.

Enacted January 10, 2020

- 3-2.2 Factors to Consider When Screening and Charging a Case.** In addition to the strength of the case and admissibility of evidence, in considering whether prosecution is in the interest of justice, prosecutors may consider the following factors when applicable:
- a. The impact of a prosecution on a victim, witness or third party;
 - b. Whether the public's or victim's interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.
 - c. The availability of suitable treatment, diversion and rehabilitative programs, the accused's willingness to enter such programs, and the accused's ability to qualify for entrance to and funding for such programs;
 - d. The accused's efforts toward voluntary restitution and/or treatment and rehabilitation prior to prosecution;
 - e. The availability of a noncriminal disposition, deferred prosecution or other diversionary disposition and the accused's willingness to participate in such a program;
 - f. Characteristics of the accused that are relevant, including:
 - i. The mental status of the accused, including whether the accused committed the offense while substantially mentally ill;
 - ii. The accused's relative level of culpability in the criminal activity;
 - iii. Whether the accused held a position of trust at the time of the offense;
 - iv. The accused's criminal history;
 - v. Whether the alleged crime represents a substantial departure from the accused's history of living a law abiding life;
 - vi. Whether the accused has already suffered substantial loss in connection with the alleged crime or whether prosecution would cause unwarranted hardship on the accused;
 - vii. The extreme youth or advanced age of the accused
 - g. The likelihood of prosecution by another criminal justice authority;
 - h. Whether non-prosecution would assist in achieving other legitimate goals, such as the investigation or prosecution of more serious offenses;
 - i. The willingness of the accused to cooperate with law enforcement in the apprehension or conviction of others;
 - j. The charging decisions made for similarly-situated accused persons;
 - k. A history of non-enforcement of the applicable law;
 - l. A reasonable belief of the prosecutor that the applicable law is unconstitutional;
 - m. Any improper conduct by law enforcement in relation to the accused or the investigation, or failure of law enforcement to perform necessary duties or investigations in relation to the prosecution;
 - n. The evidence strongly suggests improper motives of the complainant and there is minimal evidence in addition to the complainant's statements corroborating the offense;
 - o. Whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;
 - p. The extent of harm caused by the offense;
 - q. Whether the size of the loss or the extent of the harm caused by the alleged crime is too small to warrant a criminal sanction;
 - r. The impact of the crime on the community, including the potential deterrent value of a prosecution to the accused and to society at large;
 - s. Excessive costs of prosecution in relation to the seriousness of the offense(s), including the availability of resources to the prosecutor to undertake a particular prosecution or the prosecution of a certain category of offenses;
 - t. The possible influence of any cultural, ethnic, socioeconomic or other improper biases against the accused, witnesses or victims.

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

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

Enacted January 10, 2020

3-4 Discovery

3-4.0 Prosecutorial Responsibility to Provide Discovery.

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

Enacted January 10, 2020

3-4.1 Open File Policy.

- a. Providing broad and early discovery promotes the truth-seeking mission of the prosecutor and furthers the speedy trial and due process rights of both the accused and victims.
- b. A prosecutor's office should adopt and maintain an open file policy with regard to criminal cases, meaning that the prosecutor will provide to the accused copies of or access to all relevant, unprivileged information known to the prosecutor. A prosecutor may redact information prior to providing discovery as necessary for the protection of victims and witnesses (See below Rule 3-4.3, Redacting Information).

Enacted January 10, 2020

3-4.2 Obtaining Evidence from Law Enforcement.

- a. A prosecutor should educate and inform law enforcement agencies in the prosecutor's jurisdiction that the prosecutor, not the law enforcement officer or agency, is the arbiter of what information is disclosed to the defense. The prosecutor should inform and train the law enforcement officers and agencies in its jurisdiction to timely provide to the prosecutor all information in its possession pertaining to a defendant's case.
- b. A prosecutor should seek discovery information from all members of the prosecution team which includes federal, state and local law enforcement officers and agencies and other government officials and agencies known to the prosecutor to be involved in the investigation and/or prosecution of a criminal case against a defendant--including those not in the prosecutor's jurisdiction.
- c. A prosecutor should seek to identify all information in the possession or control of the prosecution team that tends to negate the guilt of the accused, mitigate the offense charged, impeach the prosecution's witnesses or evidence, or reduce the likely punishment of the accused if convicted.
- d. Prosecutors should err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes and should seek discovery information from that team.

Enacted January 10, 2020

3-4.3 Redacting Information.

- a. Prior to providing discovery, a prosecutor should redact from materials provided as discovery all information reasonably necessary to protect the safety and privacy of a victim or witness.
- b. When portions of materials are discoverable and other portions are not, a prosecutor should make good faith efforts to redact the non-discoverable portions in a way that does not cause confusion or prejudice to the accused.
- c. If counsel for the accused requests information previously redacted by a prosecutor, the prosecutor should provide the information when it is relevant to the accused's criminal case and the prosecutor can implement reasonable measures for the protection of the victim, witness, or any personal identifying information. If redacted or restricted material is ordered by a court to be produced or disclosed, a prosecutor should seek protective orders as necessary to control the dissemination of that material.

Enacted January 10, 2020

3-4.4 Reciprocal Discovery.

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

Enacted January 10, 2020

3-4.5 Brady/Giglio Evidence.

- a. The disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 154 (1972). Prosecutors must disclose exculpatory and impeachment evidence when such evidence is material to guilt or punishment. Brady, 373 U.S. at 87; Giglio, 405 U.S. at 154.
- b. Recognizing that it is sometimes difficult to assess the nature of evidence before trial, prosecutors should take a broad view of materiality and exculpating evidence and err on the side of identifying, gathering and disclosing Brady/Giglio material.

Enacted November 11, 2021

3-4.6 Brady/Giglio Evidence, Definitions.

- a. **Agency:** Any law enforcement agency as defined in Utah Code Title 53, Chapter 1, Section 102.

b. Brady/Giglio Material: Potential impeachment information relating to an officer, including information in the categories listed below:

- i.. Any finding of conduct that reflects upon the truthfulness or bias of an officer, including a finding of lack of candor during a criminal, civil, or administrative inquiry or proceeding;
- ii. Any past or pending criminal charge brought against an officer;
- iii. Any allegation of conduct bearing upon truthfulness, bias, or integrity of an officer that is the subject of a pending investigation;
- iv. Prior findings by a judge that an officer has testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct;
- v. Any conduct finding or pending conduct allegation that either casts a substantial doubt upon the accuracy of any evidence—including witness testimony—that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence. Accordingly, any findings or allegations that relate to an officer’s substantive violations concerning:
 1. Failure to follow legal or agency requirements for the collection and handling of evidence, obtaining statements, recording communications, and obtaining consents to search or to record communications;
 2. Failure to comply with agency procedures for supervising the activities of a cooperating person (confidential informants, witnesses and sources);
 3. Failure to follow mandatory protocols with regard to the forensic analysis of evidence;
- vi. Information that may be used to suggest that an officer is biased for or against a defendant (See *United States v. Abel*, 469 U.S. 45, 52 (1984). The Supreme Court has stated, "[b]ias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest."); and
- vii. Information that reflects that an officer’s ability to perceive and recall truth is impaired.
- viii. Any other impeachment information deemed Brady/Giglio material by a Utah or federal court (with jurisdiction in Utah), as determined by the prosecutor.

c. Brady/Giglio Violation: Conduct that, if sustained, may reasonably be disclosable by a prosecutor pursuant to *Giglio v. United States*, 405 U.S. 150 (1972) and related case law.

d. Officer: Any peace officer as defined in Utah Code Title 53 Chapter 13, and any employee of an agency whose job duties include providing courtroom testimony in support of the enforcement of criminal laws, statutes and ordinances.

e. Prosecutor: The Attorney General pursuant to Utah Code Section 67-5-1, a County or District Attorney pursuant to Section 17-18a, and a city attorney pursuant to Section 10-3-928 undertaking the prosecution of a law enforcement agency’s cases.

Enacted November 11, 2021

3-4.7 Brady/Giglio Evidence, Gathering Evidence.

- a. Gathering Brady/Giglio material occurs when the prosecutor collects information for the prosecutor’s review only. Gathering does not necessarily mean the information will be disclosed to the defense or the court, nor does it mean the evidence will be admitted at trial.
- b. Prosecutors must have a process in place to regularly obtain Brady/Giglio material from each law enforcement agency in the prosecutor’s jurisdiction. This process should be formalized in memoranda, agreements or written protocols. The prosecutor should ensure that each new chief, sheriff or law enforcement agency head understands and agrees to the process.

- c. Prosecutors should have a procedure to gather Brady/Giglio material directly from law enforcement officers subpoenaed to testify at trial. This is particularly important when officers are not employed by an agency within the prosecutor's jurisdiction or were previously employed by an agency not within the prosecutor's jurisdiction.
- d. Prosecutors should have a procedure to maintain awareness of the discipline of officers within its jurisdiction by the Utah Peace Officers Standards and Training Council ("POST") pursuant to Utah Code Section 53-6-211. In the event an officer's discipline may reasonably have been founded on Brady/Giglio material, the prosecutor should, unless already in its possession, obtain a copy of the investigative reports used by POST.
- e. Prosecutors should share Brady/Giglio material, when requested, pursuant to Utah Code Section 63G-2-206.
- f. Prosecutors should store Brady/Giglio material in a computer file protected from both non-authorized internal access and public disclosure. Prosecutors should use all available legal means to protect from public disclosure Brady/Giglio material in its possession that is not already publicly available.
- g. If a prosecutor, independent of an officer's agency, receives potential Brady/Giglio material regarding an officer, the prosecutor should provide that information to the officer's current agency for investigation. If a prosecutor receives new information regarding Brady/Giglio material that was previously investigated by an agency and not sustained, the prosecutor should provide the new information to the officer's current agency for investigation.

Enacted November 11, 2021

3-4.8 Brady/Giglio Evidence, Disclosing Evidence.

- a. Each prosecutor assigned to a case is responsible for making timely Brady/Giglio disclosures to the defendant, whether or not the defendant makes a disclosure request.
- b. Each prosecutor assigned to a case retains the responsibility to determine whether a Brady/Giglio disclosure is legally or ethically required. If the prosecution agency head disagrees with an assigned prosecutor's determination about whether or when to make a Brady/Giglio disclosure, the agency head should either defer to the assigned prosecutor or reassign the case.
- c. In order to protect a defendant's right to due process, a prosecutor should make Brady/Giglio disclosures to the defendant as soon as reasonably feasible and at least thirty days before trial.
- d. When making a Brady/Giglio disclosure to the defendant of information not already publicly available, the prosecutor should either:
 - i. Seek a non-dissemination protective order from the court; or
 - ii. Provide to defense counsel the opportunity to review the Brady/Giglio materials in person.
- e. A prosecutor in possession of Brady/Giglio material against an officer who is subpoenaed to testify at a trial should disclose to the defendant (1) the name and agency of the officer, (2) the date and general nature of the allegation, and (3) any material investigative reports in the prosecutor's possession.
- f. A prosecutor should not disclose alleged Brady/Giglio material unless (1) an agency has found that an officer engaged in conduct which is a Brady/Giglio violation, (2) a court has found that an officer engaged in conduct which is a Brady/Giglio violation, (3) POST has found that an officer engaged in conduct which is a Brady/Giglio violation, (4) a court has ordered disclosure, or (5) the officer's ability to perceive and recall truth is impaired in a manner relevant to the officer's testimony. In any other circumstance where the prosecutor believes disclosure is required, the prosecutor should, prior to making disclosure, provide to the officer an opportunity to rebut the allegation of a Brady/Giglio violation.
 - i. Occasionally a court or agency makes a finding that an officer engaged in conduct which is a Brady/Giglio violation without providing the officer due process, or new and material exculpatory evidence is discovered. In such an event, the prosecutor should conduct an independent investigation

and provide to the officer some due process before making its own finding. In the event the prosecutor makes a finding contrary to that of the officer's agency or a court, the prosecutor should file a motion in limine seeking to exclude or limit the admissibility of the Brady/Giglio material.

ii. In the event a prosecutor has been notified of an allegation of a Brady/Giglio violation by an officer who is subpoenaed to testify at a trial but the officer's agency or the court has not yet made findings, the prosecutor should disclose to the defendant (1) the name of the officer, (2) the general nature of the allegation, and (3) the approximate time it will take the agency to conduct its investigation or the court to enter findings. The prosecutor should file a motion in limine seeking an order from the court either (1) excluding evidence of the Brady/Giglio allegation unless or until the agency or court sustains the allegation, or (2) continuing the trial.

g. If a prosecutor disagrees with an agency's or a court's finding that an officer's conduct was a Brady/Giglio violation, the prosecutor should, prior to disclosure to the defendant, file a motion in limine with the court seeking an in camera review. The prosecutor should provide to the agency and the officer an opportunity to submit information to the court.

h. Allegations of Brady/Giglio violations that cannot be substantiated, are not credible, or have resulted in the exoneration of an officer are not disclosable. Similarly, sustained findings of Brady/Giglio violations are not disclosable if a reviewing body (court, civil service commission, etc.) has overturned the finding.

i. Prosecutors should err on the side of disclosure when evaluating Brady/Giglio material. Nonetheless, if a prosecutor is unable to reasonably determine whether information is Brady/Giglio material or whether an officer has committed a Brady/Giglio violation, the prosecutor should, prior to disclosure, request an in camera review by the court. The prosecutor should notify the officer of the prosecutor's request and should allow the officer an opportunity to submit evidence to the court.

Enacted November 11, 2021

3-4.9 Brady/Giglio Evidence, Admission of Evidence.

a. Prosecutors should seek to exclude or limit the admissibility of Brady/Giglio material that is not relevant or material to the case, or may otherwise violate Utah Rule of Evidence 608.

Enacted November 11, 2021

3-4.10 Brady/Giglio Evidence, Other Issues.

a. Notwithstanding a Brady/Giglio violation, a prosecutor should not make a determination whether an officer should be employed by a law enforcement agency. This determination should be made by the employing agency.

b. A prosecutor should inform an officer and the officer's employing agency if (1) the officer's testimony, because of a Brady/Giglio violation, will not be admitted or otherwise used in court by the prosecutor, or (2) if Brady/Giglio material relating to an officer may materially harm the successful investigation or prosecution of a crime wherein the officer may be a witness.

c. Witness Inducements:

i. Witness inducements include any benefit that has or will be provided to a witness to inform or testify including, but not limited to, dropped or reduced charges, immunity, sentencing agreements or expectations of an action/inaction by a prosecutor at sentencing, assistance in a state or local criminal proceeding, considerations regarding forfeiture of assets, assistance in deportation or other immigration status considerations, monetary benefits, non-prosecution agreements, agreements to inform other law enforcement or prosecution entities regarding the extent of a witness' assistance or making substantive recommendations on the witness' behalf, relocation assistance, and consideration or benefits to culpable or at risk third-parties.

ii. Witness inducements are impeachment evidence and should be treated as Brady/Giglio material.

Enacted November 11, 2021

3-5 Plea Negotiation and Agreements

3-5.0 General Guidelines.

- a. All Utah prosecutorial agencies are required to publish on its website the agency's policy on plea bargains, or to affirmatively disclose on its website that it does not have such a policy.
- b. All plea agreements are subject to the requirements of Utah Rules of Criminal Procedure 11.
- c. A prosecutor is under no obligation to enter into a plea agreement that has the effect of disposing of criminal charges in lieu of trial. However, where it appears that it is in the public interest, the prosecution may engage in negotiations for the purpose of reaching an appropriate plea agreement.
- d. When a plea agreement is reached, it should be reduced to writing, if practicable.

Enacted September 19, 2022

3-5.1 Conditional Offer.

Prior to reaching a plea agreement, a prosecutor may set conditions such as:

- a. The defendant's acceptance of the plea offer within a specified time period;
- b. The defendant's waiver of certain pre-trial motions such as a motion to suppress or dismiss; or
- d. The defendant's waiver of certain trial or post-trial rights, such as the right to pursue an appeal.
- e. However, a prosecutor should not require the waiver of the defendant's right to appeal based upon a claim of ineffective assistance of defendant's counsel, prosecutorial misconduct or destruction of exculpatory evidence by the government unless such claims are based on past instances of conduct that are specifically identified in the agreement or in the transcript of proceedings that address the agreement. If a proposed disposition agreement contains such a waiver regarding ineffective assistance of counsel, the prosecutor should ensure that the defendant has been provided the opportunity to consult with independent counsel regarding the waiver before agreeing to the disposition.

Enacted September 19, 2022

3-5.2 Presence of Defense Counsel and Unrepresented Defendants.

- a. A prosecutor should not negotiate a plea agreement directly with a defendant who is represented by counsel in the matter, unless defense counsel is either present or has given express permission for the prosecutor to negotiate directly with the defendant.
- b. Where a defendant has waived counsel, the prosecutor may engage in disposition discussions with the defendant.
- c. In a misdemeanor case, prior to formal waiver of the defendant's right to counsel, when a defendant has been informed of the right to counsel and chooses to not obtain counsel, the prosecutor may engage in disposition discussions with the defendant.

Enacted September 19, 2022

3-5.3 Factors to Consider.

Prior to negotiating a plea agreement, a prosecutor may consider the following factors:

- a. The nature of the offense(s);
- b. The degree of the offense(s) charged;
- c. Any possible mitigating circumstances;
- d. The age, background, and criminal history of the defendant;
- e. The expressed remorse or contrition of the defendant and willingness to accept responsibility for the crime;

- f. Sufficiency of admissible evidence to support a verdict;
- g. Undue hardship caused to the defendant;
- h. Possible deterrent value of trial;
- i. Aid to other prosecution goals through non-prosecution;
- j. A history of non-enforcement of the statute violated;
- k. The potential effect of legal rulings to be made in the case;
- l. The probable sentence if the defendant is convicted;
- m. Society's interest in having the case tried in a public forum;
- n. The defendant's willingness to cooperate in the investigation and prosecution of others;
- o. The likelihood of prosecution in another jurisdiction;
- p. The availability of civil avenues of relief for the victim, or restitution through criminal proceedings;
- q. The willingness of the defendant to waive his or her right to appeal;
- r. The willingness of the defendant to waive (release) his or her right to pursue potential civil causes of action arising from his or her arrest, against the victim, witnesses, law enforcement agencies or personnel, or the prosecutor or his or her staff or agents;
- s. With respect to witnesses, the prosecution should consider the following:
 1. The availability and willingness of witnesses to testify;
 2. Any physical or mental impairment of witnesses;
 3. The certainty of their identification of the defendant;
 4. The credibility of the witness;
 5. The witness's relationship with the defendant;
 6. Any possible improper motive of the witness;
 7. The age of the witness;
 8. Any undue hardship to the witness caused by testifying.
- t. With respect to victims, the prosecution should consider those factors identified above and the following:
 1. The existence and extent of physical injury and emotional trauma suffered by the victim;
 2. Economic loss suffered by the victim;
 3. Any undue hardship to the victim caused by testifying.

Enacted September 19, 2022

3-5.4 Factors to Not Consider.

- a. When negotiating a plea agreement, a prosecutor should not consider the factors listed in Standard 3-2.3.
- b. In considering whether to offer a plea agreement to a defendant and the terms of that plea agreement, the prosecutor should comply with Standard 1-2.0(a) and (b), unless the listed factor is relevant to the criminal conduct charged or to the anticipated sentence.
- c. When negotiating a plea agreement a prosecutor should not make a more or less favorable plea offer because a defendant is represented or not represented.

Enacted September 19, 2022

3-5.5 Collateral Consequences.

Prior to negotiating a plea agreement, a prosecutor may consider any known collateral consequences of a plea to the defendant. However, the duty to discover and inform the defendant of any collateral consequences rests solely on the defendant and his or her counsel. A prosecutor should allow a defendant adequate time to discover and consider any collateral consequences of a guilty plea.

Enacted September 19, 2022

3-5.6 Factual Basis for Plea.

- a. The prosecutor must satisfy himself or herself that there is a sound factual basis for all crimes to which the defendant will plead guilty under any proposed plea agreement.
- b. A prosecutor may agree to a plea based upon a permissible legal fiction if it is in the interests of justice, the court is fully informed, and the defendant knowingly consents to the legal fiction as the basis for the charges(s) to which the defendant will plead guilty.
- c. A prosecutor should not agree to a guilty plea or sentencing enhancement if the prosecutor reasonably believes that sufficient admissible evidence to support the conviction or enhancement would be lacking if the matter went to trial.

Enacted September 19, 2022

3-5.7 Restitution.

- a. Before entering into a plea agreement, the prosecutor should make reasonable efforts to determine whether any victims are entitled to restitution. Such efforts should include consulting with any victims. For any case involving bodily injury or death, or a substantial threat of bodily injury or death, the prosecutor should also contact the Utah Office for Victims of Crime to determine whether that office has paid reparations on behalf of any victims and will seek to recover restitution.
- b. Whenever possible, the prosecutor should negotiate a specific amount of restitution as a term of any plea agreement. When that is not possible, the prosecutor should seek an agreement from the defendant to pay restitution in an amount to be determined by the court, including restitution for offenses that are dismissed as part of the plea agreement but are intended to be included in the court's restitution order.
- c. A prosecutor should not ask the defendant to agree to a specific amount of restitution greater than the amount the prosecutor reasonably believes would be authorized by law if the defendant were convicted of all offenses the defendant was charged with, or the prosecutor reasonably believes the defendant could have legally been charged with and convicted of in the case or cases the parties are negotiating.
- d. A prosecutor should not agree to a specific amount of restitution less than the amount the prosecutor reasonably believes would be authorized by law, unless:
 - 1. the prosecutor has made diligent efforts to consult with any victims and, if possible, gain the victims' support for the proposed resolution; and
 - 2. the prosecutor believes that under the totality of the circumstances, agreeing to a lesser amount of restitution is in the interests of justice.

The prosecutor should not represent to the defendant that the victim or the court are bound by the parties' agreement to a lesser amount of restitution.

Enacted September 19, 2022

3-5.8 Discovery Relating to the Plea Agreement.

Prior to a defendant entering a guilty plea based upon a plea agreement with the prosecutor, the prosecutor shall make timely disclosures as specified in Utah Rule of Criminal Procedure 16(a)(1) and (2). A prosecutor shall also disclose any known material changes to previously disclosed evidence that is favorable to the defendant and material to guilt or punishment.

Enacted September 19, 2022

3-5.9 Candor.

The prosecutor should not knowingly make any false or misleading statements of law or fact to the defense during plea negotiations and should promptly correct any statements made which are later discovered to be false or misleading.

Enacted September 19, 2022

3-5.10 Limits of Authority.

- a. A prosecutor may advise the defense of the position the prosecutor will take concerning disposition of the case, including a sentence that the prosecutor is prepared to recommend to the court based upon present knowledge of the facts of the case and the offender, including his or her criminal history.
- b. A prosecutor should not make any promise, commitment or guarantee concerning the sentence that will be imposed by the court or concerning a suspension of sentence.
- c. A plea may be a material change in circumstances justifying the court's reconsideration of the defendant's custody status. However, a prosecutor should not condition a defendant's release from custody primarily upon the defendant entering a guilty plea.
- d. A prosecutor should avoid implying a greater power to influence the disposition of a case than the prosecutor actually possesses.

Enacted September 19, 2022

3-5.11 Fulfilling the Plea Agreement.

- a. A prosecutor should make good faith efforts to comply with a plea agreement that has been accepted and acted upon by the defendant to his or her detriment, unless the defendant fails to comply with any of his or her obligations under the same agreement or unless the prosecutor is excused from performance by law.
- b. If a prosecutor is unable to fulfill an understanding previously agreed upon in plea negotiations, the prosecutor should give prompt notice to the defendant and cooperate in securing leave of court for the defendant to withdraw any plea and take such other steps as would be appropriate to restore the defendant and the prosecution to the position they were in before the understanding was reached or plea made.

Enacted September 19, 2022

3-5.12 Rights of Others to Address the Court.

A prosecutor should not commit, as part of any plea agreement, to limit or curtail the right of any victim or other person authorized by law to address the court at the time of plea or sentencing. Pursuant to Utah Code Section 77-38-3, when a case involving a victim may resolve with a plea agreement, the prosecutor shall notify the victim of that possibility as soon as practicable and, upon the request of a victim, explain the available details of the anticipated plea agreement.

Enacted September 19, 2022

3-5.13 Notification of Media.

In a criminal case or proceeding that could result in incarceration, prior to the entry of a plea of guilty by the defendant in open court, the prosecutor should not make any extrajudicial comments to the media about the possibility of a plea of guilty to the offense. However, if a plea agreement has been reached with a defendant, either verbally or in writing, a prosecutor may inform the media of the scheduling of a change of plea hearing or the result of any step in the litigation.

Enacted September 19, 2022

3-5.14 Record of Plea Agreement and Reasons for Dismissal of Charges.

- a. Whenever the disposition of a charged criminal case is the result of a plea agreement, the prosecutor should make the existence and terms of the agreement part of the record.
- b. The prosecutor should maintain the reasons for the plea agreement in the case file.
- c. When criminal charges are dismissed on the prosecution's motion, including by plea of nolle prosequi or its equivalent, the prosecutor should make and retain an appropriate record of the reasons for the dismissal, and indicate on the record whether the dismissal was with or without prejudice.

Enacted September 19, 2022

4. Court Hearings and Trial

4-1 Using Visuals and Simulations

5. Sentencing

5-1 Fair Sentencing

5-2 Sentencing Alternatives

6. Post Sentencing

6-1 Duty of Prosecutor After Conviction

6-1 Duty of Prosecutor After Conviction

6-1 Duty of Prosecutor After Conviction.

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

b. When a prosecutor reasonably believes that a convicted person is actually innocent, the prosecutor should take appropriate steps to seek to remedy the conviction.

Enacted January 10, 2020