

# PROSECUTORS AND THE PRESS

## Ethical and Practical Guidance



# QUICK GUIDE

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**INNOVATIVE  
PROSECUTION  
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# INTRODUCTION

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

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

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

This Quick Guide provides an overview of considerations for navigating this difficult terrain. For a full discussion of the issues with practical tips and practices to avoid, as well as sample materials and a state-by-state chart of ethical rules, see [“Prosecutors and the Press – Ethical and Practical Guidelines” \(October, 2022\)](#).

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

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

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

## ETHICAL RULES AND GUIDELINES

Prosecutors must be familiar with their state rules of professional responsibility and the ABA Model Rules of Professional Conduct Rules 3.6 and 3.8 (Rules 3.6 and 3.8 will be referred to collectively as “ABA Model Rules”) that establish baseline ethical standards and responsibilities regarding trial publicity, extrajudicial statements, and post-conviction matters. Most states have adopted the ABA Model Rules in whole or in part. This guide focuses on the ABA Model Rules.

Under the ABA Model Rules, prosecutors may *not* make extrajudicial statements that they “know or reasonably should know will be disseminated to ...the public,”<sup>4</sup> and that would have a “substantial likelihood of materially prejudicing an adjudicative proceeding”<sup>5</sup> or “heightening public condemnation of the accused.”<sup>6</sup> As the comments to the ABA Model Rules recognize: It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression.”<sup>7</sup>

The “substantial likelihood” of prejudice standard in the ABA Model Rules is distinct from actual prejudice. It does not matter whether a prosecutor’s statements did prejudice a defendant, but whether they had the potential to prejudice an adjudicative proceeding.<sup>8</sup> These constraints bind extrajudicial statements made regarding any adjudicative proceeding, and include all stages of an investigation, arrest, indictment, as well as civil and criminal trials, nonjury hearings, and even arbitration proceedings.<sup>9</sup>

ABA Model Rule 3.6(d) restricts all lawyers who are participating in the investigation or litigation of a case, including defense counsel. It also restricts investigators, paralegals, and other prosecutor support staff.<sup>10</sup> ABA Model Rule 3.8(f) goes further and extends restrictions to law enforcement personnel associated with the criminal case.

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

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

<sup>6</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.8(f) (Am. Bar Ass’n 1980).

<sup>7</sup> ABA Model Rule 3.6 – comment 1, MODEL RULES OF PROFESSIONAL CONDUCT r.3.6 cmt. 1 (Am. Bar Ass’n 1980)

<sup>8</sup> *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1081 (1991) (noting that the absence of actual prejudice is not dispositive in an ethics hearing). *See also* *In re Brizzi*, 962 N.E.2d 1240, 1247 (Ind. 2012).

<sup>9</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6 cmt. 3, 6 (Am. Bar Ass’n 1980) (discussing the prejudicial impact of statements in different kinds of adjudicative proceedings).

<sup>10</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(d) (Am. Bar Ass’n 1980).

ABA Model Rule 3.6(c) is an exception to barred statements and allows prosecutors to make statements to mitigate adverse publicity “not initiated by the government” that a “reasonable lawyer would believe is necessary to protect the public from substantial and undue prejudice.”<sup>11</sup> However, any rejoinder *must be limited* to the information necessary to mitigate or redress the adverse publicity.<sup>12</sup>



## DEVELOPING A COMMUNICATIONS STRATEGY

Every chief prosecutor should have a communications strategy for when and how to deal with the media. Controversial issues that require interaction with the media is an inevitable part of a chief prosecutor’s work. A communications strategy requires a thorough review by the prosecutor about how to work with the media and who should do so. Though developing a communications strategy takes time and thought, it is far better to create a plan than to respond during a crisis when no strategy has been developed. Ideally this should be a written policy.

Examples of steps to create a communication policy include:

- **Media Outlets:** Identify local, statewide, and national media outlets and keep an up-to-date contact list of reporters.

<sup>11</sup> MODEL RULES OF PROFESSIONAL CONDUCT r.3.6(c) (Am. Bar Ass’n 1980).

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

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

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

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





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

**Prepare for Talking to the Press:** Talking with a reporter requires planning. When someone calls for a story, basic questions should be asked including name of the reporter, topic, scope of questions to be asked, others who have been interviewed and the deadline. The prosecutor should plan for what can and cannot be said, identify the three main points to convey to the reporter, and prepare to explain the ethical limitations on what can be said. The interview should be conducted in a respectful manner, without being hostile or defensive.

**Press Conferences:** Press conferences should be considered when an issue is truly newsworthy and timely, and where all media have a fair and equal chance to ask questions. While most prosecutors will hold press conferences a few times

per year to announce charges or provide updates on criminal cases, there are occasional opportunities to partner with other local leaders for community-wide announcements.



## SPECIAL CONSIDERATIONS FOR VARIOUS ASPECTS OF A CASE

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

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

- **Pre-Arrest Investigation:** In active investigations, statements should be general, devoid of details, and preferably limited to information that is part of a public filing.
- **Finding the Suspect:** When warning the community or requesting help in locating a suspect or evidence, photos and other relevant images previously disclosed in public filings are generally helpful.

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

## CONCLUSION

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