



Travis County District Attorney's Office Attorney Standards

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Part I. General Standards

1-1. Prosecutor Responsibilities

1-1.1. Primary Responsibility

“It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done. They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused.” Article 2.01, Texas Code of Criminal Procedure.

The primary duty of every prosecutor is to seek justice within the bounds of the law, not merely to convict. Prosecutors in the Travis County District Attorney’s Office (“Office”) are expected to be administrators of justice, zealous advocates, and officers of the court. Prosecutors should exercise sound discretion and independent judgment in making decisions. Prosecutors are the only actor in a criminal proceeding responsible for the presentation of the truth. Truth is a primary goal in all proceedings; without it, justice is not complete.

1-1.1a. Duty to Represent Societal versus Individual Rights and Interests

Prosecutors are not a mere advocates. Unlike other lawyers, prosecutors do not represent individuals or entities, but society as a whole. In that capacity, prosecutors must exercise independent judgment in reaching decisions while taking into account the interest of victims, witnesses, law enforcement officers, suspects, defendants, and those members of society who have no direct interest in a particular case but are nonetheless affected by its outcome.

Prosecutors should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity and exercising discretion not to pursue criminal charges when appropriate.

Prosecutors should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the rights of all persons, including suspects and defendants.

1-1.1b. Actual Innocence, Wrongful Conviction, or Miscarriage of Justice

If a prosecutor believes that a convicted defendant is actually innocent, that the defendant was wrongfully convicted, or that a miscarriage of justice associated with the conviction has occurred, the prosecutor should immediately notify both the Director over the Appellate Section and the Conviction Integrity Unit, regardless of whether the defendant has pursued a direct appeal or other post-conviction relief, and regardless of whether the prosecutor’s belief is based upon newly available evidence or information. The Conviction Integrity Unit will then review the underlying case in accordance with the policies of the Conviction Integrity Unit.

1-1.2. Rules of Conduct

1-1.2a. Duty to Abide by and Enforce Ethical Rules

Prosecutors in the Office are expected to know and abide by the Texas Disciplinary Rules of Professional Conduct, and opinions related to ethical standards by appellate courts and the Texas Board of Disciplinary Appeals.

Prosecutors should avoid any appearance of impropriety in performing their duties.

Prosecutors should seek out supervisory advice and ethical guidance when the proper course of prosecutorial conduct seems unclear. If that advice and guidance is not given, the matter should be brought to the attention of the First Assistant or the District Attorney.

1-1.2b. Duty to Respond to Misconduct

Prosecutors in the Office are obligated to respond to professional misconduct that has, will, or has the potential to, interfere with the proper administration of justice. If a prosecutor knows that a person associated with the Office has engaged, or intends to engage, in professional misconduct, the prosecutor should report the matter as soon as possible to their immediate supervisor. That supervisor is obligated to evaluate the report and share both the report and their evaluation of the matter to their Division Director. The Director will then elevate the matter to the First Assistant and the District Attorney for staffing by the Executive Committee. The final decision as to any action or inaction on the matter will be made by the District Attorney. Failure to report known misconduct constitutes a personnel violation and may constitute a violation of the prosecutor's professional duties.

Misconduct by employees of the Office will be documented and maintained in the employee's personnel file.

1-1.3. Duty to Eliminate Improper Bias

The Office will mindfully strive to detect, investigate, and eliminate improper biases in all of our work.

1-1.3a. Duty to Prosecute without Improper Bias

Prosecutors 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 in the performance of their duties in the Office. Additionally, prosecutors should not use other improper partisan, political, or personal considerations, in exercising prosecutorial discretion.

1-1.3b. Duty to Proactively Combat Improper Bias

Prosecutors are encouraged to continually examine the practices and effects of the Office's performance of its duties for the presence of historically persistent biases, such as those based on race and gender. Any prosecutor who observes practices that unfairly impact groups in such communities should notify the District Attorney and First Assistant.

1-1.4. Duty to Avoid Conflicts of Interest

“District and county attorneys shall not be of counsel adversely to the State in any case, in any court, nor shall they, after they cease to be such officers, be of counsel adversely to the State in any case in which they have been of counsel for the State.” Article 2.08(a), Texas Code of Criminal Procedure.

Prosecutors in the Office should not hold an interest or engage in activities, financial or otherwise, 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.

1-1.4a. Duty to Disclose Relationship

Prosecutors in the Office must be sensitive to situations where personal interests of the prosecutor would cause a fair-minded, objective observer to conclude that the prosecutor’s neutrality, judgment, or ability to administer the law in an objective manner may be compromised. The types of relationships or circumstances that preclude a prosecutor’s participation in the case include, but are not limited to, the following:

- a. Prosecution of a former client or 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;
- b. A matter in which the prosecutor previously participated, personally and substantially, in a capacity other than prosecutor;
- c. An investigation or prosecution where the prosecutor has a familial, personal, or financial relationship to any person involved in the case; or
- d. Prosecution of a person the prosecutor knows is represented by a lawyer who is a parent, child, sibling, spouse, or sexual partner of the prosecutor or a lawyer who has a significant financial relationship with the prosecutor.

A prosecutor who learns of the potential of a specific conflict should immediately report the matter to their supervising attorney. A prosecutor who has such a conflict has a duty to comply with and adhere to safeguards implemented by the Office to ensure the prosecutor is appropriately separated from further contact with the case.

1-1.4b. Duty to Handle Conflict Situations Appropriately

A supervising attorney who receives a disclosure of a potential conflict from a prosecutor has a duty to promptly investigate and make a report to the supervising attorney’s Director. The Director will take steps to ensure that the prosecutor’s access to information about the case is curtailed, which shall include taking the appropriate measures to prevent the prosecutor from being able to access the case, or cases, in TechShare-Prosecutor. The Director will also make sure that notice is given to other prosecutors about the conflict and that the matter is placed on the agenda for the Executive Team to discuss.

1-1.4c. Special Prosecutors and Attorneys Pro Tem

The decision to either seek the appointment of Attorney Pro Tem under article 2.07 of the Texas Code of Criminal Procedure or employ the use of a special prosecutor is solely that of the District Attorney. Special Prosecutors serve at the will and pleasure of the District Attorney and are subject to the direction and policies of the District Attorney when conducting the business of the Office. The Office

should give all appropriate assistance, cooperation, and support to Special Prosecutors and Attorneys Pro Tem.

1-1.4d. Duty to Remain Neutral as to Defense Counsel and Not Refer Cases

Prosecutors should not recommend the services of particular defense counsel to accused persons or witnesses in cases being handled by the Office.

1-2. Professionalism

Prosecutors in the Office should conduct themselves with a high level of dignity and integrity in all professional relationships, both in and out of court. Prosecutors should remember that their position makes them representatives of the Office at all times and that they should conduct all of their activities in a way that would not diminish the reputation and effectiveness of the Office.

It is the aspiration of the Office to exemplify professionalism in the discharge of our responsibilities as attorneys for the State of Texas. To that end, at a minimum:

- a. Prosecutors should familiarize themselves with and abide by the letter and spirit of Local Rules.
- b. Prosecutors, having a heightened duty of candor to the courts and in fulfilling professional obligations, should act with candor, good faith, and courtesy in all professional matters.
- c. Prosecutors should develop and maintain courteous and civil working relationships with judges and defense counsel and should cooperate with them in developing solutions to address ethical, scheduling, or other issues that may arise in particular cases.
- d. Prosecutors should act with integrity in all communications, interactions, and agreements with opposing counsel. A prosecutor should not express personal animosity toward opposing counsel, regardless of personal opinion.
- e. Prosecutors should at all times display proper respect and consideration for the judiciary, without foregoing the right to justifiably criticize individual members of the judiciary at appropriate times and in appropriate circumstances.
- f. Prosecutors should be punctual for all court appearances. When absence or tardiness is unavoidable, prompt notice should be given to the prosecutor's supervisor, the court and opposing counsel.
- g. Prosecutors should conduct themselves with proper restraint and dignity throughout the course of proceedings. Disruptive conduct or excessive argument is always improper.
- h. Prosecutors should treat witnesses fairly and professionally and with due consideration. In questioning the testimony of a witness, a prosecutor should not engage in a line of questioning intended solely to abuse, insult, or degrade the witness. Examination of a witness's credibility should be limited to legally permitted impeachment techniques.
- i. Prosecutors should avoid obstructive and improper tactics. Examples of such tactics include, but are not limited to, knowingly:
 - Making frivolous objections, or making objections for the sole purpose of disrupting opposing counsel;
 - Attempting to proceed in a manner that is obviously inconsistent with a prior ruling by the court;
 - Attempting to ask clearly improper questions or to introduce clearly inadmissible evidence;

- Engaging in dilatory actions or tactics; and
- Creating or taking unlawful advantage of prejudicial or inflammatory arguments or publicity.

Part II. Relations

2-1. Relations with Law Enforcement

The maintenance of good relations between the Office and the law enforcement agencies and personnel with whom we work is essential to achieve just results. In building and maintaining these relations, prosecutors should pay respectful attention to law enforcement concerns while exercising independent judgment in making prosecutorial decisions.

2-1.1. Communications

Prosecutors are expected to reasonably communicate with law enforcement personnel at all phases of the exercise of prosecutorial decisions. It is particularly important to explain the reasons—both factual and legal—that inform a prosecutor’s decisions and actions.

2-1.2. Law Enforcement Training

Prosecutors are encouraged to participate in law enforcement training, subject to the approval of the District Attorney or First Assistant, in order to ensure consistency and accuracy of the information used in the training.

2-2. Relations with the Judiciary

2-2.1. Courtroom Conduct

A prosecutor should vigorously pursue all proper avenues of argument. However, such action must not undermine respect for the judicial function.

2-2.2. Duty with Regard to *Ex Parte* Communications

In all contacts with judges, the prosecutor should maintain a professional and independent relationship. A prosecutor should not engage in *ex parte* unauthorized discussions with, or submission of material to, a judge relating to a particular matter that is, or is likely to be, before the judge.

When *ex parte* communications or submissions are authorized under the Texas Code of Judicial Conduct, the prosecutor should inform the court of material facts known to the prosecutor, including adverse facts, sufficient to enable the court to make a fair and informed decision. Except when non-disclosure is authorized, counsel should notify opposing counsel that an *ex parte* contact has occurred, without disclosing its content unless permitted.

2-2.3. Improper Influence

A prosecutor should not seek to unfairly influence the proper course of justice by taking advantage of any personal relationship with a judge, or by engaging in any *ex parte* communication with a judge on the subject matter of the proceedings other than as authorized by law or court order.

2-2.4. Duty to Report Misconduct

When a prosecutor has knowledge of conduct by a member of the judiciary that may violate the applicable code of judicial conduct and/or that raises a substantial question as to the judge's fitness for office, the prosecutor has the responsibility to report that knowledge to their supervisor.

2-2.5. Application for Recusal

When a prosecutor reasonably believes that it is warranted by the facts, circumstances, law, or rules of judicial conduct, the prosecutor should consult with the District Attorney about whether to move for the judge's disqualification or recusal from the matter.

2-3. Relations with Suspects and Defendants

Prosecutors must remain mindful that we have a duty to ensure that the criminal justice process scrupulously accords accused persons their rights under the law.

2-3.1. Communications with Represented Persons

Prosecutors must not circumvent or interfere with a suspect's or defendant's constitutional right to the assistance of counsel, notwithstanding the foregoing:

- a. A prosecutor may communicate with a defendant or suspect in the absence of his counsel when either (1) counsel has consented to the communication or (2) the communication is authorized by law or court rule or order; and
- b. A prosecutor may communicate with a witness who is also charged as a defendant in an unrelated criminal matter about the witness's upcoming testimony without the advance permission of the witness's attorney if the prosecutor does not discuss the criminal charges pending against the witness.

2-3.2. Communication with Unrepresented Defendants or Defendants Whose Counsel is Not Present

When a prosecutor communicates with a defendant charged with a crime who is not represented by counsel, or whose counsel is not present, the prosecutor should make certain that the defendant is treated with honesty, fairness, and with full disclosure of their potential criminal liability in the matter under discussion.

A prosecutor should identify himself or herself to the defendant as a prosecutor and make clear that they do not represent the defendant. If legally required under the circumstances, the prosecutor should advise the defendant of their rights.

If a prosecutor is engaged in communications with a charged defendant who is not represented by counsel or whose counsel is not present, and the defendant changes their mind and expresses a desire

to obtain counsel, the prosecutor should promptly terminate the communication to allow the defendant to obtain the presence of counsel. When appropriate, the prosecutor should advise the defendant on the procedures for obtaining appointed counsel.

2-3.3. Unsolicited Communications

A prosecutor may receive, accept, and use unsolicited written correspondence from defendants, regardless of whether the defendant is represented by counsel. If the prosecutor does not know that the defendant is represented by counsel, a prosecutor may receive unsolicited oral communications from defendants, of which they have no advance notice, without any duty of first ascertaining whether or not there is a valid reason for the communication or whether or not the defendant is represented by counsel. However, the situation may arise where a defendant who has been charged with a crime is represented by counsel, but requests to communicate with a prosecutor on the subject of the representation out of the presence of their counsel. Before engaging in such communication, the prosecutor should first ascertain whether the defendant has expressed a valid reason to communicate with the prosecutor without the presence of their attorney, and if so should thereafter communicate with the defendant only if authorized by law or court order.

2-3.4. Plea Negotiations

A prosecutor should never take unfair advantage of an unrepresented defendant. The prosecutor should not give legal advice to a defendant who is not represented by counsel, other than the advice to secure counsel. Prosecutors in the Office should not engage in plea negotiations with defendants who are not represented by counsel without consulting with a supervisor for a determination if such a negotiation is in the interest of justice.

If a prosecutor enters into a plea negotiation with a defendant who is not represented by counsel, they should seek to ensure that the defendant understands their rights, duties, and liabilities under the agreement. When possible, the agreement should be reduced to writing and a copy provided to the defendant.

2-3.5. Communications with Represented Persons During Investigations

A prosecutor performing their duty to investigate criminal activity should neither be intimidated nor discouraged from communicating with a defendant or suspect in the absence of counsel when the communication is authorized by law or court rule or order. A prosecutor may advise or authorize a law enforcement officer to engage in undercover communications with an uncharged, represented suspect in the absence of the suspect's counsel, provided such a communication is authorized by law or court order.

2-4. Relations with Defense Counsel

A prosecutor should strive to maintain a uniformity of fair dealing among different defense counsel. In all contacts with members of the defense bar, the prosecutor should strive to preserve proper relations. A prosecutor should cooperate with defense counsel at all stages of the criminal process to ensure the attainment of justice and the most appropriate disposition of each case. A prosecutor need not cooperate

with defense demands that are abusive, frivolous, or made solely for the purpose of harassment or delay.

2-4.1. Duty to Report Ethical or Criminal Misconduct

2-4.1a. Suspicion of Criminal Conduct

When a prosecutor has reasonable suspicion of criminal conduct by defense counsel, the prosecutor has a duty to report that suspicion to their supervisor and to cooperate in ensuring that necessary actions are taken to substantiate or dispel such suspicion.

2-4.1b. Ethical Misconduct

When a prosecutor has knowledge of ethical misconduct by defense counsel that raises a substantial question as to the attorney's fitness to practice law, the prosecutor should report such conduct to their supervisor. When such misconduct occurs during the course of litigation, the prosecutor should notify their supervisor and seek permission of their Director to seek sanctions as appropriate.

2-4.2. Avoiding Prejudice to Client

Prosecutors should at all times make reasonable efforts to ensure that a defendant who is not involved in misconduct is not prejudiced by the unlawful or unethical behavior of their attorney. Prosecutors will not allow conflicts with defense counsel to prejudice a just resolution of the client's case.

2-5. Relations with Witnesses, Including Victims

2-5.1. Victim's Rights

Prosecutors are required to ensure compliance with Chapter 56 of the Texas Code Criminal Procedure, Rights of Crime Victims, and the victim contact and assistance policies of the Office.

2-5.2. Communication

Prosecutors in the Office are expected to effectively communicate with victims and witnesses to ensure that evidence is thoroughly developed and trial testimony is clearly presented. This requires full collaboration with the District Attorney's Victim Services staff, and personal interactions with witnesses and victims.

Prosecutors or the prosecutors' agents should seek to interview victims and witnesses and should not act to intimidate or unduly influence them. Prosecutors and prosecution agents should not misrepresent their status, identity, or interests when communicating with a witness.

2-5.3. Contacts by Defense with Witnesses

A prosecutor shall not advise a witness or victim to decline to meet with or give information to the defense. A prosecutor may advise a witness or victim that they are not required to provide information

to the defense outside of court, and may also inform a witness or victim of the possible implications and consequences of providing information to the defense.

2-5.4. Represented Witnesses

When a prosecutor is informed that a witness has obtained legal representation with respect to the criminal proceeding, the prosecutor should arrange all out-of-court contacts with the witness regarding the subject of that proceeding through the witness's counsel, unless the victim specifically consents to direct contact. If the attorney represents the victim in a civil matter only, the prosecutor may contact the victim directly.

If a victim informs the prosecutor that they have hired counsel specifically on the criminal case, the prosecutor must report that fact to a supervisor. The supervisor must inform the Executive Committee of the Office.

2-5.5. Interviewing and Preparation

A prosecutor shall not advise or assist a witness or victim to testify falsely. The prosecutor may discuss the content, style, and manner of the witness's or victim's testimony, but should at all times make efforts to ensure that the witness or victim understands their obligation to testify truthfully.

A prosecutor should avoid the prospect of having to testify personally about the content of a witness or victim interview. Interviews of most routine or government witnesses such as custodians of records or law enforcement agents should not require a third-party observer. But, when the need for corroboration of an interview is reasonably anticipated, the prosecutor should be accompanied by another trusted and credible person during the interview. Prosecutors should avoid being alone with any witness the prosecutor reasonably believes has potential or actual criminal liability or with any foreseeably hostile witnesses.

2-5.6. Assistance

Prosecutors should be familiar with Office policies regarding providing victims or witnesses the following:

- a. Assistance in applying for expense reimbursements;
- b. Assistance in appropriate employer intervention concerning required court appearance(s);
- c. Assistance in necessary transportation and lodging arrangements, if appropriate;
- d. Assistance in minimizing the time the witness has to wait for any court appearance; and
- e. Assistance in reducing overall inconvenience whenever possible and appropriate.

2-5.7. Pursuit of Crimes Against Victims or Witnesses

The Office assigns a high priority to the investigation and prosecution of any type of victim or witness intimidation, harassment, coercion, or retaliation, including any such conduct or threatened conduct against family members or friends. If a prosecutor receives information of such a crime, they should immediately consult with their supervisor regarding appropriate action.

2-5.8. Record of Brady/Morton Disclosure Material from Witness Interviews

If a prosecutor communicates with a witness and learns information that must be disclosed to the defense attorney pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, Texas Disciplinary Rule of Professional Conduct 3.09, or any disciplinary opinions related to failures to disclose evidence in a criminal proceeding, that information must be reduced to writing in the form of a *Brady* notice. This notice should be sent promptly to defense counsel. A copy of the *Brady* notice must be saved in TechShare-Prosecutor, and the prosecutor must enter a discovery note documenting the disclosure to the defense. The discovery note should be added to the discovery manifest.

2-5.9. Warnings to Witnesses

Prosecutors should advise a witness who is to be interviewed of their rights against self-incrimination and the right to independent counsel when the law so requires. Even if the law does not require it, a prosecutor should consider so advising a witness if the prosecutor reasonably believes that the witness may provide self-incriminating information and the witness appears not to know their rights. However, a prosecutor should not advise, discuss, or exaggerate the potential criminal liability of, a witness with a purpose, or in a manner likely, to intimidate the witness, to influence the truthfulness or completeness of the witness's testimony, or to change the witness's decision about whether to provide information.

2-5.10. Inappropriate Relationships

A prosecutor should not engage in a personal relationship with any victim or witness. If a prosecutor discovers that they have a personal relationship with a person who is a victim, witness, or defendant, the prosecutor must immediately disclose the relationship to their supervisor and refrain from any involvement with the case in which the person is a participant.

2-5.11. Expert Witnesses

When a prosecutor determines that the testimony of an expert witness is necessary, the independence of the expert should be respected, and if it is determined that a fee be paid to an expert witness, the fee should be reasonable and independent of the outcome of the case.

Prosecutors must follow all internal rules and processes for obtaining approval to retain an expert prior to any agreement with an expert witness.

2-6. Relations with the Media

2-6.1. Media Relations

The District Attorney has an obligation as an elected official to fully and appropriately inform the public about the business of the Office. That necessitates maintaining a relationship with the media that facilitates the flow of information to and from the public. The Office is committed to accountability and transparency. All comments to the media, whether on or off the record, must be scrupulously accurate.

2-6.2. Contact with the Media

In general, the Office has a policy not to comment on pending cases. No comment, on or off the record, should be made without the permission of the District Attorney. If a prosecutor is asked for comment, the prosecutor should relay that request to their supervisor or directly to the First Assistant or District Attorney.

2-6.3. Permissible Comment

Public statements about the judiciary, jurors, other lawyers, or the criminal justice system should be respectful even when expressing disagreement.

Prior to and during a criminal trial, the prosecutor given permission to speak to the media may comment on the following matters:

- a. The accused's name, age, residence, occupation, family status, and citizenship;
- b. The substance or text of the charge such as the complaint, indictment, information, and, where appropriate, the identity of the complainant;
- c. The existence of probable cause to believe that the accused committed the offense charged;
- d. The identity of the investigating and arresting agency, the length and scope of the investigation, the thoroughness of the investigative procedures, and the diligence and professionalism of the law enforcement personnel in identifying and apprehending the accused;
- e. The circumstances immediately surrounding the arrest, including the time and place of arrest, the identity of the arresting officer or agency, resistance, pursuit, possession and use of weapons, and a description of items seized at the time of arrest or pursuant to a search warrant;
- f. Procedural matters to clarify the status of a case or court rulings;
- g. Information contained in a public record, the disclosure of which would serve the public interest; and
- h. Reasonable and fair reply to comments of defense counsel or others, which response is made to protect the prosecution's legitimate official interest.

2-6.4. Impermissible Comment

Prior to and during a criminal trial, the prosecutor given permission to speak to the media should not make any public, extrajudicial statement that has a substantial likelihood of materially prejudicing a judicial proceeding. In particular, from the commencement of a criminal investigation until the conclusion of trial, the prosecutor should not make any public, extrajudicial statements about the following matters, unless the information is part of the public record of the criminal proceeding:

- a. The character, reputation, or prior criminal conduct of a suspect, accused person, or prospective witness;
- b. Admissions, confessions, or the contents of a statement or alibi attributable to a suspect or accused person;
- c. The performance or results of any scientific tests or the refusal of the suspect or accused to take a test;
- d. Statements concerning the credibility or anticipated testimony of prospective witnesses; or
- e. The possibility of a plea of guilty to the offense charged or to a lesser offense, or the contents of any plea agreement.

2-6.5. Comments Subsequent to Verdict

The prosecutor who is given permission to comment should not make any public statement after trial that is critical of jurors, but may express disagreement with or disappointment in the jury verdict.

Any other comment should be discussed with the District Attorney, or the First Assistant if the District is unavailable, first.

Part III. Investigations

3-1. Investigations Generally

3-1.1. Authority to Investigate

In general, the Office requires a person complaining of a crime to report that crime to the appropriate law enforcement agency for investigation. In the appropriate instance, the Office has the discretionary authority to and will initiate investigations of criminal activity under its jurisdiction. The exercise of this authority will depend upon many factors, including, but not limited to, available resources, adequacy of law enforcement agencies' investigation in a matter, office priorities, and potential civil liability.

3-1.2. Fairness in Investigations

A criminal investigation should not begin or be continued if it is motivated in whole or part by the victim or perpetrator's race, age, gender, ethnicity, religion, sexual orientation, or political affiliation unless these factors are an element of a crime or relevant to the perpetrator's motive. Nor should an investigation be motivated, in whole or significant part, by partisan political pressure, professional ambition, or improper personal considerations.

3-1.3. General Standards in Investigations

Prosecutors who conduct, or collaborate with other agencies to conduct, criminal investigations, should:

- a. ensure that criminal investigations are not based upon premature beliefs or conclusions as to guilt or innocence but are guided by the facts;
- b. consider whether an investigation would be in the public interest and what the potential impacts of a criminal investigation might be on subjects, targets and witnesses; and
- c. seek, in most circumstances, to maintain the secrecy and confidentiality of criminal investigations.

3-2. Responsibility for Evidence

A prosecutor who knows or who is aware of a substantial risk that an investigation has been conducted in an improper manner, or that evidence has been illegally obtained by law enforcement, must report the matter to their supervisor in order that the District Attorney may determine what steps need to be taken to investigate and remediate such problems. A prosecutor should not knowingly obtain evidence through illegal means, nor should the prosecutor instruct or encourage others to obtain evidence through illegal means.

3-3. Investigative Assistance

3-3.1. On-Call Assignments

Prosecutors assigned to on-call duties, whether the routine 24/7 or the Major Crimes hotline, will promptly respond to law enforcement requests for advice. This advice may include the proper interpretation of the criminal laws, the sufficiency of evidence to commence criminal charges or arrest, the requirements for obtaining search warrants for physical evidence and electronic surveillance, and similar matters relating to the investigation of criminal cases. Law enforcement should be encouraged to have a prosecutor review search warrant applications prior to being submitted to a judicial officer. Prosecutors should also assist law enforcement in finding an appropriate judicial officer when necessary.

Those who are assigned to Major Crimes on-call duty are expected to respond to the scene and/or the agency location to assist in providing legal services and advice as early as possible in the investigation, unless the decision is jointly made with the law enforcement agency that such a response is unnecessary.

Should any issues arise that require additional assistance, the on-call prosecutor should consult with a Director.

3-3.2. Duty Judges

The District Judges have agreed to provide a duty judge roster for prosecutors and law enforcement to use to expedite applications for warrants. The judge's personal contact information should not be shared with law enforcement, unless the judge gives permission. The ADA reviewing the warrant should personally contact the duty judge to determine their availability. If the duty judge is not available another judge may be contacted.

3-4. Grand Jury Investigations

3-4.1. Scope of Grand Jury Investigations

A prosecutor should not use a grand jury investigation to:

- a. Assist solely in a non-criminal matter; or
- a. Gather evidence solely for the use at trial against a defendant who already has been charged by indictment or information; except, a prosecutor may use the grand jury to investigate additional or new charges against a defendant who has already been indicted.

3-4.2. Examination of Witnesses:

Prosecutors shall comply with articles 20.04 and 20.18 of the Texas Code of Criminal Procedure.

3-4.3. Counsel for Witnesses

Generally, counsel will not be permitted in the grand jury. Prosecutors must allow a witness reasonable opportunities to consult with counsel during questioning.

3-4.4. Subpoenaing or Inviting the Target of an Investigation to the Grand Jury

If a person suspected or accused of an offense is called to testify before the grand jury, even though the person is the target of the investigation, the following procedures should apply:

- a. The Director over Grand Jury should approve all efforts to have a target of the investigation testify before a grand jury;
- b. The target shall be informed of the offense with which he is suspected, the county where the offense is said to be committed, and, nearly as may be, the time of the commission of the offense;
- c. The target should be informed in writing of their status before any grand jury appearance and advised in writing to obtain legal advice as to their rights;
- d. To avoid the appearance of unfairness, the prosecutor should make reasonable efforts to secure the target's grand jury appearance voluntarily rather than through a subpoena; and
- e. At the outset of their appearance before the grand jury, the target should be informed of their rights.

At all times, the prosecutor and the Grand Jury should comply with all requirements of Article 20.17 of the Texas Code of Criminal Procedure.

3-4.5. Request by a Target to Testify

Except as otherwise governed by law, the prosecutor should grant requests by the target of an investigation to testify before the grand jury, unless such a request:

- a. Would unduly burden or delay the grand jury proceedings;
- b. Would clearly provide information that is irrelevant to the investigations;
- c. Would be inconsistent with the need to preserve the secrecy of the investigation; or
- d. Is made for an improper purpose.

Before a request to testify is granted, the target should be required to waive on the record their Fifth Amendment privilege against self-incrimination.

3-4.6. Evidence Before the Grand Jury

Unless otherwise required by law or applicable rules of ethical conduct, the following should apply to evidence presented to the grand jury:

- a. A prosecutor should disclose any credible evidence of actual innocence known to the prosecutor or other credible evidence that tends to negate guilt;
- b. A prosecutor should not present evidence to the grand jury that the prosecutor knows was obtained illegally by law enforcement;
- c. In the absence of a valid waiver, a prosecutor should not seek information from a witness that the prosecutor knows or believes is covered by a valid claim of attorney-client privilege;
- d. A prosecutor should not take any action that could improperly influence the testimony of a grand jury witness;
- e. If the prosecutor is convinced in advance of a grand jury appearance that any witness will invoke their Fifth Amendment privilege against self-incrimination rather than provide any relevant information, the prosecutor should not present the witness to the grand jury unless the prosecutor plans to challenge the assertion of the privilege or to seek a grant of immunity. The grand jury may be informed of the reason the witness will not appear;
- f. The prosecutor should inform the grand jury that it has the right to hear in person any available witness or subpoena pertinent records;

- g. A prosecutor should not present evidence to the grand jury that the prosecutor knows to be false; and
- h. A prosecutor should not knowingly make a false statement of fact or law to the grand jury.

3-4.7. Grand Jury Subpoenas

While a prosecutor should zealously pursue all relevant information that is within the scope of a criminal investigation, reasonable efforts should be made to minimize the burden of investigation on third-party witnesses. A prosecutor should consider in good faith requests to limit or otherwise modify the scope of subpoenas that are claimed to impose an undue burden on the recipients.

3-4.8. Termination of Target Status

If a person has previously been notified or made aware that they were the target of a grand jury investigation and the prosecutor elects not to seek an indictment or the grand jury fails to return a true bill and no further investigation against the target is contemplated, the prosecutor should notify the person that they are no longer a target, unless doing so is inconsistent with the effective enforcement of the criminal law.

3-5. Grants of Immunity

3-5.1. Immunity Generally

There are two primary types of immunity in Texas: use immunity and transactional immunity. A prosecutor may not grant or request transactional immunity for a witness without the prior approval of the District Attorney. Approval will be granted only after careful consideration of the public interest.

A prosecutor must obtain approval of a supervisor prior to offering use immunity to a witness.

Any grant of immunity, regardless of type, will be in writing and describe the scope and character of the immunity granted.

3-5.2. Granting or Requesting Immunity—the Public Interest

Factors that should be considered before deciding whether to grant or request immunity from prosecution for a witness include:

- a. The likelihood that a grant of immunity will produce truthful information from the witness;
- b. The value of the witness's testimony or information to the investigation or prosecution;
- c. The impact on the witness's perceived credibility if they testify before a grand jury or trial jury pursuant to a grant of immunity;
- d. The likelihood of prompt and full compliance with a compulsion order, and the likely effectiveness of available sanctions if there is no such compliance;
- e. The witness's relative culpability in connection with the offenses being investigated or prosecuted, and their criminal history;
- f. The possibility of successfully prosecuting the witness prior to compelling their testimony;
- g. The likelihood of future physical harm to an individual if the witness testifies under a compulsion order;
- h. Other compelling interests of justice.

3-5.3. Prosecution After Grants of Immunity

Any prosecution of a witness who has previously been granted use immunity should be approved by the District Attorney or their designee. The District Attorney will take reasonable steps to ensure that any decision to pursue a subsequent prosecution of an immunized witness is not perceived as a breach of a prosecutorial commitment.

3-5.4. Grants of Immunity to Compel Testimony on Behalf of a Defendant

Except as otherwise required by law, a prosecutor is not obligated to grant or seek immunity to compel information on behalf of a defendant. A prosecutor may immunize or seek to immunize a defense witness if the prosecutor believes that it is necessary for a just prosecution.

Part IV. Pre-Trial Considerations

4-1. Case Screening and Charging

4-1.1. Prosecutorial Responsibility

The decision to initiate a criminal prosecution should be made by the Office; however, in Travis County, most prosecutions are initiated by law enforcement in a process known as “direct filing.” When criminal charges are initiated by law enforcement, prosecutors should, at the earliest practical time, decide whether the charges should be accepted for prosecution.

In some instances, the Office makes the initial decision to investigate, for example in white-collar or public integrity cases. In other instances, the Office works with law enforcement to screen cases before they are filed. In those situations, a decision can be rendered by the Office either to file or decline a case.

A prosecutor is not obliged to file or maintain all criminal charges that the evidence might support, even though law enforcement may have chosen to do so. The Office is committed to addressing the filing of multiple charges by identifying the overriding public safety interest and pursuing the charge or charges appropriate to that objective.

Thoroughly screening cases filed by law enforcement is a very high priority for the office. Prosecutors assigned to the Intake and Diversion Division, prosecutors handling vertical prosecutions, and prosecutors handling cases on specialty dockets are required to carefully review the file to determine whether a case should proceed, whether it should be charged as a felony, and whether it should be disposed without indictment.

4-1.2. Prosecutorial Discretion

The District Attorney recognizes the importance of the charging decision. Prosecutors in the Office are encouraged to exercise their discretion in reviewing charging decisions made by law enforcement or initiating charges in order to ensure justice. Any prosecutor who has questions about appropriate charging should consult a supervisor.

4-1.3. Factors to Consider

A prosecutor should believe the case has prosecutorial merit. The determination whether a case is legally sufficient should take into account a number of factors beyond the presence of probable cause, including whether there is sufficient admissible evidence to sustain a conviction beyond a reasonable doubt and whether the prosecution of the case is in the interest of justice.

Prosecutors should screen potential charges to eliminate from the criminal justice system those cases where prosecution is not merited.

Prosecutors may not file charges greater in number or degree than can be reasonably supported with evidence at trial and are necessary to fairly reflect the gravity of the offense or deter similar conduct.

Factors that may be considered in this decision include:

- a. Doubt about the accused's guilt;
- b. Insufficiency of admissible evidence to support a conviction;
- c. Whether the law enforcement action that resulted in the arrest and/or seizure of evidence was improper or unfair;
- d. The negative impact of a prosecution on a victim;
- e. Whether civil remedies are being sought by the victim;
- f. The availability of suitable diversion and rehabilitative programs;
- g. Provisions for restitution;
- h. Likelihood of prosecution by another criminal justice authority;
- i. Whether non-prosecution would assist in achieving other legitimate goals, such as the investigation or prosecution of more serious offenses;
- j. The cooperation of the offender in the apprehension or conviction of others;
- k. Unwarranted disparate treatment from that of similarly situated defendants;
- l. The attitude and mental status of the accused;
- m. Whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;
- n. A history of non-enforcement of the applicable law;
- o. Failure of law enforcement to perform necessary duties or investigations; and
- p. 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.

4-1.4. Factors Not to Consider

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

- 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. Political advantages or disadvantages that a prosecution might bring to the prosecutor;
- d. Characteristics of the accused that have been recognized as the basis for invidious discrimination, insofar as those factors are not pertinent to the elements or motive of the crime; and
- e. The impact of any potential asset forfeiture.

4-1.5. Information Sharing

The prosecutor should attempt to gather all relevant information that would aid in rendering a sound screening or charging decision. The prosecutor screening a case or preparing a case for indictment should report to their supervisor or Director any failure of a law enforcement agency to cooperate in providing the prosecutor with case information or follow-up investigation.

4-1.6. Continuing Duty to Evaluate

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

4-1.7. Record of Declined Prosecution

Prosecutors must accurately record the reason(s) for declining a prosecution or dismissing a filed case.

4-1.8. Explanation When Charges are Declined or Dismissed

Prosecutors, or Victim Witness personnel under their direction, should ensure that victims receive notice of the decision to decline or dismiss their case, whenever possible, and should promptly respond to inquiries from those who are directly affected by a declination or dismissal of charges.

4-2. Diversion

The Office is committed to diverting offenders from the criminal justice system in appropriate instances. Multiple diversionary or specialty dockets are used consider alternatives to a traditional prosecution track for appropriate defendants with the aim of reducing recidivism by addressing issues that may be driving their criminal conduct.

4-2.1. Diversion Alternatives

All prosecutors should be familiar with the DA Pretrial Diversion Program and other specialty dockets and diversion programs available to appropriate felony defendants in Travis County. Prosecutors should note in TechShare the possible eligibility of a defendant and advise defense attorneys when a defendant is or could be eligible for diversion or other program.

4.2.2. Prosecutorial Responsibility

The decision to divert cases from the criminal justice system is the responsibility of the prosecutor. The prosecutor should, within the exercise of their discretion, determine whether diversion of an offender to a treatment alternative best serves the interests of justice.

The prosecutor assigned to a particular diversion program will make the final decision of an applicant's suitability for the program.

4.2.3. Information Gathering

The prosecutor should have all relevant investigative information, personal data, case records, and criminal history information necessary to render sound and reasonable decisions on diversion of individuals from the criminal justice system.

4.2.4. Factors to Consider

The prosecutor may divert individuals from the criminal justice system when they consider it to be in the interest of justice and beneficial to the community and the individual. Factors that may be considered in this decision include:

- a. The nature, severity, or class of the offense;
- b. Any special characteristics or difficulties of the offender;
- c. Whether the defendant is a first time offender;
- d. The likelihood that the defendant will cooperate with and benefit from the diversion program;
- e. Whether an available program is appropriate to the needs of the offender;
- f. The impact of diversion and the crime on the community;
- g. Recommendations of the relevant law enforcement agency;
- h. The likelihood that the defendant will reoffend;
- i. The extent to which diversion will enable the defendant to maintain employment or remain in school;
- j. The opinion of the victim;
- k. Provisions for restitution;
- l. The impact of the crime on the victim; and
- m. Diversion decisions with respect to similarly situated defendants.

4.2.5. Diversion Procedures

The process of diverting a defendant is governed by the particular policy applicable to the program. These policies are available on the District Attorney's website.

4-2.6. Record of Diversion

A record of the defendant's participation in a diversion program, including the reasons for the diversion, should be created for each case and maintained by the prosecutor's office for subsequent use by law enforcement, unless prohibited by law.

4-2.7. Explanation of Diversion Decision

Upon request, the prosecutor should provide adequate explanations of diversion decisions to victims, witnesses, law enforcement officials, the court, and, when deemed appropriate, to other interested parties.

4-3. Pretrial Release

4-3.1. Prosecutorial Responsibility

The Office supports pretrial release of a criminally accused unless detention is necessary to protect the victim or individuals or the community or to ensure the appearance of the defendant for court proceedings. If pretrial release is considered by the court to be appropriate, prosecutors should recommend terms and conditions of that release to serve the permissible and appropriate interests of public safety. In general, the Office favors the use of personal-recognition releases, unless specific factors indicate otherwise.

4-3.2. Bail Amount Request

In those instances where prosecutorial input is requested, a prosecutor should take steps to gather adequate information about the defendant's circumstances and history to request an appropriate bail amount. Among the factors a prosecutor may consider, if such information is available, in determining the proper amount to request are:

- a. The defendant's employment status and history;
- b. The defendant's financial condition, ability to raise funds and source of funds, to the extent these factors are relevant to the risk of non-appearance and the commission of other crimes while awaiting trial;
- c. The defendant's length and character of residence in the community and the extent and nature of the accused's family ties to the community;
- d. The nature and severity of the crime, the strength of the evidence, and the severity of the sentence that could be imposed on conviction, to the extent these factors are relevant to the risk of non-appearance and the commission of other crimes while awaiting trial;
- e. The defendant's criminal record, including any record of appearance or nonappearance on other criminal charges;
- f. The likelihood of the defendant attempting to intimidate witnesses or victims or to tamper with the evidence;
- g. Identification of responsible members of the community who would vouch for the accused's reliability; and
- h. Any other factors indicating the defendant's ties to the community.

A prosecutor should not seek a bail amount or other release conditions that are greater than necessary to ensure the safety of others and the community and to ensure the appearance of the defendant at trial.

4-3.3. Continuing Obligation

If, after the initial bail determination is made, the prosecutor learns of new information that makes the original bail decision inappropriate, the prosecutor should take steps to modify the accused person's bail status or conditions.

4-4. Seeking Indictments

No person shall be held to answer for a felony unless on indictment of a grand jury. Art. 1.05, Tex. Code Crim. Proc.

A prosecutor should not seek an indictment unless the prosecutor reasonably believes that the charges are supported by probable cause, that there will be admissible evidence sufficient to support the charges beyond a reasonable doubt at trial, and that the indictment is in the interest of justice.

4-4.1. Prosecutorial Responsibility

In presenting a matter to a grand jury the prosecutor should:

- a. Respect the independence of the grand jury, mislead the grand jury, or abuse the processes of the grand jury;
- b. As a legal advisor to the grand jury, appropriately explain the law and express an opinion on the legal significance of the evidence while giving due deference to the grand jury as an independent legal body;
- c. Not make statements or arguments to a grand jury in an effort to influence grand jury action in a manner that would be impermissible in a trial;
- d. Assist the grand jury with procedural and administrative matters appropriate to its work.
- e. Recommend, when appropriate, that specific charges be returned;
- f. Provide the grand jury with sufficient testimony or documentation to permit the grand jurors to make an intelligent decision as to the appropriateness of the indictment sought;
- g. Recommend that a grand jury not indict if the prosecutor believes that the evidence presented does not warrant an indictment under governing law, and encourage members of the grand jury to consider the fact that sufficient evidence must exist to enable the prosecutor to meet the state's burden of proof at trial;
- h. Take all necessary steps to preserve the secrecy of the grand jury proceedings;
- i. Not use the grand jury to obtain evidence to assist the prosecution's preparation for trial of a defendant who has already been indicted; except, a prosecutor may use the grand jury to investigate additional or new charges against a defendant who has already been indicted; and
- j. Generally treat grand juries with the same level of candor as is required before a court.

4-4.2. Evidence Before the Grand Jury

In presenting a case to the grand jury, prosecutors should follow the standards in Section 3-4.6, above.

4-4.3. Grand Jury Materials Provided by the Defense

The Office allows the presentation of materials provided by the defense. The defense must comply with the Office's policy governing the process, which is posted on the website.

4-4.4. Grand Jury Empaneling

The Director of Intake and the Grand Jury Chief will work with the empaneling judges to ensure that only persons legally qualified are chosen by the Court to serve and that every effort is made to ensure that grand juries represent the diversity of Travis County.

4-4.5. Grand Jury Orientation

The Director of Intake and Major Crimes Division and the Grand Jury Chief will ensure that new grand jurors are properly instructed on the duties of the grand jury and its right and ability to seek evidence, ask questions, and hear directly from available witnesses. The Director and Chief will also recommend

to the District Attorney such other matters to be covered in orientation that they deem to be appropriate to assist the grand jury in performing its duties. The Director and Chief will ensure that the grand jury is sufficiently supported to perform its administrative functions.

4-5. Discovery

4-5.1. Prosecutorial Responsibility

Prosecutors in the Office must be familiar with and comply with all discovery obligations under the Texas Code of Criminal Procedure, *Brady v. Maryland* and its progeny, Texas Disciplinary Rule of Professional Conduct 3.09, and any disciplinary opinions related to failures to disclose evidence in a criminal proceeding. Prosecutors must be mindful that the duty to disclose exculpatory, impeachment, or mitigating evidence is continuing in nature and exists even after conviction.

Prosecutors should at all times carry out discovery obligations diligently and in good faith. Prosecutors should further the goals of discovery: to minimize surprise, afford the opportunity for effective cross-examination, expedite trials, and meet the requirements of due process.

4-5.2. Disclosure Files

4-5.2a. Duty to Disclose Exculpatory, Impeachment, and Mitigating Evidence

Texas prosecutors are obligated, by law and by ethical standards, to timely disclose to each defendant “any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.” Tex. Code Crim. Proc. art. 39.14(h); *see also Brady v. Maryland*, 373 U.S. 83 (1963); Tex. Disciplinary Rules Prof'l Conduct R. 3.09(d). Such exculpatory, impeachment, or mitigating evidence must be disclosed even if it is not admissible and even if the disclosure would not change the outcome of any legal proceeding.

4-5.2b. Disclosure Information Maintained by the Office

It is the policy of the Office to liberally construe the provisions cited above. Prosecutors should report to the Disclosure Attorney any information that could possibly be construed as exculpatory, impeachment, or mitigating, whether or not it is potentially admissible, involving any individual or entity that may be involved in a criminal proceeding in the Office. The Disclosure Attorney should add such information to all applicable disclosure files.

If any prosecutor in the Office believes that a potential witness for the State has credibility issues that are so significant that the Office should not sponsor that person as a witness in the future, whether generally or on a specific issue, that prosecutor should send a detailed email to the Disclosure Attorney and to the prosecutor's Division Director. If either the Director or the Disclosure Attorney agrees that the office should not sponsor the person as a witness in the future, then the Disclosure Attorney will forward the pertinent information to the District Attorney for a decision on this issue and on the way the Office will address it.

4-5.2c. Prosecutorial Responsibility -Protecting Disclosure Information

Disclosure files and their contents are not available to the public, and the ability of defense attorneys to share the contents of those files with other persons is restricted by law, by court order, and by written agreement. Prosecutors are expected to diligently protect this information from improper disclosure.

The Office does not, by disclosing the contents of those files to defense counsel, make any express or implied representation as to the character or credibility of any individual or entity named in those files. Nor does the Office make any representation or concession as to the authenticity, veracity, relevance, or admissibility of the contents of those files.

The Office expressly reserves the right to oppose the admission of such evidence in legal proceedings because such evidence might be inadmissible in some cases under the Texas Rules of Evidence and other applicable law.

4-5.2d. Supplementation of Disclosure Files Upon Request

Under the legal and ethical standards cited above, prosecutors are obligated to disclose “any exculpatory, impeachment, or mitigating document, item, or information ... that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.” Tex. Code Crim. Proc. art. 39.14(h); *see also* Tex. Disciplinary Rules Prof'l Conduct R. 3.09(d). Article 39.14(h) and Rule 3.09 require disclosure of such information even if that information is not material (i.e., even if the disclosure of the information would not change the outcome of any legal proceeding). Consequently, the disclosure responsibilities imposed by those provisions do not hinge upon the accuracy of the information or upon the credibility of its source. For that reason, the District Attorney's Office does not, when adding information to disclosure files, take the additional step of affirmatively investigating and assessing the accuracy of that information. This Office may take that step later, where warranted, in relation to particular trials.

Nevertheless, the District Attorney's Office will, upon request by any individual named in a disclosure file and/or by that person's employer, supplement the applicable disclosure file(s) with written materials provided by the person or by the employer for the purpose of clarifying or rebutting information in the file. The individual and the employer are under no obligation to provide such clarifying materials or to even let this Office know whether such materials will or will not be provided. A decision, by the individual or by the person's employer, not to provide such materials is not considered by this Office to be a statement as to whether the information in the file is accurate or inaccurate. If any clarifying materials are submitted to this Office, the materials should be narrowly tailored to address the specific allegations in the disclosure file. The District Attorney's Office discourages the submission of materials that are not directly responsive to specific allegations, such as letters that tout the individual's good character or good job performance but fail to address the specific allegations.

The District Attorney's Office retains the exclusive authority to decide whether materials submitted by the individual and/or by the employer should be included in the applicable disclosure file(s). Any supplemental materials that are added to a file will be disclosed to defense counsel in appropriate cases, along with the original information. It should be noted that, in some situations, supplemental materials created by the individual or the employer may also be used by defense counsel as *additional*

exculpatory, impeachment, or mitigating evidence. Absent exceptional circumstances, any clarifying materials added to a disclosure file will remain there indefinitely.

4-5.2e. Supplementation to Reflect Any Administrative or Judicial Rulings

Disclosure files sometimes contain allegations that the person named therein has engaged in criminal conduct, policy violations, and/or other misconduct. If any prosecutor in the Office learns that a court, government agency, government official, or administrative body has made an official determination that such an allegation is unfounded or otherwise lacks merit, that prosecutor should notify the Disclosure Attorney, who should then cause the applicable disclosure files to be supplemented to reflect that determination. Such a determination does not justify the deletion of the disclosure file, or of any items containing the underlying allegations, because that determination might not preclude reconsideration of the issue in future criminal cases. Such items might still be viewed as exculpatory, impeaching, or mitigating.

4-5.2f. No deletion of disclosure files or of contents

No disclosure file, and no information in a disclosure file, will be deleted except in those exceedingly rare situations where the elected District Attorney expressly authorizes deletion after determining that there is no way that the information at issue could be viewed as exculpatory, impeaching, or mitigating. In situations where deletion is warranted, the District Attorney will memorialize her decision in a memo or email, and the resulting memo or email will be retained for future reference.

4-5.3. Access to Evidence Not to Be Impeded

Unless permitted by law or court order, a prosecutor should not impede opposing counsel's investigation or preparation of the case.

4-5.4. Redacting Evidence

When portions of certain 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 the accused.

Part V. Plea Negotiation and Plea Agreements

5-1. Propriety of Plea Negotiation

5-1.1. Policy Statement

The District Attorney recognizes the value of fair and equitable plea bargaining to see that justice is done in a particular case. Prosecutors are under no obligation to enter into a plea agreement to dispose of criminal charges in lieu of trial. However, where it appears that it is in the public interest and unless prohibited by the laws of Texas, the United States, or the policies and procedures of the Office, the Office will be available to consult with defense counsel concerning the disposition of charges by a plea

agreement or other negotiated disposition, and will set aside times and places for such plea negotiations to take place.

Such negotiations and agreements are to be conducted and afforded to all persons without regard to race, religion, gender, sexual orientation, national origin, or political association or belief.

Plea offers and final plea agreements must be recorded in TechShare Prosecutor.

5-1.2. Uniform Plea Opportunities

Similarly situated defendants should be afforded substantially equal plea offers. In considering whether to offer a plea agreement to a defendant, the prosecutor should not take into account the defendant's race, religion, sex, sexual orientation, national origin, or political association or belief, unless legally relevant to the criminal conduct charged.

In making plea offers, prosecutors may take into account:

- a. The nature of the offense, including whether the crime involves violence or bodily injury;
- b. The probability of conviction;
- c. The characteristics of the defendant that are relevant to their blameworthiness or responsibility, including the accused's criminal history;
- d. Potential deterrent value of a prosecution to the offender and to society at large;
- e. The decisions by juries in similar cases;
- f. The value to society of incapacitating the accused in the event of a conviction;
- g. The willingness of the offender to cooperate with law enforcement;
- h. The defendant's relative level of culpability in the criminal activity;
- i. The status of the victim, including the victim's age or special vulnerability;
- j. Whether the accused held a position of trust at the time of the offense;
- k. Excessive costs of prosecution in relation to the seriousness of the offense;
- l. Recommendation of the involved law enforcement personnel;
- m. The impact of the crime on the community; and
- n. Any other aggravating or mitigating circumstances.

5-1.3. Innocent Defendants

The prosecutor should always be vigilant for the case where the accused may be innocent of the offense charged. The prosecutor must be satisfied that there is a sound factual basis for all crimes to which the defendant will plead guilty under any proposed plea agreement. Prosecutors should not make plea offers that would incentivize an innocent person to plead guilty.

5-1.4. Presence of Defense Counsel

The prosecutor should not negotiate a plea agreement directly with a defendant who is represented by counsel in the matter unless defense counsel is present. Should a represented defendant expressly ask to negotiate directly with a prosecutor, the prosecutor should alert their supervisor, and ensure that the waiver of counsel is properly secured.

5-1.5. Candor; False Statements and Misrepresentations of Law or Fact Prohibited

The prosecutor shall not knowingly make any false or misleading statements of law or fact to the defense during plea negotiations.

5-1.6. Prosecutor's Responsibility to Ensure the Sufficiency of Evidence at Trial

A prosecutor should not agree to a guilty plea if the prosecutor reasonably believes that sufficient admissible evidence to support conviction beyond reasonable doubt would be lacking if the matter went to trial.

5-1.7. Prosecutor's Responsibility to Ensure Factual Basis Exists for Plea of Guilt and Sufficient Evidence to Assess Defendant's Culpability

A prosecutor shall not agree to a guilty plea and enter into a plea agreement before having information sufficient to assess the defendant's actual culpability, and shall disclose to the defendant and their counsel the factual basis supporting the charges, along with any evidence or information that tends to negate guilt, mitigate the offense, or is likely to reduce punishment.

5-1.8. Prohibition on Seeking Conditions that are Unlawful or Against Public Policy

A prosecutor should not demand terms in a negotiated disposition agreement that are unlawful or in violation of public policy.

5-1.9. Prohibition on Plea Agreements Involving the Waiver of Certain Rights

A prosecutor shall not seek, demand or agree to a guilty plea, or enter into a plea agreement, that involves a waiver of any of the defendant's rights unless the waiver is knowingly and voluntarily given, and such waiver cannot be sought to hide an injustice or matter material to guilt or punishment flaw in the case which is undisclosed to the defense.

5-1.10. Limits of Authority

The prosecutor should not make any promise or commitment assuring a defendant that the Court will impose a specific sentence or disposition in the case. The prosecutor should avoid implying a greater power to influence the disposition of a case than the prosecutor actually possesses.

5-1.11. Rights of Others to Address the Court

An Assistant District Attorney engaging in plea negotiations or entering into a plea agreement shall not commit, as part of any plea agreement, to limit or curtail the legal right of any victim or other person authorized by law to address the court at the time of plea or sentencing. The prosecutor should honor the legal rights of victims and other persons authorized by law to address the court.

5-1.12. Record of Agreement

Whenever the disposition of a charged criminal case is the result of a plea agreement, the prosecutor shall make the existence and terms of the agreement part of the record.

5-1.13. Fulfillment of State's Obligations

Once a disposition agreement is final and accepted by the court, the prosecutor should comply with, and make good faith efforts to have carried out, the State's obligations. The prosecutor should construe agreement conditions, and evaluate the defendant's performance, including any cooperation, in a good-

faith and reasonable manner. If the prosecutor reasonably believes that a court is acting inconsistently with any term of a negotiated disposition, the prosecutor should raise the matter with the court.

Part VI: Trial

6-1. Jury Selection

6-1.1. Investigation

A prosecutor may conduct an investigation of any prospective juror before jury selection, but any such investigation shall not harass or intimidate prospective jurors. Prosecutors may conduct criminal history record checks of prospective jurors and, to the extent required by law or court order, share any conviction information with the court or defense for use in conducting the jury selection examination.

6-1.2. Voir dire Examination

A prosecutor should not (a) conduct jury selection examination in such a manner as to cause any prospective juror unnecessary embarrassment; or (b) intentionally use the jury selection process to present information that they know will not be admissible at trial.

If the prosecutor has reliable information that conflicts with a potential juror's responses, or that reasonably would support a challenge for cause by any party, the prosecutor should inform the court and, unless the court orders otherwise, defense counsel.

6-1.3. Peremptory Challenges

A prosecutor should not exercise a peremptory challenge in an unconstitutional manner based on group membership or in a manner that is otherwise prohibited by law.

6-1.4. Identity of Jurors

In cases where probable cause exists to believe that jurors may be subjected to threats of physical or emotional harm, the prosecutor may request the trial court to keep their identities from the defendant or the public in general.

6.2. Relations with Jury

6-2.1. Direct Communication

A prosecutor should not intentionally speak to or communicate with any juror or prospective juror prior to or during the trial of a case, except while in the courtroom with all parties and the judge present and on the record.

6-2.2. After Discharge

After the jury is discharged, the prosecutor may, unless otherwise prohibited by the court, communicate with the jury as a whole or with any members of the jury to discuss the verdict and the evidence. The prosecutor may ask the court to inform jurors that it is not improper to discuss the case with the lawyers

in the case after verdict, if the juror decides to do so. The prosecutor should not criticize the verdict, harass any juror, or intentionally seek to influence future jury service during such communication. A prosecutor should cease communication upon a juror's request.

6-3. Opening Statements

6-3.1. Purpose

A prosecutor should give an opening statement for the purpose of explaining the legal and factual issues, the evidence, and the procedures of the particular trial.

6-3.2. Limits

A prosecutor should not allude to evidence unless they believe, in good faith, that such evidence will be available and admitted into evidence at the trial.

6-4. Presentation of Evidence

6-4.1. Admissibility

A prosecutor should not, in the presence of the jury, mention any testimony or exhibit which the prosecutor does not have a good faith belief will be admitted into evidence.

The prosecutor should not display tangible evidence, and should object to such display by the defense, until it is properly admitted into evidence, except insofar as its display is necessarily incidental to its tender, although the prosecutor may seek permission to display admissible evidence during opening statement.

6-4.2. Questionable Admissibility

A prosecutor, when anticipating the use of testimony or exhibits of questionable admissibility, should endeavor to obtain a ruling on the admissibility of the testimony or exhibit prior to mentioning or displaying the same before the jury.

6-4.3. Fair Use and Presentation of Evidence

If the prosecutor reasonably believes there has been misconduct by opposing counsel, a witness, the court or other persons that affects the fair presentation of the evidence, the prosecutor should challenge the perceived misconduct by appealing or objecting to the court or through other appropriate avenues, and not by engaging in improper retaliatory conduct.

During the trial, if the prosecutor discovers that false evidence or testimony has been introduced by the prosecution, the prosecutor should take reasonable remedial steps.

The prosecutor should exercise strategic judgment regarding whether to object or take exception to evidentiary rulings that are materially adverse to the prosecution and need not make every possible objection. The prosecutor should make an adequate record for appeal, and consider the possibility of an interlocutory appeal regarding significant adverse rulings if available.

6-4.4. Facts Outside the Record

When before a jury, the prosecutor should not knowingly refer to, or argue on the basis of, facts outside the record, unless such facts are matters of common public knowledge based on ordinary human experience matters of which a court clearly may take judicial notice, or facts the prosecutor reasonably believes will be entered into the record at that proceeding. In a nonjury context, the prosecutor may refer to extra-record facts relevant to issues about which the court specifically inquires, but should note that they are outside the record.

6-5. Examination of Witnesses in Court

6-5.1. Fair Examination

A prosecutor should conduct the examination of all witnesses fairly and with due regard for their reasonable privacy.

6-5.2. Improper Questioning

A prosecutor should not ask a question that implies the existence of a factual predicate that the prosecutor either knows to be untrue or has no reasonable objective basis for believing is true.

6-5.3. Impeachment and Credibility

A prosecutor should not misuse the power of cross-examination or impeachment to ridicule, discredit, undermine, or hold a fact witness up to contempt, if the prosecutor knows the witness is testifying truthfully.

6-5.4. Privileges

The prosecutor should not call a witness to testify in the presence of the jury, or require the defense to do so, when the prosecutor knows the witness will claim a valid privilege not to testify. If the prosecutor has reason to believe a particular witness might claim a privilege to not testify, the prosecutor should alert the court and defense counsel in advance and outside the presence of the jury.

6-6. Objections and Motions

6-6.1. Procedure

When making an objection during the course of a trial, a prosecutor should formally state the objection in the presence of the jury along with a short and plain statement of the grounds for the objection. Unless otherwise directed by the court, further argument should usually be made outside the hearing of the jury.

6-6.2. Motions *in limine*

Whenever possible, a prosecutor should attempt to resolve issues relating to the admissibility of evidence prior to the swearing of the jury or, in non-jury adjudications, prior to the swearing of the first witness. Where permitted, this may be accomplished by the filing of and a hearing on a motion *in limine*. A prosecutor should also request the court to similarly resolve questions as to the admissibility of any defense evidence.

6-7. Closing Arguments to Trier of Fact

6-7.1. Fair Argument

In closing argument, a prosecutor should be fair and accurate in the discussion of the law, the facts, and the reasonable inferences that may be drawn from the facts.

The prosecutor should not make arguments calculated to appeal to improper prejudices of the trier of fact. The prosecutor should make only those arguments that are consistent with the trier's duty to decide the case on the evidence, and should not seek to divert the trier from that duty.

6-7.2. Personal Opinion

In closing argument, a prosecutor should not express personal opinion regarding the justness of the cause or the credibility of a witness or the guilt of the defendant, assert personal knowledge of facts in issue, or allude to any matter not admitted into evidence during the trial.

6-7.3. Rebuttal Argument

If the prosecutor presents rebuttal argument, the prosecutor may respond fairly to arguments made in the defense closing argument. If the prosecutor believes the defense closing argument is or was improper, the prosecutor should timely object and request relief from the court, rather than respond with arguments that the prosecutor knows are improper.

6-8. After the Verdict

6-8.1. Comments by a Prosecutor After a Verdict or Ruling

The prosecutor should respectfully accept acquittals. Public comments after a verdict or ruling should be respectful of the legal system and process. The prosecutor may publicly praise a jury verdict or court ruling, compliment government agents or others who aided in the matter, and note the social value of the ruling or event. The prosecutor should not publicly gloat or seek personal aggrandizement regarding a verdict or ruling.

6-8.2. Post-trial Motions

The prosecutor should conduct a fair evaluation of post-trial motions, determine their merit, and respond accordingly and respectfully. The prosecutor should not oppose motions at any stage without a reasonable legal basis for doing so.

Part VII: Sentencing

7-1. Sentencing

7-1.1. Fair Sentencing

To the extent that the prosecutor becomes involved in the sentencing process, they should seek to assure that a fair and fully informed judgment is made and that unfair sentences and unfair sentence disparities are avoided.

7-1.2. Consequences of Sentences

The prosecutor should be familiar with relevant sentencing laws, rules, consequences and options, including alternative outcomes that do not involve imprisonment. Before or soon after charges are filed, and throughout the pendency of the case, the prosecutor should evaluate potential consequences of the prosecution and available sentencing options, such as forfeiture, restitution, and immigration effects, and be prepared to actively advise the court in sentencing.

7-1.3. Sentencing Input

The prosecutor may take advantage of the opportunity to address the sentencing body, whether it is the jury or the court, and may offer a sentencing recommendation where appropriate. The prosecution should also take steps to see that the victim is not denied their rights to address the sentencing body.

7-1.4. Victim Input

The prosecutor should know the relevant laws and rules regarding victims' rights, and facilitate victim participation in the sentencing process as the law requires or permits.

7-1.5. Mitigating Evidence

The prosecutor should disclose to the defense, prior to sentencing, any known evidence that would mitigate the sentence to be imposed. This obligation to disclose does not carry with it additional obligations to investigate for mitigating evidence beyond what is otherwise required by law.

7-1.6. Pre-Sentencing Reports

The prosecutor should take steps to ensure that sentencing is based upon complete and accurate information drawn from the pre-sentence report and any other information the prosecution possesses. The prosecutor should disclose to the court or probation officer any information in its files relevant to the sentencing process. Upon noticing any material information in a pre-sentence report that conflicts with other information known to the prosecutor, it is the duty of the prosecutor to notify the appropriate parties of such conflicting information.

7-2. Community Supervision

7-2.1. Role in Pre-Sentence Report

The prosecutor should take an active role in the development and submission of the presentence report, including the following:

- a. The office of the prosecutor should be available as a source of information to the probation department concerning a defendant's background when developing pre-sentence reports; and
- b. The office of the prosecutor should review pre-sentence reports prior to or upon submission of such reports to the court.

7-2.2. Prosecutor as a Resource to Community Supervision

The prosecutor should be available as a source of information for the Travis County Community Justice Services Adult Probation Department for offenders under supervision.

7-2.3. Notice

Prosecutors in a court should seek to be notified of and have the right to appear at probation revocation and termination hearings and be notified of the outcome of such proceedings in that court.

7-3. Community-Based Programs

7-3.1. Knowledge of Programs

The prosecutor should be cognizant of all community-based programs to which defendants may be sentenced or referred to as a condition of probation.

7-3.2. Prosecutor as a Resource to Community Programs

To the extent permitted by law, the prosecutor should be available as a source of information for community-based agencies that provide services to probationers.

Part VIII: Post-Sentencing

8-1. Post-Conviction Policies

8-1.1. Preserving the Record

All prosecutors should be sufficiently knowledgeable about appellate practice to be able to make a record which preserves issues and arguments for appeal. At every stage of representation, the prosecutor should take steps necessary to make a clear and complete record for potential review. Such steps may include: filing motions, including motions for reconsideration, and ensuring exhibits are appropriately included; making objections and placing explanations on the record; requesting evidentiary hearings; requesting or objecting to jury instructions; and making offers of proof and proffers of excluded evidence.

8-1.2. Duty to Defend Conviction Not Absolute

The prosecutor has a duty to defend convictions obtained after fair process. In other words, when handling an appeal from a conviction, a collateral attack on a conviction, or any other post-conviction litigation, the prosecutor has the duty to require the defendant to meet the applicable burden of proof to obtain relief. This duty is not absolute, however, and the prosecutor should temper this duty with independent professional judgment and discretion. The prosecutor should not personally handle, or continue to personally handle, any such post-conviction litigation if the prosecutor believes that the defendant is innocent, that the defendant was wrongfully convicted, or that a miscarriage of justice associated with the conviction has occurred. Instead, the prosecutor should immediately notify both the Assistant Director of Appeals and the Director of the Civil Rights Division, the latter of whom should cause the underlying case to be reviewed by the Conviction Integrity Unit in accordance with the policies relating to that unit.

8-2. Appeals

8-2.1. General Principles

Prosecutors are encouraged to involve appellate section attorneys at all stages of litigation and to alert the appellate section when an issue arises in court that could result in a ruling adverse to the State.

A prosecutor handling a criminal appeal or other post-conviction matter should know the specific rules, practices and procedures that govern such proceedings in the jurisdiction.

A prosecutor handling a criminal appeal or other post-conviction matter who was not counsel in the trial court should consult with the trial prosecutor when and to the extent needed, but the appellate prosecutor should exercise independent judgment in reviewing the record and the defense arguments. The appellate prosecutor should not make or oppose arguments in an appeal or other post-conviction proceeding unless there is a basis in both law and fact for doing so. The basis should not be frivolous and may include good faith arguments for extension, modification, or reversal of existing law.

8-2.2. Pursuit of Appellate Relief by the State

When a prosecutor receives an adverse ruling at the trial level, the prosecutor should consider whether it is possible for the State to pursue relief from an appellate court via an appeal, a mandamus proceeding, or some other type of appellate proceeding. If such a mechanism is available, and if the prosecutor believes that pursuit of such relief would be appropriate and in the interests of justice, the prosecutor should promptly refer the matter to the Assistant Director of Appeals. If the Assistant Director of Appeals agrees, after consulting with the applicable Division Director, that such relief should be pursued, the Assistant Director of Appeals should refer the matter to the District Attorney for decision.

When considering whether an adverse ruling warrants the pursuit of such relief, prosecutors should evaluate not only the legal merits, but also whether it would be in the interests of justice to pursue such relief, taking into account the benefits to the prosecution, the judicial system, and the public, as well as the costs of the appellate process and of delay to the prosecution, the defendant, victims, and witnesses.

8-2.3. Responses to Newly Discovered or Newly Available Evidence or New Law

8-2.3a. Duty Regarding Newly Discovered or Newly Available Evidence

If, after a defendant has been convicted or entered a guilty plea, a prosecutor learns of newly discovered or newly available evidence or information that would have been subject to disclosure if it had previously been available, including evidence or information having potential exculpatory, impeachment, and/or mitigation value to the defendant, the prosecutor shall promptly disclose that evidence or information to defense counsel, to the defendant (if not represented by counsel), and/or to the convicting court, regardless of the credibility, materiality, or admissibility of the evidence or information. The prosecutor shall also promptly refer the matter to both the chief appellate prosecutor and the Director of the Civil Rights Division, the latter of whom will cause the underlying case to be reviewed by the Conviction Integrity Unit in accordance with the policies relating to that unit.

8-2.3b. Duty Regarding New Law

If a prosecutor learns of a new law, including a binding decision of an appellate court, that appears to create a reasonable likelihood that a defendant was wrongfully convicted, was wrongfully sentenced, or is actually innocent, the prosecutor shall promptly refer the matter to the chief appellate prosecutor to determine whether the new law arguably applies to the defendant's case. If the new law arguably applies to that case, the chief appellate prosecutor shall notify the Director of the Civil Rights Division, who will cause that case, and all other cases reasonably likely to be affected by the new law, to be reviewed in accordance with the policies relating to that unit.

8-2.4. Challenges to the Effectiveness of Defense Counsel

Prosecutors should be mindful of a criminal defendant's Sixth Amendment right to the effective assistance of counsel. Under *Strickland v. Washington*, 466 U.S. 668 (1984), counsel is constitutionally ineffective if counsel's performance is deficient and if that deficient performance prejudices the defendant. This analysis takes place in light of the entire record of the proceedings and a strong presumption exists that defense counsel's performance was the result of reasonable professional judgment.

In any post-conviction challenge to the effectiveness of defense counsel, the prosecutor should be cognizant of the defendant's potential attorney-client privilege with former defense counsel as well as former defense counsel's other ethical or legal obligations, and not seek to abrogate such privileges or obligations without an unambiguous legal basis, or court order.

If a prosecutor observes, at any stage of a criminal proceeding, defense counsel conduct or omission that might reasonably constitute ineffective assistance of counsel, the prosecutor should take reasonable steps to preserve the defendant's right to effective assistance as well as the public's interest in obtaining a valid conviction, while not intruding on a defendant's constitutional right to counsel. During an ongoing defense representation, the prosecutor should not express concerns regarding possible ineffective assistance on the public record without an unambiguous legal basis or court order, and should not communicate any such concerns directly to the defendant.

8-2.5. Collateral Attacks on Conviction

If required to respond to a collateral attack on a conviction, the prosecutor should consider all lawful responses, including applicable procedural or other defenses. The prosecutor need not, invoke every possible defense to a collateral attack and should consider potential negotiated dispositions or other remedies, if the prosecutor and the prosecutor's office reasonably conclude that the interests of justice are thereby served.

8-2.6. Post-Conviction Discovery

The Office shall provide post-conviction discovery to the defendant's attorney of record where required to do so by law, rule, or court order, or upon request.

Such post-conviction discovery shall also be provided, upon request, to the Capitol Area Private Defender Service ("CAPDS") if CAPDS has been authorized by a court to conduct an investigation of potential post-conviction claims on behalf of the defendant.

The policy of the Office is to permit post-conviction inspection of the State's work product where possible. As is addressed more fully in section 4-5.2a, the State has a duty to disclose to a defendant any exculpatory, impeachment, or mitigating evidence or information that is possessed or controlled by the State, regardless of admissibility or materiality. This duty continues after the defendant has been convicted or entered a guilty plea. To ensure that any such evidence or information contained in the State's work product relating to a case has been disclosed to the defendant, a prosecutor providing post-conviction discovery in that case should permit defense counsel to inspect all of the State's work product relating to that case, to the extent that disclosing such work product would not violate any law, rule, or court order. However, the prosecutor must not provide paper or digital copies of any portion of the State's work product to defense counsel unless expressly authorized by the chief appellate prosecutor or ordered by a court. Any decision to withhold work product from post-conviction inspection must be approved by the chief appellate prosecutor.

Except as is otherwise stated in this section, if post-conviction discovery is provided in a case, such discovery will be provided pursuant to the same procedures that are employed in relation to pretrial discovery. Notwithstanding any provision in this policy statement to the contrary, a prosecutor providing post-conviction discovery shall not disclose grand jury information except as permitted by the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. Art. 20.02.