Prosecutorial Ethics: Private Decision Making in the Very Public Practice of Law

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MINISTERS OF JUSTICE

Private Ethical Decision-Making
In the Very Public Practice of Law

Chuck MacLean, Winona County Attorney

Presented at the Annual Meeting of the Minnesota County Attorneys Association

November 17, 2001

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The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor.

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A Prosecutor’s Obligation: “[The Prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” Berger v. United States, 295 U.S. 78, 88 (1935) (J. Sutherland).

A Prosecutor’s Integrity: “The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor.” Comment, “On Prosecutorial Ethics,” 13 Hastings Const. L.Q. 537 (1986) (Author Carol Corrigan, a Senior Deputy District Attorney for Alameda County, California).

A Prosecutor’s Lament: “[T]he adversary system is justified, not because it is a good way of achieving justice, but because it is a good way of hobbling the government . . . .” D. Luban, ed. “The Adversary System Excuse” in The Good Lawyer: Lawyers’ Roles and Lawyers’ Ethics 83, 92 (1983)

I. A Prosecutor’s Ethics: In our work, each of us, as a prosecutor, writes and speaks with the power of the entire State of Minnesota. We hold the accused’s rights and freedom in our hands. As we exercise that awesome power, each of us must follow an ethical code, whether codified or internalized, to ensure that the power we have is not corrupted.

II. A Prosecutor’s Codified “Conscience”: Prosecutors are guided by numerous codified ethics rules, including:

A. The ABA Standard for Criminal Justice - The Prosecution Function – 3d ed. 1993 (“Standards” or “ABA Standards”)
C. The ABA Model Code of Professional Responsibility - (“Code”)
D. The NDAA National Prosecution Standards 2d ed. - 1991 (“NDAA”)
E. Your Office policy and guidelines manual or handbook.

But these are only guides and minimums. A prosecutor’s conscience must be guided by the rules, but moderated and refined from within.
III. Prosecutor/Court [External] Ethical Dilemmas: Minnesota appellate courts bombard us with decisions on prosecutorial ethics and misconduct. This is most easily seen in the context of Closing Arguments. In that area, the Minnesota appellate courts have so confined the prosecution, that if that trend were extrapolated, one can envision prosecution closing arguments devoid of drama, inference and legal “argument.”

Prosecutor closing arguments are subject to appellate scrutiny, since appeals flow from convictions. However, defense closings, even ones with substantial misconduct are typically delivered with impunity, since Minnesota prosecutors do not argue last, Minnesota prosecutors do not have a closing rebuttal as of right, and of course, if the objectionable defense closing yields an acquittal, there can be no appeal.

This first dilemma for prosecutors, which might be labeled the “Prosecutor/Court Dilemma,” pits us against the appellate courts, with the issue being what conduct will be approved (or overlooked) by the appellate courts, and what conduct will yield reversal and remand. After all, none of us would argue in closing that which we knew was unethical. Our interests lie in convictions that stand up to appeal. This Prosecutor/Court Dilemma is addressed below, but is not a central part of this paper.

IV. A Prosecutor’s Internal Ethical Dilemmas: Each of us has an individual obligation, as an attorney, to act responsibly and ethically, within the applicable rules, canons and standards. Each of us also has his or her own ethical compass or conscience that should never be less restrictive than the codified ethical guides, and can often exceed the codified guides. These internal ethical dilemmas focus not on what conduct will result in reversed or affirmed convictions, but on what seems or feels right, just, fair, honest, ethical. These internal ethical dilemmas are encountered daily in our work, and this paper focuses on a few of these internal dilemmas.

V. Prosecutor/Supervisor Ethical Dilemmas: There may be times when a subordinate prosecutor’s personal moral compass does not match his or her supervisor’s moral compass, or does not match office policy and procedure. The “horns” of the prosecutor/supervisor dilemma, carried to the extreme, can be, on the one hand, following policy, deferring to the supervisor’s ethical compass, and maintaining your position, career and performance rating, and on the other hand, following your own personal ethical compass and risking censure, discipline, demotion or worse. This type of ethical dilemma is addressed in this paper, as are ways to minimize the chance your office can carry these dilemmas to the extreme.

VI. Suggestions for Monitoring the Use or Abuse of Prosecutor Discretion: There can be no doubt the power of the prosecutor is immense. And as the power of the judiciary has waned with the felt impact of legislative controls circumscribing judicial power, prosecutors have become the most powerful figures in the Courthouse. With that power, obviously, goes responsibility to exercise it fairly and to promote justice. But also the enormous power of the prosecutor has drawn self-appointed watchdogs with a range of ideas for oversight and monitoring of prosecutors’ discretionary decisions. Obviously, the PR Board plays a role and does the Crime Victims’ Ombudsman, but some commentators have proposed a range of accountability measures that include: externally imposed charging guidelines, externally imposed disposition guidelines, screening conferences, legislative oversight, strict enforcement of ethics rules, and so on. See generally, Ellen S. Podgor, The Ethics and Professionalism of Prosecutors in Discretionary Decisions, 68 Fordham L.Rev. 1511, ___ (2000). But for now, our key external control is embodied within the various codified ethical guides for prosecutors.
VII. The Details of the Codified Prosecutor Ethical Guides: The remainder of the paper is organized around the ABA Standards for Criminal Justice - The Prosecution Function - 1993 (“Standards”), incorporating Codes, Rules, caselaw and Dilemma Scenarios, where appropriate. Less critical Standards have been omitted.

ABA Standard 3-1.1 - The Function of the Standards

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

Comment: It should be noted that one or more of these ABA Standards have been cited by Minnesota appellate courts in dozens of prosecutorial misconduct cases. See e.g., State v. Salitros, 499 N.W.2d 815, 817-18 (Minn. 1993) (indicating that Minnesota appellate courts will use the ABA Standards as a guide in evaluating allegations of prosecutorial misconduct).

But see, State v Serstock, 402 N.W.2d 514, 515-17 (Minn. 1987); State v. Serstock, 390 N.W.2d 399, 402-04 (Minn. Ct. App. 1986) (the Serstock cases indicate that ethical violations alone do not satisfy the misconduct element of Minn. Stat. § 609.43, Misconduct of a Public Officer/Employee).

State v. Buggs, 581 N.W.2d 329, 339 (Minn. 1998) (the prosecutor must seek justice, “guard” the rights of the accused and “enforce” the rights of the public).

State v. Thaggard, 527 N.W.2d 804, 812-13 (Minn. 1995).

State v. James, 520 N.W.2d 399, 405 (Minn. 1994).

State v. Starkey, 516 N.W.2d 918, 927 (Minn. 1994).

State v. Salitros, 499 N.W.2d 815, 817 (Minn. 1993).

See also, Steele, Walter W., Jr., “Unethical Prosecutors and Inadequate Discipline,” 38 S.W.L.J. 965, 979-88 (1984) (arguing that given the ubiquitous nature of prosecutorial misconduct, disciplinary actions against prosecutors should be common, but since they are not, the author proposes creation of a Prosecutor’s Grievance Council, with sanctions ranging from required education to fines to suspensions to disbarment; “Prosecutors’ unethical trial conduct is too common and too destructive to ignore. Any amount of misconduct by a prosecutor is intolerable... .

See also, Note, “Harmless Error, Prosecutorial Misconduct, and Due Process: There’s More to Due Process than the Bottom Line,” 88 Colum. L. Rev. 1298 (1988) (vilifying harmless error affirmances in situations of prosecutorial misconduct, and suggesting that prosecutorial misconduct should almost result in a per se due process reversal).
ABA Standard 3-1.2 - The Function of the Prosecutor

(a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction.

(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions;

(c) The duty of the prosecutor is to seek justice, not merely to convict.

(d) It is an important function of the prosecutor to seek to reform or improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, he or she should stimulate efforts for remedial action.

(e) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor’s jurisdiction. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in standard 4-1.5.

Comment: The Salitros Court underscored the unique quasi-judicial, justice-maximizing role of prosecutors: “In a criminal trial the prosecutor may not seek convictions at any price. Rather, the prosecutor is a ‘minister of justice’ whose obligation is ‘to guard the rights of the accused as well as to enforce the rights of the public.’” State v. Salitros, 499 N.W.2d 815, 817 (Minn. 1993) (citation to ABA Prosecution Standards commentary omitted).

The Minnesota Rules of Professional Conduct also address this unique prosecutorial obligation:

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

Minn. R. Prof. Cond. 3.8 (1985 commentary to Rule 3.8 - Special Responsibilities of a Prosecutor).

State v. Henderson, 620 N.W.2d 688, 701-02 (Minn. 2001) (“Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial.” Citing State v. Sha, 193 N.W.2d 829, 831 (Minn. 1972)).

State v. Bradford, 618 N.W.2d 782, 798 (Minn. 2000) (“A prosecutor may not seek a conviction at any price,” rather, the prosecutor is a minister of justice.).

State v. Erickson, 589 N.W.2d 481, 485 (Minn. 1999) (“The County Attorney's Office's excessive use of [peremptory removal of assigned judges], is prejudicial to the administration of justice and contrary to the spirit of the rule.”).

State v. Grayson, 546 N.W.2d 731, 739 (Minn. 1996) (“We take this opportunity to again remind prosecutors that they have ‘an overriding obligation, shared by the court, to see that defendant receives a fair trial, however guilty he may be.’”) (emphasis added) (citing Sha, 193 N.W.2d at 831).
State v. Thaggard, 527 N.W.2d 804, 812-13 (Minn. 1995) (as a minister of justice, prosecutor should not have argued the jury was to decide if the evidence was “sufficient to convict,” should not have tried to put the jury into the victim’s shoes, should not have endorsed a police witness as a “good cop,” and should not have made references to defendant’s gang affiliations).

State v. James, 520 N.W.2d 399, 405 (Minn. 1994) (a prosecutor whose obligation is to also “guard the rights of the accused,” should not argue items not in evidence, should not inject his or her personal opinions of witnesses’ credibility, and should not inflame the jury in closing).

State v. Starkey, 516 N.W.2d 918, 927 (Minn. 1994) (the prosecutor properly guarded the rights of the accused, although some remarks, including injection of prosecutor’s personal opinions, were misconduct).

State v. Blasus, 445 N.W.2d 535, 539-40 (Minn. 1989) (the obligation of the prosecutor to seek justice means prosecutors “are charged with responsibilities to the court, to the constitution, and to the defendant not present in civil cases ... These additional responsibilities limit the scope of proper conduct of prosecutors to a narrower field than is available to their civil law counterparts.”).


Kipp v. Saetre, 454 N.W.2d 639, 644 (Minn. Ct. App. 1990) (prosecutorial immunity was appropriately granted to prosecutor who honored his “duty to ... see that defendants receive procedural justice.”).


But see, Kevin C. McMunigal, Are Prosecutorial Ethics Standards Different?, 68 Fordham L. Rev. 1453, 1453 (2000) (“[O]verstatement of the differences between prosecutorial ethical standards and ethical standards for other lawyers contributes to the ambiguity that currently plagues the subject of prosecutorial ethics . . . when prosecutorial standards of conduct do differ from those of criminal defense lawyers and civil advocates, they typically differ in degree rather than in kind, in shades of gray rather than in black and white.”).

ABA Standard 3-1.3 - Conflicts of Interest

(a) A prosecutor should avoid a conflict of interest with respect to official duties.

(b) A prosecutor should not represent a defendant in criminal proceedings in a jurisdiction where he or she is also employed as a prosecutor.

(c) A prosecutor should not, except as law may otherwise expressly permit, participate in a matter in which he or she participated personally and substantially while in private practice or nongovernmental employment unless under applicable law no one is, or by lawful delegation may be, authorized to act in the prosecutor’s stead in the matter.
(d) A prosecutor who has formerly represented a client in a matter in private practice should not thereafter use information obtained from that representation to the disadvantage of the former client unless the rules of attorney-client confidentiality do not apply or the information has become generally known.

(e) A prosecutor should not, except as law may otherwise expressly permit, negotiate for private employment with any person who is involved as an accused or as an attorney or agent for an accused in a matter in which the prosecutor is participating personally and substantially.

(f) A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.

(g) A prosecutor who is related to another lawyer as parent, child, sibling, or spouse should not participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer. Nor should a prosecutor who has a significant personal or financial relationship with another lawyer participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer, unless the prosecutor’s supervisor, if any, is informed and approves or unless there is no other prosecutor authorized to act in the prosecutor’s stead.

(h) A prosecutor should not recommend the services of particular defense counsel to accused persons or witnesses unless requested by the accused person or witness to make such a recommendation, and should not make a referral that is likely to create a conflict of interest. Nor should a prosecutor comment upon the reputation or abilities of defense counsel to an accused person or witness who is seeking or may seek such counsel’s services unless requested by such person.

ABA Standard 3-1.4 - Public Statements

(a) A prosecutor should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the prosecutor knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.

(b) A prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under this Standard.


ABA Standard 3-1.5 - Duty to Respond to Misconduct

(a) Where a prosecutor knows that another person associated with the prosecutor’s office is engaged in action, intends to act or refuses to act in a manner that is a violation of a legal obligation to the prosecutor’s office or a violation of law, the prosecutor should follow the policies of the prosecutor’s office concerning such matters. If such policies are unavailing or do not exist, the prosecutor should ask the person to reconsider the action or inaction which is at issue if such a request is aptly timed to prevent such misconduct and is otherwise feasible. If such a request for reconsideration is unavailing, inapt or otherwise not feasible or if the seriousness of the matter so requires, the prosecutor should refer the matter to higher authority in the prosecutor’s office, including, if warranted by the seriousness of the matter, referral to the chief prosecutor.
(b) If, despite the prosecutor’s efforts in accordance with section (a), the chief prosecutor insists upon action, or a refusal to act, that is clearly a violation of law, the prosecutor may take further remedial action, including revealing the information necessary to remedy this violation to other appropriate governmental officials not in the prosecutor’s office.

Comment: See also, Minn. R. Prof. Cond. 8.3.

ABA Standard 3-2.1 - Prosecution Authority to be Vested in a Public Official [Omitted]

ABA Standard 3-2.2 - Interrelationship of Prosecution Offices Within a State [Omitted]

ABA Standard 3-2.3 - Assuring High Standards of Professional Skill [(a)-(c) Omitted]

(d) Special efforts should be made to recruit qualified women and members of minority groups for prosecutorial office.

(e) In order to achieve the objective of professionalism and to encourage competent lawyers to accept such offices, compensation for prosecutors and their staffs should be commensurate with the high responsibilities of the office and comparable to the compensation of their peers in the private sector.

ABA Standard 3-2.4 - Special Assistants, Investigative Resources, Experts [Omitted]

ABA Standard 3-2.5 - Prosecutor’s Handbook; Policy Guidelines and Procedures

(a) Each prosecutor’s office should develop a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures of the office. The objectives of these policies as to discretion and procedures should be to achieve a fair, efficient, and effective enforcement of the criminal law.

(b) In the interest of continuity and clarity, such statement of policies and procedures should be maintained in an office handbook. This handbook should be available to the public, except for subject matters declared “confidential,” when it is reasonably believed that public access to their contents would adversely affect the prosecution function.


ABA Standard 3-2.6 - Training Programs [Omitted]

ABA Standard 3-2.7 - Relations with Police

(a) The prosecutor should provide legal advice to the police concerning police functions and duties in criminal matters.

(b) The prosecutor should cooperate with police in providing the services of prosecutor’s staff to aid in training police in the performance of their function in accordance with law.
ABA Standard 3-2.8 - Relations with the Courts and Bar [Omitted]

ABA Standard 3-2.9 - Prompt Disposition of Criminal Charges

(a) A prosecutor should avoid unnecessary delay in the disposition of cases. A prosecutor should not fail to act with reasonable diligence and promptness in prosecuting an accused.

(b) A prosecutor should not intentionally use procedural devices for delay for which there is no legitimate basis.

(c) The prosecution function should be so organized and supported with staff and facilities as to enable it to dispose of all criminal charges promptly. The prosecutor should be punctual in attendance in court and in the submission of all motions, briefs and other papers. The prosecutor should emphasize to all witnesses the importance of punctuality in attendance in court.

(d) A prosecutor should not intentionally misrepresent facts or otherwise mislead the court in order to obtain a continuance.

(e) A prosecutor, without attempting to get more funding for additional staff, should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the interests of justice in the speedy disposition of charges, or may lead to the breach of professional obligations.

ABA Standard 3-2.10 - Supersession and Substitution of Prosecutor [Omitted]

ABA Standard 3-2.11 - Literary or Media Agreements

A prosecutor, prior to conclusion of all aspects of a matter, should not enter into any agreement or understanding by which the prosecutor acquires an interest in literary or media rights to a portrayal or account based in substantial part on information relating to that matter.

ABA Standard 3-3.1 - Investigative Function of Prosecutor

(a) A prosecutor ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts, but the prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies.

(b) A prosecutor should not invidiously discriminate against or in favor of any person on the basis of race, religion, sex, sexual preference, or ethnicity in exercising discretion to investigate or to prosecute. A prosecutor should not use other improper considerations in exercising such discretion.

(c) A prosecutor should not knowingly use illegal means to obtain evidence or to employ or instruct or encourage others to use such means.
(d) A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give.

(e) A prosecutor should not secure the attendance of person for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless the prosecutor is authorized by law to do so.

(f) A prosecutor should not promise not to prosecute for prospective criminal activity, except where such activity is part of an officially supervised investigative and enforcement program.

(g) Unless a prosecutor is prepared to forgo impeachment of a witness by the prosecutor’s own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present the impeaching testimony, a prosecutor should avoid interviewing a prospective witness except in the presence of a third person.

Comment: State v. Mussehl, 408 N.W.2d 844, 847 (Minn. 1987) (“A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct for the prosecutor to advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give.”).

State v. Brown, 348 N.W.2d 743-46 (Minn. 1984) (prosecutors should only interview prospective witnesses when a third person is present).

State v. Fratzke, 325 N.W.2d 10, 11-12 (Minn. 1982) (prosecutors risk being called as a witness in a case where they are an advocate, when they interview witnesses without a third person present).

State v. Ellert, 301 N.W.2d 320, 323 (Minn. 1981) (prosecutors should only interview prospective witnesses when a third person is present).

See also, ABA Model Code of Professional Responsibility, DR 5-102.

ABA Standard 3-3.2 - Relations with Victims and Prospective Witnesses [Omitted]

ABA Standard 3-3.3 - Relations with Expert Witnesses [Omitted]

ABA Standard 3-3.4 - Decision to Charge

(a) The decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor.

(b) Prosecutors should take reasonable care to ensure that investigators working at their direction or under their authority are adequately trained in the standards governing the issuance of arrest and search warrants and should inform investigators that they should seek approval of a prosecutor in close or difficult cases.
(c) The prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted.

(d) Where the law permits a citizen to complain directly to a judicial officer or the grand jury, the citizen complainant should be required to present the complaint for prior approval to the prosecutor, and the prosecutor’s action or recommendation thereon should be communicated to the judicial officer or grand jury.

Comment: Lawless, Joseph F., Jr., Prosecutorial Misconduct, 1985, supp. 1990 (espec. Ch. 3).

ABA Standard 3-3.5 - Relations with Grand Jury [Omitted]

Comment: State v. Johnson, 441 N.W.2d 460, 469 (Minn. 1989) (J. Wahl, Concurring Op.) (errors in original Grand Jury orientation, and not relating to any particular case, were not fatal to indictment).

ABA Standard 3-3.6 - Quality and Scope of Evidence Before Grand Jury [Omitted]

Comment: State v. Olkon, 299 N.W.2d 89, 110 (Minn 1980) (exculpatory evidence known to the prosecutor should be disclosed to the Grand Jury).

ABA Standard 3-3.7 - Quality and Scope of Evidence for Information [Omitted]

ABA Standard 3-3.8 - Discretion as to Noncriminal Disposition [Omitted]

ABA Standard 3-3.9 - Discretion in the Charging Decision

(a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

(i) the prosecutor’s reasonable doubt that the accused is in fact guilty;

(ii) the extent of the harm caused by the offense;

(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;

(iv) possible improper motives of a complainant;

(v) reluctance of the victim to testify;

(vi) cooperation of the accused in apprehending or convicting others; and

(vii) availability and likelihood of prosecution by another jurisdiction.
(c) A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused.

(d) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions.

(e) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of a particular kind of criminal act in question.

(f) The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.

(g) The prosecutor should not condition a dismissal of charges, nolle prosequi, or similar action on the accused’s relinquishment of the right to seek civil redress unless the accused has agreed to the action knowingly and intelligently, freely and voluntarily, and where such waiver is approved by the court.

Comment: State v. Greenleaf, 591 N.W.2d 488, 501-02 (Minn. 1999) (allowing a cooperating accomplice to plead to a lesser-included offense is a proper use of prosecutorial discretion).

State v. DeVerney, 592 N.W.2d 837, 844 (Minn. 1999) (to same effect as Greenleaf).

State v. Jones, 392 N.W.2d 224, 232 (Minn. 1986) (allowing a cooperating accomplice to plead to a lesser-included offense is a proper use of prosecutorial discretion and does not so limit the probative value of that testimony as to require its suppression).

State v. Herme, 298 N.W.2d 454, 455 (Minn. 1980) (“Necessarily, prosecutors must have considerable discretion in the charging decision ... [and it is] not subject to judicial review absent proof ... of deliberate discrimination based on some unjustifiable standard such as race, sex, or religion.”).

State v. Weatherspoon, 514 N.W.2d 266, 280 (Minn. Ct. App. 1994) (J. Randall, Concurring Op.) (“Ethical prosecutors do not take citizens at random, come up with a charge at random, and throw it up to a jury ... Prosecutors are supposed to, before bringing a charge, satisfy themselves from the evidence law enforcement has brought them that there is probable cause [, then] prosecutors proceed to trial ... bound and determined to convince the jury beyond a reasonable doubt what they themselves think to be true.”).

State v. Klindt, 400 N.W.2d 127, 130 (Minn. Ct. App. 1987) (one factor a prosecutor may use in making a charging decision is the availability and likelihood of prosecution by another jurisdiction.”).

ABA Standard 3-3.10 - Role in First Appearance and Preliminary Hearing [Omitted]

ABA Standard 3-3.11 - Disclosure of Evidence by the Prosecutor [Omitted]


ABA Standard 3-4.1 - Availability for Plea Discussions [Omitted]

ABA Standard 3-4.2 - Fulfillment of Plea Discussions [Omitted]

ABA Standard 3-4.3 - Record of Reasons for Nolle Prosequi Dispositions [Omitted]

ABA Standard 3-5.1 - Calendar Control [Omitted]

ABA Standard 3-5.2 - Courtroom Professionalism [Omitted]

ABA Standard 3-5.3 - Selection of Jurors [Omitted]

ABA Standard 3-5.4 - Relations with Jury [Omitted]

ABA Standard 3-5.5 - Opening Statement

The prosecutor’s opening statement should be confined to a statement of the issues in the case and the evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible. A prosecutor should not allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.

ABA Standard 3-5.6 - Presentation of Evidence [Omitted]

Comment: State v. Garner, 294 N.W.2d 725, 728 (Minn. 1980) (prosecutors “should avoid jeopardizing a strong case by introducing evidence which is essentially cumulative but which may bring about a reversal.”).

State v. White, 203 N.W.2d 852, 857 (Minn. 1973) (“It is unprofessional conduct for either the prosecutor or defense counsel knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury, to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments in the presence of the judge or jury.”).
State v. Peterson, 530 N.W.2d 843, 847 (Minn. Ct. App. 1995) (starting with the language quoted from White above, the Court noted that appellate “courts will pay special attention to [a prosecutor’s] statements that may inflame or prejudice the jury where credibility is a central issue.”).

State v. Richardson, 514 N.W.2d 573, 577 (Minn. Ct. App. 1994) (prosecutor failed to meet this ABA Standard by injecting personal opinions, improperly eliciting character evidence, and impeaching the defendant by his failure to call alibi witnesses - reviewing court opined that the prosecutor “sought to inflame the jury under the theory that ‘anything goes.’ That is not the law in Minnesota.”)

See also, Gershman, Bennett L., Prosecutorial Misconduct (1985, supp. 1995 espec. Ch. 9).

ABA Standard 3-5.7 - Examination of Witnesses [Omitted]

Comment: State v. White, 203 N.W.2d 852, 857 (Minn. 1973) (it is unprofessional conduct to ask a question requiring a factual predicate which the questioner cannot support with sufficient evidence).

ABA Standard 3-5.8 - Argument to the Jury

(a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.

(b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

Comment: State v. Washington, 521 N.W.2d 35, 42 fn. 3 Minn. 1994) (the fable of the Scorpion and the Tortoise, told by the prosecutor in his closing, improperly implied the defendant had the character of a scorpion, but was harmless error, although it diverted the jury from its duty to decide the case on evidence)

State v. Salitros, 499 N.W.2d 815, 817-18 (Minn. 1993) (quoting verbatim from this ABA Standard “[i]n the interest of educating both prosecutors and defense attorneys,” noting that the Standard is a “general outline as to what is appropriate and inappropriate ... [but] our cases should be looked to for a more detailed explication of what is appropriate and what is inappropriate.”).

State v. Everett, 472 N.W.2d 864, 870 (Minn. 1991) (this ABA Standard “helps avert exploitation of the influence of the prosecutor’s office, [but is] ... not designed to prevent the prosecutor from arguing that particular witnesses were or were not credible.”).

State v. Ture, 353 N.W.2d 502, 516 (Minn. 1984) (the prosecutor in closing “may not throw onto the scales of credibility the weight of his own personal opinion.”).
State v. Thomas, 232 N.W.2d 766, 768 (Minn. 1975) (in deciding what is proper argument, such as whether a prosecutor may say in closing that he left out some witnesses who were duplicative, “the court should be guided by [ABA Standard 3-5.8].”).


State v. Richardson, 514 N.W.2d 573, 577 (Minn. Ct. App. 1994) (prosecutor, in his closing argument, failed to meet this ABA Standard by injecting personal opinions, improperly eliciting character evidence, and impeaching the defendant by his failure to call alibi witnesses - reviewing court opined that the prosecutor “sought to inflame the jury under the theory that ‘anything goes.’ That is not the law in Minnesota.”).


See also, ABA Model Code of Professional Responsibility, DR 7-106 (C) (4).


See also, Zacharias, Fred C., “Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?,” 44 Vand. L. Rev. 45, 95-102 (1991) (“[C]ase law offers few standards for proper prosecutorial argument . . . Prosecutors are left to govern their own conduct, with little to guide them except a generalized fear of reversal for ‘overargument,’ and a commitment to satisfying their ethical obligation to do justice.” at p. 96)

**ABA Standard 3-5.9 - Facts Outside the Record [Omitted]**

**Comment:** State v. Thomas, 232 N.W.2d 766, 768 (Minn. 1975) (Facts outside the record should not be argued in the prosecutor’s closing).

State v. Page, 386 N.W.2d 330, 336 (Minn. Ct. App. 1986) (“It is improper conduct for a prosecutor to refer to a witness who was not called.”).

**ABA Standard 3-5.10 - Comments by Prosecutor after Verdict**

The prosecutor should not make public comments critical of a verdict, whether rendered by judge or jury.

**ABA Standard 3-6.1 - Role in Sentencing [Omitted]**

**ABA Standard 3-6.2 - Information Relevant to Sentencing [Omitted]**
ETHICAL DILEMMA SCENARIOS

1. Your newest prosecutor, known to have turned down a good case a time or two already, has turned down another case. You believe it is a winner. The new prosecutor believes there is not enough admissible evidence to convict. What could (and should) the prosecutor do?

2. You have charged a serious case that later on collapses when witnesses become unavailable and/or recant. You do not immediately dismiss the serious offense, but instead you offer to allow an Alford plea to a lesser charge (that you also believe you cannot prove). The Defendant accepts to avoid the downside risk of the original very serious charge. Did you do Good Work?

3. You have a series of five cases with defendants all represented by the same public defender. The defense attorney says that if you cut the first guy some slack to keep him out of prison, he will talk the other four into pleading even though the cases are flimsy. What should you do?

4. You are engaged in the early stages of an Attempted Second Degree Intentional Murder case. There are some good evidentiary issues the defense could raise if it saw them, but the defense attorney is so inept he misses all the good arguments. Does the prosecutor have any obligation to ensure a fair trial for that defendant? If so, what could/should the prosecutor do?
5. In a case where the defendant is alleged to have dropped a PDR onto a baby’s head, seriously injuring the child, you bring your personal PDR volume to court each day and place it on counsel table with the title turned toward the jury box. All along you know the actual PDR volume dropped on the baby was never recovered and will not be coming into evidence. What could/should the prosecutor do?

6. Your Office Procedures and Policies Manual devotes a great deal of attention to disposition guidelines and very little to charging discretion. You discover the reason for that is the public never really finds out about charging discretion but dispositions are on the front page every day. In practice, that means the prosecutors in that office charge whatever they believe will never have to be dismissed or reduced if the case later weakens. Is this ethical leadership in prosecutorial practice?

7. As a case progresses toward trial, probable cause evaporates. You seek permission to dismiss, but your supervisor tells you to let the case continue so you can “see what happens.”

8. As a very serious assault case progresses toward trial, you lose track of your victim and several new witnesses come forward who say your defendant was not involved in the assault. Your defendant is also embroiled in a federal case and you want to keep your charges pending to keep the heat on, intending to “trade” dismissal of your assault charge for his plea to the federal charges.
9. You discover that one of your fellow prosecutors, the Head of your Division, intends to “really slam dunk” two African-American defendants were acquitted in the last trial your fellow prosecutor tried against them. Slam dunk here includes overcharging, seeking inordinately high bail and refusing to plea bargain.

10. In an election year, your County Attorney instructs you to charge out a long shot case on a serial child molester with what you believe is insufficient identification evidence and no DNA. What can you do? What should you do?

11. If the assigned judge has always declined to send drunk drivers to serve real jailtime until the fifth conviction, and you know that judge hates to be removed and will hold it against you in future cases, what should the prosecutor do?

12. If the prosecutor knows the judge has issued a patently incorrect evidentiary ruling that effectively eliminates any chance the other side can mount its permissible defense, what should the prosecutor do?

13. If the prosecutor is busy and does not want to fight a Second Degree Assault jury trial right now (they’re always fought due to the mandatory prison sentence), can that prosecutor ethically decide to charge only Terroristic Threats (presumptive probation) when what really happened is Assault 2?

14. Can a prosecutor stride over to the defendant during the prosecutor’s closing argument in a kiddie sex case, point at the defendant’s face from two feet away, and say to the jury: “You may be wondering what a child molester looks like – well here is one right here!”?