

## **Ethical Prosecution: A Philosophical Field Guide**

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The impetus for this article is my sense from training new prosecutors, and also from having been one myself, that most new prosecutors feel completely overwhelmed by their responsibilities. Typically prosecutors begin their journey when they are in their mid-twenties, right after law school graduation. Immediately they have an incredible amount of power, if through nothing else but by the number of lives they touch. The hope is that one's sensitivity to ethical issues will continuously grow and become more refined. All prosecutors can use a "philosophical moment" now and again to evaluate their system of professionalism, no matter how experienced they might be. My goal is to set out some good general principles for ethical prosecution, and also to hopefully raise issues for discussion about the subject. We affect so many lives not merely through the degree of seriousness (or lack thereof) of the cases we handle, but also through the impression of the justice system that we impart to the defendants, victims, witnesses, jurors, families, and other observers. It is imperative that our philosophies are in order before we attempt to tackle even a day of our profession.

This essay is in no way meant to be an exhaustive study of a prosecutor's responsibilities and prohibitions as provided by their state's Rules of Professional Conduct (RPC). Jurisdictions vary as to some of their particularities. Needless to say, the place that every new attorney must begin is with his or her own state's Rules.<sup>1</sup> However, no prosecutor should ever strive for minimum competence ethically. Therefore, I am positing an overall basic moral system by which most dilemmas can be deciphered and dealt with honorably by applying these tenets.

### **I. REALIZE THAT YOU ARE THE GATEKEEPER OF JUSTICE**

"Wherever Law ends, Tyranny begins."

—John Locke<sup>2</sup>

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1. North Carolina, where I practice, is virtually identical in its RPCs for prosecution as the Model Rules. You should always check your RPCs as well as Bar and Court Opinions, which act as a gloss on the RPCs.

2. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 400 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

“Take nothing on its looks; take everything on evidence. There’s no better rule.”

—Charles Dickens<sup>3</sup>

The most useful thing I ever learned about being an ethical prosecutor was in my prosecution practicum at the Ohio State University, College of Law. It was the introduction to the somewhat controversial notion that prosecution is a “quasi-judicial” function. Take a second to ponder that. It should be truly earth-shatteringly poignant to one who walks into a courtroom everyday and represents the People of their jurisdiction. One can base an entire ethical philosophy on this single premise properly applied. Good prosecutors are a natural choice to be appointed as judges for precisely this reason. We should learn as prosecutors to objectively evaluate cases before we ever decide on a course of prosecution. Judges are to be fair and impartial in all things. So are we. Our dismissal power and our ability to charge are in a way the ultimate non-judicial but yet “quasi-judicial” powers.

It is true that we are a part of an adversarial process, but we should never forget that justice and fairness are our ultimate goals. We may work very hard to win a case, and we may argue it vehemently. After all, we are the voice of the People. That is in no way, however, to be construed that we are ever allowed to step on the Constitution. This is true no matter how high profile a case might be. This is also true no matter how serious the offense.

Every prosecutor will run across the situation of prosecuting a person who has committed a heinous crime, or they are prosecuting a career criminal who needs to be sent to prison. You should do everything in your power to convict that person and get them an appropriate sentence. Your definition of “power” should encompass, however, an explicit understanding within yourself that you are personally required to follow the law entirely. This includes state bar requirements, obviously, but state bar requirements should not be the only test. You owe it to the People to represent them at a higher level. The Constitution is their document. You must follow its spirit.

You also must follow all rules of discovery.<sup>4</sup> This includes the ones that you do not like. If you do not like a law then work to change it through proper channels but not through a misguided or illegal “self help.” This case, whatever it is, is neither about you nor about personal glory. “The duty of the prosecutor is to seek justice, not merely to convict.”<sup>5</sup> It is the mandate of your United States Su-

3. CHARLES DICKENS, *GREAT EXPECTATIONS* 320 (Barnes & Noble Books 1998) (1860-1861).

4. MODEL RULES OF PROF'L CONDUCT R. 3.4 & 3.8(d) (2000); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

5. ABA STANDARDS FOR CRIMINAL JUSTICE, *THE FUNCTION OF THE PROSECUTOR* Standard 3-1.2(c) (3d ed. 1993).

preme Court.<sup>6</sup> Thus, you are required to act with honor. The People deserve to have a state's attorney who represents them with honor after all.

It would seem that the defense attorney has the duty to make sure that a defendant has fair process. He or she does have that duty. Almost counterintuitively, you also have certain duties along these lines, particularly as to the defendant obtaining counsel.<sup>7</sup> Also, you must not inhibit their right to a fair trial.<sup>8</sup> Needless to say, you cannot comment on a defendant's silence,<sup>9</sup> nor can you attempt to admit false or inadmissible evidence.<sup>10</sup> Included in this inadmissibility would be seeking an attorney to violate the defendant's attorney-client privilege by placing them under subpoena without following specific ethical guidelines.<sup>11</sup> I would posit that if you were inclined to purposefully act in this manner that you should not be in the legal profession at all. Again, understanding our duties as quasi-judicial and doing justice will give you a higher standard to follow than mere strict adherence to RPCs.

## II. UNDERSTAND THE IMPORTANCE OF YOUR SKILLS

"I will not say with Lord Hale, that 'The Law will admit of no rival' . . . but I will say that it is a jealous mistress, and requires a long and constant courtship. It is not to be won by trifling favors, but by lavish homage."

—Joseph Story<sup>12</sup>

"(The aim of forensic oratory is) to teach, to delight, to move."

—Cicero<sup>13</sup>

Included in honorable prosecution is a necessity for diligence and a high degree of skill in one's work. For as much as it is odious to try a case just to establish personal glory, it is also odious to do a poor job in your cases. The People deserve a very high level of technical expertise from their prosecutors. You should know your Rules of Evidence. You should also strive to develop a style that is likely to convict the guilty in a courtroom. If you are arguing in front of a judge, know the

6. *Berger v. United States*, 295 U.S. 78, 88 (1935); MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2000).

7. MODEL RULES OF PROF'L CONDUCT R. 3.8(b).

8. MODEL RULES OF PROF'L CONDUCT R. 3.8(c).

9. *Griffin v. California*, 380 U.S. 609, 615 (1965).

10. MODEL RULES OF PROF'L CONDUCT R. 3.3 & 3.4.

11. MODEL RULES OF PROF'L CONDUCT R. 3.8(f).

12. Joseph Story, Inaugural Address as Dane Professor of Law at Harvard University, on the subject of The Value and Importance of Legal Studies (Aug. 5, 1829), in JOHN BARTLETT, FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE 447 (Emily Morison Beck ed., Little Brown & Co. 1980).

13. MARCUS TULLIUS CICERO, DE INVENTIONE; DE OPTIMO GENERE ORATORUM; TOPICA 367 (E.H. Warmington, Harvard Univ. Press 1988).

law and your facts as well as you can. If you are arguing before a jury, learn how to impart your case and your argument in a manner that reaches them and is understandable to them. If you are not a very good trial attorney, maybe you should consider another part of the law. The People deserve the best. At a minimum, they deserve your best. Your sloppiness in a case could very well cost a citizen his or her life. A citizen could die because you decided to cut an imprudent deal or did not prove your case. Certainly even misdemeanants, particularly in impaired driving and domestic violence cases, could end up killing someone one day. We are not play-acting. We have one of the most serious jobs that a person can have. There should always be a certain amount of weight that we feel from this. Wear this weight not as a burden, but as a mantle of privileged responsibility to the People. If you do not see this sacred trust of responsibility to the People as the privilege of service, then you are looking at the profession incorrectly. Above all, we are public servants. We should strive to be the highest ideal of the People.

III. REFLECT THE POSITION OF THE PEOPLE OF YOUR  
JURISDICTION AT THEIR MOST NOBLE, WHILE REALIZING THAT  
YOU MUST PROTECT THEIR SAFETY

“The law: It has honored us; may we honor it.”

—Daniel Webster<sup>14</sup>

“[L]et the safety of the people be the highest law.”

—Cicero<sup>15</sup>

A prosecutor quite literally represents the People of his or her jurisdiction. In my case, when I walk into a courtroom, I truly believe that I represent the People of the State of North Carolina. When asked by the judge, “What says North Carolina?” I feel that I must do my best to accurately reflect the will of the People with my argument. The key is that immediate public opinion must serve only as one guideline.

The U.S. Constitution, and your state constitution, are clearly the ultimate and highest will of the People. The written U.S. Constitution, as well as the cases that interpret it, are the noblest and highest will of all Americans. Given that as your bedrock, public opinion in your jurisdiction must be taken into account. You speak for the public. This must always be grounded in law and fairness, and particu-

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14. Daniel Webster, Speech at Charleston Bar Dinner (May 10, 1847), in JOHN BARTLETT, FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE 451 (Emily Morison Beck ed., Little Brown & Co. 1980).

15. MARCUS TULLIUS CICERO, ON THE COMMONWEALTH AND ON THE LAWS 159 (James G. Zetzel ed., Cambridge Univ. Press 1999) [hereinafter ON THE LAWS].

larly, it must be grounded in constitutionality. It must not be allowed to deteriorate into mob rule or rule by the media. The voice of the People must include all voices, not just the loud ones. We represent every person in our jurisdiction; we are their sworn protectors. Given this, what an interesting irony arises out of representing the People! We must be careful that we do not tell our “client” (the People) about certain aspects of the trial while the proceedings are pending. We are clearly in a different position than that of defense counsel in this regard.<sup>16</sup> We must not prejudice the defendant by seeking improper publicity in a case and in fact, we must prevent others from doing so as well, even though the audience of the media is our “client.”<sup>17</sup>

#### IV. TREAT EVERYONE EQUALLY WHILE TAKING INTO ACCOUNT MERITORIOUS DIFFERENCES IN SITUATIONS

“[T]he law is the last result of human wisdom acting upon human experience for the benefit of the public.”

—Samuel Johnson<sup>18</sup>

“[L]et the penalty be equal to the crime.”

—Cicero<sup>19</sup>

It is vital to take into consideration the will of the people. However, the will of a select few, or the will of the merely powerful, must not be among your determining factors at any point. This is where the concept I like to call “reasoned consistency” comes into play. You should take the time to develop your own policies about how you handle most situations. The longer that you are a prosecutor, the easier this will become as you will inevitably see many patterns emerge. Having a general notion of what you do with a certain type of case, with a certain set of facts, will allow you to be consistent. However, it is absolutely essential that you learn how to take into account extenuating circumstances for both the defendant and for the victim. You must always remember that your “victim” is usually a two-sided, Janus-faced coin. One side is the notion of all the People of your jurisdiction being victimized because a crime has been committed. The other side is the victim or set of victims who were most directly affected by the crime. Appropriate extenuating circumstances should never include the power, wealth, or influence of the defendant or of the individual victim. You have a moral obligation to discuss cases with as many victims as you can before you make a decision about a case’s outcome. However, you must make the final decision. You re-

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16. MODEL RULES OF PROF’L CONDUCT R. 1.4.

17. MODEL RULES OF PROF’L CONDUCT R. 3.6, 3.8(e), & 3.8(g).

18. HESTHER LYNCH PIOZZI, ANECDOTES OF THE LATE SAMUEL JOHNSON, LL.D. DURING THE LAST TWENTY YEARS OF HIS LIFE 111 (1786).

19. ON THE LAWS, *supra* note 15, at 174.

present the People; you never should be representing an individual client. Following your state's Victim's Rights Amendment, if your state has one, is essential, but your own code of ethics should flesh this out. You should strive for a higher level of service to all victims than any Victim's Rights Amendment would strictly have you do.

V. BALANCE AND PROFESSIONAL DILIGENCE IN DIFFICULT SITUATIONS IS THE KEY

"Recompense injustice with justice, and recompense kindness with kindness."

—Confucius<sup>20</sup>

"[I]t is advisable to appraise people in doubt and danger and to discover how they behave in adversity; for then and only then is the truth elicited from the bottom of their hearts: the mask is ripped off; the reality remains."

—Lucretius<sup>21</sup>

Some jurisdictions will ask you to represent clients in certain civil cases. This is usually seen in child support matters such as in the Uniform Interstate Family Support Act (UIFSA). Other jurisdictions may actually have you more involved than that and require you to do all types of child support and juvenile civil matters. The key here is that you are required by law to be the attorney for this particular client. You therefore must do so. However, it is a complete ethical atrocity that a group of attorneys who are sworn to represent the People are now being required to have actual individual clients. It is quickly seen that numerous conflicts are evidenced. Do what you can through your Chief Prosecutor to have your office removed from these types of cases. Those clients deserve independent representation, and the People deserve not to be put in the middle. Another state agency should always be available to take such cases. If not, a separate agency should be created or divided off from our offices.<sup>22</sup>

The other example of doing the best you can in a stressful situation is the overwhelming caseloads all of us are given out of necessity. Take comfort in the fact that you care more, and therefore put in more effort than another person who might hold your position would demonstrate. Then, once again, do the best you can. Your best is your best. No one is perfect. Focus on those moments when you most love your job. The good thing is that with a well-planned ethical code that you live by, you will truly feel forthright and confident about all of your accomplishments as a protector of the People.

20. CONFUCIUS, *CONFUCIUS: THE CONFUCIAN ANALECTS, THE GREAT LEARNING AND THE DOCTRINE OF THE MEAN* 14, at 288 (James Legge ed., Dover Publ'ns, Inc. 1971).

21. TITUS LUCRETIVS CARUS, *ON THE NATURE OF THINGS* 69 (Martin Ferguson Smith trans., Hackett Publ'g Co., Inc. 2001).

22. MODEL RULES OF PROF'L CONDUCT R. 1.7.