

A Note On Prosecutorial Ethics

The California Department of Justice estimates that in 2022, 61.4 percent of adult felony arrests resulted in conviction. In 2020, it was estimated that the percentage of convictions resulting in incarceration in a state institution increased from 17.2% to 21.2%.

Behind every conviction in this state is a prosecutor. The subject matter of prosecutorial ethics has become an integral part of public discourse, and our society is more attuned to prosecutorial compliance with ethical rules. For convictions to be just and fair, prosecutors must pursue them ethically and with the highest level of professionalism and integrity.

The rules that govern prosecutors stem from the unique role that prosecutors have in our communities. That role is to pursue fair and just punishment of the guilty, protect the interests of victims of crime, safeguard the rights of individuals involved in the criminal justice system, and increase community safety. As the United States Supreme Court explained in *Berger v. United States* (1935) 295 U.S. 78, 88 “the prosecutor represents the 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.” And for prosecutors, justice does not always mean winning convictions.

There are several rules in the California Rules of Professional Conduct that outline the special responsibilities of a prosecutor. An often overlooked but a critical prosecutorial duty is the protection of the rights of the accused. Rule 3.8(b) requires the prosecutor to assure that the accused has been advised of the right to and the procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel. As the commentary to the rule points out, the prosecutor is obligated to ensure that “the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence and that special precautions are taken to prevent and rectify the conviction of innocent persons.” The rules are intended to achieve the ends of justice for all defendants accused of crimes.

Another special responsibility that all criminal law practitioners are familiar with is Rule 3.8(d), which is the requirement to timely disclose to the defense all evidence or information that tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence. As the commentary to the rule points out, a prosecutor has the responsibility of a “minister of justice and not simply that of an advocate. The prosecuting attorney must disclose to the defendant “any exculpatory evidence,” (Penal Code Section 1054.1(e)). All criminal law practitioners are familiar with the case *Brady v. Maryland* (1963) 373 U.S. 83, 87, stating that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” A 2017 California law makes it a felony for prosecutors to alter or intentionally withhold evidence that could be used to exonerate defendants.

How do prosecutors seek justice? In our criminal justice system where over 90% of cases result in a plea bargain, justice starts with the prosecutor's objective and impartial consideration of each individual case. In formulating an offer to resolve a case, the prosecutor should be mindful of the facts of the crime and its impact, the social and criminal background of the individual, specific and general deterrence, proof problems, the victim's input, circumstances in aggravation, mitigation and extenuation and a consideration of how the community and those involved in the criminal justice system stand to benefit from the proposed disposition.

While the prosecutor does have a duty of zealous advocacy, "both the accused and the public have a legitimate expectation that his zeal...will be born of objective and impartial consideration of each individual case." (*People v. Superior Court (Greer)* (1977) 19 Cal. 3d 255. The prosecutor does not represent victims or witnesses of a charged crime but speaks for all the People. Indeed, when stating an appearance, the prosecutor states their name but ends with "for the People." The People on behalf of which the prosecutor speaks includes not just the victims and members of their families but also the accused and the members of the accused's family.

As representatives of the government, prosecutors must reflect the highest levels of integrity, fairness and ethics when dealing with everyone involved in the criminal justice system. Adherence to the ethical rules is not only required by the Bar rules, but it increases the public's confidence that criminal convictions are obtained fairly. When the public perceives prosecutors as fair, unbiased, transparent, and egalitarian, the public's confidence in the criminal justice system increases and the integrity of criminal convictions is maintained.