

Connecticut Division of Criminal Justice

# Connecticut Prosecution Standards



**First Edition**

With Commentary

May 2023



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## FOREWORD

I am pleased to introduce the first edition of the Connecticut Prosecution Standards, which formalize, in writing, the Division of Criminal Justice's unwavering commitment to the highest standards of ethical and professional conduct. These standards are a compilation of national best practices that have been constructed carefully to accurately reflect the unique aspects of Connecticut criminal law and procedure.

The standards are intended to assist prosecutors with the critical decisions that they are called upon to make at every stage of a prosecution. Moreover, they will serve as a blueprint for enhanced Division training statewide. It is my hope that these standards will further serve to promote public confidence in the prosecutorial function, by assuring the public that our decisions are based firmly in the law and are the result of a fair and unbiased evaluation of every individual case.

I appreciate the full support of State's Attorneys Margaret E. Kelley (Ansonia/Milford), David R. Applegate (Danbury), Joseph T. Corradino (Fairfield), Sharmese L. Walcott (Hartford), David R. Shannon (Litchfield), Michael A. Gailor (Middlesex), Christian M. Watson (New Britain), John P. Doyle, Jr. (New Haven), Paul J. Narducci (New London), Paul J. Ferencek (Stamford/Norwalk), Matthew C. Gedansky (Tolland), Maureen T. Platt (Waterbury), and Anne F. Mahoney (Windham); The Honorable Andrew J. McDonald, Chair, and the members of the Criminal Justice Commission; Deputy Chief State's Attorney for Operations Kevin D. Lawlor; Deputy Chief State's Attorney for Personnel, Finance, and Administration John J. Russotto; Deputy Chief State's Attorney, Inspector General Robert J. Devlin, Jr.; President Melissa L. Streeto and the officers of the Connecticut Association of Prosecutors throughout the year-long process of developing these standards.

I would be remiss if I did not recognize specifically the extraordinary efforts of Executive Assistant State's Attorney Lisa M. D'Angelo, Director of the Office of Ethics and Professional Standards; Supervisory Assistant State's Attorney David M. Kutzner; Senior Assistant State's Attorney Timothy J. Sugrue; and Senior Assistant State's Attorney Kathryn W. Bare who contributed their time and talents to this project. Lastly, I would like to express my sincere appreciation and gratitude to the dedicated employees of the Division who demonstrate daily their commitment to the pursuit of justice on behalf of the citizens of Connecticut.



---

Patrick J. Griffin  
Chief State's Attorney  
May 2, 2023

## PREAMBLE

The Division of Criminal Justice and its employees are committed to the fair and equal administration of justice in Connecticut. To this end, the Division of Criminal Justice acknowledges its duty to investigate and prosecute criminal matters within its jurisdiction diligently, ethically, and impartially, honoring its constitutional and common law foundations. It is with this mission statement in mind that these Connecticut Prosecution Standards were adopted.

These standards, adopted by the Chief State's Attorney and the thirteen State's Attorneys on behalf of the Connecticut Division of Criminal Justice, are intended to provide guidance for the professional conduct and performance of prosecutors in fulfilling their duties. Unless otherwise indicated, these standards are intended to apply to the Chief State's Attorney, Deputy Chief State's Attorneys, State's Attorneys, Executive and Supervisory Assistant State's Attorneys, Assistant and Deputy Assistant State's Attorneys, Special Deputy Assistant State's Attorneys, as well as to any governmental attorneys cross-designated to perform prosecutorial duties in the State of Connecticut.

These standards, as adopted, draw extensively from the National District Attorneys Association (NDAA) National Prosecution Standards (Fourth Edition with Revised Commentary, 2023)<sup>1</sup>, the American Bar Association (ABA) Standards for Criminal Justice: Prosecution Function (Fourth Edition, 2017)<sup>2</sup>, and the ABA Standards for Criminal Justice: Prosecutorial Investigations (Third Edition, 2014), which have been modified where appropriate to comport with Connecticut law and practice. These standards are intended to be entirely consistent with, and supplement, the Rules of Professional Conduct, and are not intended to suggest any lesser standard of conduct or modify a prosecutor's obligations under such mandatory rules, relevant statutes, the constitution, or other binding authorities. As such, these standards generally should be construed in such a way that they are consistent with existing law and applicable rules of ethical conduct.

These standards have been adopted as the policy of the Connecticut Division of Criminal Justice and, unless determined to be in direct contravention of existing law and applicable rules of ethical conduct, should be followed by Connecticut prosecutors accordingly. The accompanying commentary is provided to help prosecutors understand and interpret these standards, and supplies cross-

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<sup>1</sup> The NDAA National Prosecution Standards were developed by a national association of state and local prosecutors, and are used throughout the country as a source of training and guidance for assistant state's and district attorneys.

<sup>2</sup> The ABA Criminal Justice Standards were developed by a commission of expert judges, scholars, defense attorneys, and government lawyers as non-binding guidelines intended to provide guidance for the professional conduct and performance of prosecutors.



reference to rules, statutes, and prevailing caselaw where necessary for further explication. If the commentary appears in any way inconsistent with the text of the standard, the text should guide the prosecutor's actions.

These standards, and internal office procedures adopted pursuant to them, are intended solely for the guidance of prosecutors performing prosecutorial duties in the State of Connecticut. While these standards are meant to provide guidance for prosecutors in the day-to-day performance of their prosecutorial duties, it is recognized that the areas of ethics and professionalism are too varied to be subject to hard-and-fast rules. Thus, it is understood that the decision whether or not to follow one or more of these standards may or may not constitute an unacceptable lack of professionalism, depending on the attendant facts and circumstances. Therefore, these standards are not intended to: (a) be used by the judiciary in determining whether a prosecutor committed error or engaged in improper conduct; (b) be used by disciplinary agencies when passing upon allegations of violations of rules of ethical conduct; (c) create any right of action in any person; or (d) alter existing law in any respect. Notwithstanding the above, these standards may be utilized as guidance for the imposition of professional employment-related discipline within the Division of Criminal Justice to the extent permitted by the collective bargaining agreement between the State of Connecticut Division of Criminal Justice and the Connecticut Association of Prosecutors.

## DEFINITIONS

“Jurisdiction” — Means the specific Judicial District or Districts in which the prosecutor exercises prosecutorial authority in criminal matters on a day-to-day basis. However, in the context of applicable laws and rules of ethical conduct, “jurisdiction” includes the entire state as well.

“Knows,” “Has Knowledge,” or “Within the Knowledge of” — Means actual knowledge.

“Misconduct” — Conduct defined as misconduct by the relevant Rules of Ethical Conduct.

“Prosecutor” — Unless otherwise specifically indicated, means any person in Connecticut appointed or otherwise designated or charged generally or specially with the duty of prosecuting persons accused of criminal offenses in any court, and includes, but is not limited to, the Chief State’s Attorney, the State’s Attorney for each judicial district, and any assistants or deputies assisting them in performing the prosecutorial function.

“Rules of Ethical Conduct” — Refers to the Code of Ethics of Public Officials and State Employees, set forth in the Connecticut General Statutes, Chapter 10, Part 1 – codified by the Connecticut legislature to regulate state employee conduct generally. The term also refers to the Rules of Professional Conduct contained in the Connecticut Practice Book, which governs attorney conduct in particular, as well as the Connecticut Division of Criminal Justice Ethics Policy No. 106, applicable to all employees of the Division.

## **ABBREVIATIONS**

American Bar Association (ABA) Standards for Criminal Justice: Prosecution Function (Fourth Edition, 2017) — “ABA Crim. Just. Stds.”

American Bar Association (ABA) Standards for Criminal Justice: Prosecutorial Investigations (Third Edition, 2014) — “ABA Pros. Inv. Stds.”

Connecticut General Statutes — “C.G.S.”

Connecticut Practice Book — “P.B.”

Division of Criminal Justice — “DCJ”

National District Attorneys Association (NDAA) National Prosecution Standards (Fourth Edition with Revised Commentary, 2023) — “NDAA Nat. Pros. Stds.”

Rules of Professional Conduct — “R. Prof. Conduct”



# **PART I. GENERAL STANDARDS**

- 1. The Prosecutor's Responsibilities**
- 2. Professionalism**
- 3. Conflicts of Interest**
- 4. Duties, Powers, Qualifications, Jurisdiction, Appointment, and Removal of Prosecutorial Officials**
- 5. Training and Guidance**
- 6. Prosecutorial Immunity**

## **1. The Prosecutor's Responsibilities**

### **1-1.1 Primary Responsibility**

Connecticut's prosecutors (state's attorneys) are members of the executive branch, tasked with the enforcement of the state's criminal and motor vehicle laws. The prosecutor is an independent administrator of justice, a zealous advocate, and an officer of the court. The primary responsibility of a prosecutor is to seek justice within the bounds of the law, not merely to convict. This can only be achieved by the representation and presentation of the truth. The prosecutor's responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the constitutional and legal rights of all persons affected by the criminal justice system, particularly victims of crime, are respected.

### **1-1.2 Societal and Individual Rights and Interests**

The State's Attorney's office should exercise sound discretion and independent judgment in the performance of the prosecutorial function. The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness, or victim. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor's clients.

A prosecutor should zealously protect the rights of individuals, but without representing any individual as a client. A prosecutor should put the rights and interests of society in a paramount position in exercising prosecutorial discretion in individual cases.

The Division of Criminal Justice should seek to reform criminal laws whenever it is appropriate and necessary to do so. Societal interests, rather than individual or group interests, also should be paramount in efforts to seek reform of criminal laws.

### **1-1.3 Elimination of Improper Biases**

The prosecutor 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. Nor should the prosecutor use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion. A prosecutor should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor's authority.

The Division of Criminal Justice should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work. The Division should regularly assess the potential for biased or unfairly disparate impacts of its policies on the communities it serves, and eliminate those impacts that cannot be properly justified.

### **1-1.4 Rules of Conduct**

A prosecutor should know and abide by all applicable provisions of the rules of ethical conduct governing Connecticut prosecutors, which include not only professional rules regulating attorney conduct, but also an ethical code that governs state employees generally.

### **1-1.5 Inconsistency in Rules of Conduct**

To the extent prosecutors are bound by rules of ethical conduct that are inconsistent with these standards, they shall comply with the rules. A prosecutor who disagrees with a governing ethical rule should endeavor to seek modification of the rule if appropriate, and directly challenge it if necessary, but should comply with it unless relieved by court order. A prosecutor should seek out, and the Division of Criminal Justice should provide, supervisory advice and ethical guidance when the proper course of prosecutorial conduct seems unclear.

### **1-1.6 Duty to Report and Respond to Misconduct of Others**

A prosecutor is obligated to respond to professional misconduct that has, will, or has the potential to interfere with the proper administration of justice, as follows:

- a. When a prosecutor knows that another person associated with the Division of Criminal Justice intends or is about to engage in professional misconduct that could interfere with the proper administration of justice, the prosecutor should, in the first instance, attempt to dissuade the person from engaging in the misconduct.

- b. If such attempt to dissuade misconduct fails or is not possible, and the prosecutor has knowledge that the misconduct is ongoing, will occur, or has occurred, the prosecutor should immediately report the matter to the State's Attorney for the judicial district, or, in the case of prosecutors employed in the Office of the Chief State's Attorney, directly to the Chief State's Attorney.
- If the State's Attorney for the judicial district is the subject of the allegation of misconduct, the prosecutor should promptly report the matter directly to the Chief State's Attorney, who shall, in consultation with the Chairperson of the Criminal Justice Commission, make a determination as to whether the matter should be referred to the Commission for further action.
  - If the Chief State's Attorney is the subject of the allegation of misconduct, the prosecutor should promptly report the matter directly to the Director of the Office of Ethics and Professional Standards for referral to the Division's Ethics Committee, which shall, in consultation with the Chairperson of the Criminal Justice Commission, make a determination as to whether the matter should be referred to the Commission for further action. (As a standing member of the Ethics Committee, the Chief State's Attorney shall recuse himself or herself from any matters referred to the Committee regarding the Chief's conduct.)
- c. Allegations of professional misconduct so reported should be investigated and acted upon promptly, objectively, and in an independent and conflict-free manner.
- d. Any disciplinary action arising from corroborated allegations of misconduct should be addressed in accordance with Standard 1-4.9 (Discipline and Removal).
- e. Corroborated allegations of misconduct constituting a violation of the Rules of Professional Conduct that raise a substantial question as to a prosecutor's honesty, trustworthiness, or fitness as a lawyer in other respects, as described in Rule 8.3 of the Rules of Professional Conduct and the commentary thereto, shall be reported to the statewide bar counsel in accordance with Practice Book Section 2-32.
- f. If, despite a prosecutor's best efforts, no action is taken as outlined above to remedy the reported misconduct, the prosecutor should take further remedial action, including revealing information necessary to address, remedy, or prevent a clear violation of law or the Rules of Professional Conduct to appropriate judicial, regulatory, or other government officials outside the Division of Criminal Justice to the extent permitted by the law and rules of ethical conduct.
- g. A prosecutor's failure to report known misconduct may itself constitute a violation of the prosecutor's professional duties.

### **1-1.7 Duty to Report Allegations of Misconduct Against Oneself**

A prosecutor should promptly report to a supervisor all but the most obviously frivolous misconduct allegations made, publicly or privately, against the prosecutor. If a supervisor or judge initially determines that an allegation is serious enough to warrant official investigation, reasonable measures, including possible recusal, should be instituted to ensure that the prosecution function is fairly and effectively carried out. Nonetheless, a mere allegation of misconduct is not a sufficient basis for prosecutorial recusal, and should not deter a prosecutor from attending to the prosecutor's duties.

If a prosecutor receives notice that he or she is the subject of a written complaint filed with the statewide bar counsel the prosecutor shall respond timely to the grievance panel as required by Practice Book provisions, and in accordance with Division policy. A copy of the prosecutor's response to a grievance shall be forwarded to the Office of the Chief State's Attorney to the attention of the Deputy Chief State's Attorney for Personnel, Finance, and Administration.

[NDAA Nat. Pros. Stds. Standards 1-1.1 through 1-1.3, inclusive, & 1-1.5 through 1-1.7, inclusive; ABA Crim. Just. Stds. Standards 3-1.2, 3-1.3, 3-1.6, and 3-1.7; R. Prof. Conduct Rules 3.8, 8.3 & 8.4; C.G.S. §§ 1-79(5), 1-84, 51-84, 51-85, 51-275, 51-275a, 51-276, 51-277, 51-278b, & 51-279; P.B. § 2-29 et seq.; DCJ Policy Nos.103, 106, 333, & 334]

### **Commentary**

The role of a prosecutor was perhaps best and most succinctly described by the United States Supreme Court:

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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). Moreover, unlike other advocates whose ethical duty is to use legal procedure for the fullest benefit of the client's



cause, a prosecutor is the only one in a criminal action who is responsible for the presentation of the truth. Compare R. Prof. Conduct Rule 3.1, commentary (the advocate's duty) with R. Prof. Conduct Rule 3.8, commentary (the prosecutor's responsibility); see also United States v. Wade, 388 U.S. 218, 256-57 (1967) (White, J., concurring in part and dissenting in part) ("Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is.")

Thus, the commentary to Rule 3.8 describes the prosecutor's role as follows: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." R. Prof. Conduct Rule 3.8, commentary; see State v. Copas, 252 Conn. 318, 336 (2000) (" . . . in all facets of a criminal trial, the prosecutor, as a representative of the state, has a duty of fairness that exceeds that of other advocates.").

Justice is not complete without the truth always being the primary goal in all criminal proceedings. A prosecutor is not a mere advocate and, unlike other lawyers, a prosecutor does not represent individuals or entities, but society as a whole. In that capacity, a prosecutor 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 who are nonetheless affected by its outcome.

Over a century ago, the Connecticut Supreme Court recognized the unique honor-bound role of a state's attorney, stating:

[The state's attorney] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the state, who seek impartial justice for the guilty as much as for the innocent. In discharging his most important duties, he deserves and receives in peculiar degree the support of the court and the respect of the citizens of the county. By reason of his office, he usually exercises great influence upon jurors. His conduct and language in

the trial of cases in which human life or liberty are at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice, or resentment. If the accused be guilty, he should none the less be convicted only after a fair trial, conducted strictly according to the sound and well-established rules which the laws prescribe.

State v. Ferrone, 96 Conn. 160, 168-69 (1921).

Inherent in the prosecutors' duty is to ensure that decisions made during a case, including whether or not to charge a person, are nondiscriminatory. Prosecutors should not react and make decisions based upon political or public pressure. It is the prosecutor's obligation to maintain a higher duty to ensure that the law is enforced appropriately, fairly, and in an unbiased manner.

Standard 1-1.3 encourages prosecutors to be attuned to the need to detect and eliminate implicit biases in their work. As Connecticut Supreme Court Chief Justice Robinson acknowledged:

[W]e all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them. Racism now lives not in the open but beneath the surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus.

State v. Holmes, 334 Conn. 202, 237-38 (2019), quoting State v. Saintcalle, 178 Wash. 2d 34, 46, 309 P.3d 326, 335 (2013), [abrogated by City of Seattle v. Erickson, 188 Wash. 2d 721, 398 P.3d 1124 (2017)].

Once stereotypes have formed, they affect us even when we are aware of them and reject them. Stereotypes can greatly influence the way we perceive, store, use, and remember information. Discrimination, understood as biased decision-making, then flows from the resulting distorted or unobjective information.

(Citation omitted) State v. Saintcalle, supra, 178 Wash. 2d at 48, 309 P.3d at 336.

Self-awareness/reflection, education, and training can help to reduce the corrupting influences that implicit or unconscious bias may have on prosecutorial decision making. For information and exercises designed to identify potential individual implicit and unconscious biases, visit: <https://www.projectimplicit.net>.

Connecticut has adopted Rules of Professional Conduct that provide a framework for the ethical practice of law in the state. Some of the rules that govern the behavior of attorneys are imperatives, cast in the terms “shall” or “shall not.” These define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,” are permissive and define areas under the rules in which an attorney has professional discretion. According to the rules, no disciplinary action should be taken when an attorney chooses not to act or acts within the bounds of such discretion. The complete Rules and Commentary can be found in the Connecticut Practice Book, or can be accessed through the Judicial Department website at: <https://www.jud.ct.gov>.

The Rules of Professional Conduct explicitly set forth the “Special Responsibilities of a Prosecutor” in one rule. See R. Prof. Conduct Rule 3.8. While the Rules do not fully address the special concerns of prosecutors in carrying out their public responsibilities, they describe the fundamental ethical requirements of those so employed and, at a minimum, are the prevailing law and rules Connecticut prosecutors must follow. Like all attorneys, prosecutors serve as officers of the court. See C.G.S. §§ 51-80 & 51-85. By law, “[a]ttorneys admitted by the Superior Court shall be attorneys of all courts and shall be subject to the rules and orders of the courts before which they act.” C.G.S. § 51-84(a). Statutorily, any court possesses the power to “fine an attorney for transgressing its rules and orders an amount not exceeding one hundred dollars for any offense, and may suspend or displace an attorney for just cause.” C.G.S. § 51-84(b). As with any other attorney, a prosecutor who violates the Rules of Professional Conduct is subject to referral to, and potential discipline by, the Statewide Grievance Committee, or, in the case of a presentment for misconduct, the Superior Court. Massameno v. Statewide Grievance Committee, 234 Conn. 539 (1995) (judicial branch may exercise jurisdiction to supervise and discipline prosecutors concurrently with executive branch); see DCJ Policy No. 333 (Bar Grievances, Civil Suits, & Subpoenas). Depending upon the conduct involved, such discipline of the prosecutor may include reprimand, suspension for a period of time, disbarment, or such other discipline as the court deems appropriate. See P.B. §§ 2-37 & 2-47.

Prosecutors employed by the Division of Criminal Justice must recognize that — in addition to the general ethical requirements imposed upon them by the Rules of Professional Conduct as members of the Connecticut bar, and the special responsibilities of a prosecutor set forth in Rule 3.8 and these Connecticut Prosecutorial Standards — as employees of the State of Connecticut they are also bound by the same ethical code applicable to all state employees. The Code of Ethics of Public Official and State Employees, codified by the Connecticut legislature to regulate state employee conduct generally, is set forth in the Connecticut General Statutes, Chapter 10, Part 1. Prosecutors should be familiar with and abide by the Code, as well as Division policy particularizing portions of the Code to Division employees, and should be especially cognizant of General

Statutes Section 1-79(5), which defines “gift” under the code, and Section 1-84, which identifies “prohibited activities.” See DCJ Policy No. 106 (Ethics).

Using appropriate procedures, and in the appropriate forum, a prosecutor may challenge such code or rule provisions believed in good faith to be unjust or inapplicable. The existence of a code or rule does not eliminate the duty of the prosecutor to seek justice and serve the public interest. In this sense, the role of the prosecutor is not always the same as other members of the bar. If a prosecutor chooses to disregard a code or rule because of a belief that his or her duty to seek justice requires the same, it should be done with the awareness that the Statewide Grievance Committee may well disagree with that determination.

Because proposed rules and legislation may impact upon the prosecutorial function, it is important for prosecutors to become involved in the rule making process. Prosecutors should seek to prevent the adoption of, or seek to modify, any such rules or laws which adversely affect the proper execution of the prosecutorial function. The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. As a representative of society as a whole, a prosecutor should take an active role in the legislative process when proposals dealing with the criminal justice system are being considered. The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action. In that role, the prosecutor once again should exercise his or her independent judgment in proposing or supporting legislation in the best interest of society. See C.G.S. § 51-279(a)(5) (“The Chief State's Attorney, with the advice of the Division of Criminal Justice Advisory Board, . . . shall engage in long-range planning and review policy and legislation concerning the administration of criminal justice in the state and recommend needed changes and additions thereto.”).

One of the basic objectives of the Division of Criminal Justice is the wholesale prevention of professional misconduct within its prosecutorial ranks. The Division aims to do so through the selection, hiring, and promotion of prosecutors who possess and demonstrate a core understanding of the ethical obligations inherent in the position, as well as through a robust continuing education program that places particular emphasis upon proper prosecutorial conduct. In support of this objective, the Chief State's Attorney's Office has developed and maintains the position of Director of the Office of Ethics and Professional Standards, whose responsibilities include, among other things, developing educational curricula, coordinating appropriate training programs, and serving as a resource to employees for ethics guidance and information. To the extent possible, prosecutors with questions regarding their ethical obligations in any particular

situation should avail themselves of this resource prior to taking action. Particularly vexing ethical questions may be referred by the Director to the Division's Ethics Committee to pass upon. The standing Committee is comprised of, among others, the Chief State's Attorney, one or more State's Attorneys, the Director of the Office of Ethics and Professional Standards, and one or more officers from the Connecticut Association of Prosecutors. Issues requiring further clarification from outside the Division may thereafter be referred to the Office of State Ethics for an opinion.

Because the responsibility to seek justice is one borne by each individual prosecutor, one cannot turn a blind eye or a deaf ear to misconduct by another prosecutor that will or has the potential to interfere with that responsibility. While instances of misconduct are rare, institutional integrity nonetheless demands that policies and procedures be in place to address potential misconduct should it arise. Toward that end, the Chief State's Attorney and the State's Attorneys have adopted the procedures outlined in Standard 1-1.6 to be utilized for the reporting and handling of allegations of professional misconduct, including written complaint directed to the statewide bar counsel when appropriate.

Connecticut General Statutes Section 51-278b provides authority for the Chief State's Attorney and the State's Attorneys to discipline for due cause Assistant or Deputy Assistant State's Attorneys who assist them, consistent with the collective bargaining agreement between the State of Connecticut Division of Criminal Justice and the Connecticut Association of Prosecutors. See C.G.S. § 51-278b(c). Serious misconduct by an Assistant or Deputy Assistant State's Attorney may result in termination of employment. Id.; see also Standard 1-4.9 (Discipline and Removal), infra. The statute further vests authority in the Criminal Justice Commission to discipline, or remove from office, the Chief State's Attorney, Deputy Chief State's Attorneys, and State's Attorneys under conditions set forth therein. See C.G.S. § 51-278b.

If, despite a prosecutor's best efforts, no action is taken in accordance with the prior procedures to address the alleged misconduct, a prosecutor should report the alleged misconduct to appropriate officials outside the prosecutor's office to the extent permitted by the law and rules of ethical conduct of the state. In the event that the prosecutor believes that action taken by a higher authority in the office is inadequate, the prosecutor should consider discussing the matter with the Director of the Office of Ethics and Professional Standards before deciding what other action should be taken.

## 2. Professionalism

### 1-2.1 Standard of Conduct

In light of the prosecutor's public responsibilities, broad authority, and enormous discretion, a prosecutor should conduct himself or herself with a high level of dignity and integrity in all professional relationships, both in and out of court. Appropriate behavior includes, but is not limited to, the following:

- a. A prosecutor should act with heightened candor, good faith, and courtesy in all professional relations.
- b. A prosecutor should act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and rights of the defendant, victims, and witnesses.
- c. A prosecutor 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.
- d. A prosecutor 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.
- e. A prosecutor should be punctual for all court appearances, in the submission of motions, briefs, and other papers, and in dealings with opposing counsel, witnesses, and others. A prosecutor should emphasize to all prosecution witnesses the importance of punctuality in court attendance. When absence or tardiness is unavoidable, prompt notice should be given to the court and opposing counsel.
- f. A prosecutor should conduct himself or herself with proper restraint and dignity throughout the course of proceedings.
- g. A prosecutor should know and comply with timing requirements applicable to a criminal investigation and prosecution, so as to not prejudice a criminal matter.
- h. When providing reasons for seeking a continuance, a prosecutor should not knowingly misrepresent facts or otherwise mislead. A prosecutor should use procedures that will cause delay only when there is a legitimate basis for such use, and not to secure an unfair tactical advantage.
- i. A prosecutor should not unreasonably oppose requests for continuances from defense counsel.
- j. A prosecutor should not make a statement of fact or law, or offer evidence, that the prosecutor does not reasonably believe to be true, to a court, lawyer, witness, or third party, except for lawfully authorized investigative purposes.

- k. While seeking to accommodate legitimate confidentiality, safety, or security concerns, a prosecutor should correct a prosecutor's representation of material fact or law that the prosecutor reasonably believes is, or later learns was, false, and should disclose a material fact or facts when necessary to avoid assisting a fraudulent or criminal act or to avoid misleading a judge or factfinder.
- l. A prosecutor 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.
- m. A prosecutor 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.

## **1-2.2 Maintaining Confidentiality**

Prosecutors must be cognizant of the fact that in the regular course of their duties with the Division of Criminal Justice they will be exposed to, or come into possession of, communications, information, records, or other materials that, by virtue of statute, rule, or court order are deemed confidential in nature. Prosecutors should be familiar with their obligations in this regard and should be vigilant in maintaining the required confidentiality.

Prosecutors should be familiar with, and strictly adhere to, Division policies which regulate the use and disclosure of confidential information, and should take care to guard against inadvertent disclosure. Prosecutors shall comply with the social media policy applicable to all Division employees, which provides that they shall not post, transmit, or otherwise disseminate on social media sites any information to which they have access as a result of their employment with the Division.

[NDAA Nat. Pros. Stds. Standard 1-2.1; ABA Crim. Just. Stds. Standard 3-1.4; R. Prof. Conduct Rules 1.1, 1.3, 1.6, 3.2 through 3.5, inclusive, 4.1; DCJ Policy Nos. 106, 113, & 118]

## Commentary

A prosecutor's obligation to comply with the rules of ethical conduct adopted in Connecticut is a fundamental and minimal requirement. When a prosecutor falls below that standard, he or she may expect sanctions impacting on a particular case or on the individual prosecutor.

The dignity and honor of the profession, however, call for compliance with a higher standard of conduct — one of professionalism. This standard requires the prosecutor to bring integrity, fairness, and courtesy into all interactions, whether they are with victims, witnesses, law enforcement officers, opposing counsel, the court, jurors, or defendants.

This standard should be used to inspire and invigorate all prosecutors, from the recently admitted to the very experienced, as all can be affected by the stress of the situations encountered by prosecutors. This especially applies in litigation, where emotions run highest, and the adversary setting generates a competitive orientation. While professionalism is a word of elusive definition, the standard lists a number of types of conduct that must be considered.

Rule 1.6(a) generally prohibits attorneys from disclosing information related to the "representation of a client unless the client gives informed consent." R. Prof. Conduct Rule 1.6(a). Although the rule is written with the private practitioner and client in mind, maintaining confidentiality is even more important for prosecutors who routinely have access to highly sensitive information. Moreover, the maintenance of confidentiality is imposed by statute or rule in certain instances. See, e.g., C.G.S. §§ 54-47g (investigative grand jury information); 54-41p (wiretap information); 46b-124 (records in juvenile matters); 54-76l (records or other information of youth); 54-76o (erasure of police and court records of youthful offender); 54-86d & 54-86e (confidentiality of victims of certain crimes); 54-142a & 54-142d (erasure of criminal records). Prosecutors should know the restrictions imposed by these statutes and others designed to protect the confidentiality of sensitive information. Prosecutors should be ever mindful that careless or unauthorized disclosure of that information could jeopardize investigations, result in sanctions or arrest, ruin reputations and, in some cases, cost lives.

### 3. Conflicts of Interest

#### 1-3.1 Conflict Avoidance

A prosecutor should know and abide by the ethical rules regarding conflicts of interest that apply in Connecticut, and be sensitive to facts that may raise conflict issues. A prosecutor 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 State's Attorney's office.



### 1-3.2 Specific Conflicts

- a. A prosecutor shall excuse himself or herself from the investigation and prosecution of any person who is related to the prosecutor by blood or marriage.
- b. A prosecutor shall excuse himself or herself from the investigation and prosecution of any case wherein the victim of a crime is related to the prosecutor by blood or marriage.
- c. A prosecutor shall excuse himself or herself from the investigation and prosecution of any case wherein a witness to the underlying crime is related to the prosecutor by blood or marriage.
- d. A prosecutor shall excuse himself or herself from the investigation and prosecution of any former client, or of any matter 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.
- e. To avoid even the appearance of impropriety that may arise when a prosecutor prosecutes a defendant represented by a member of the prosecutor's immediate family, a prosecutor shall excuse himself or herself from the investigation and prosecution of any person who the prosecutor knows is represented by a lawyer related to the prosecutor as a parent, child, sibling, spouse, former spouse, domestic partner, or former domestic partner. Likewise, a prosecutor shall excuse himself or herself from the investigation and prosecution of any person who the prosecutor knows is represented by a lawyer who has a significant financial relationship with the prosecutor.
- f. A prosecutor should not permit the prosecutor's professional judgment or obligations to be affected by the prosecutor's personal, political, financial, professional, business, property, or other interests or relationships. The prosecutor should excuse himself or herself from any investigation, prosecution, or other matter 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. A prosecutor should not allow interests in personal advancement or aggrandizement to affect judgments regarding what is in the best interests of justice in any case.
- g. A prosecutor should immediately disclose to appropriate supervisory personnel any facts or interests that could reasonably be viewed as raising a potential conflict of interest. If it is determined that the prosecutor should nevertheless continue to act in the matter, the prosecutor and supervisors should consider whether any disclosure to a court or defense counsel should be made, and make such disclosure if appropriate. Close cases should be resolved in favor of disclosure to the court and the defense.

### **1-3.3 Conflict Handling**

Upon discovery of an actual or potential conflict of interest, it is imperative that the involved prosecutor immediately notify his or her supervisor, who in turn, shall notify the State's Attorney for the judicial district. When a conflict requiring recusal exists the prosecutor should recuse from further participation in the matter. The office should not go forward until a non-conflicted prosecutor is in place. Methods for handling conflicts of interest should include, but are not limited to:

- a. Creating firewalls and taint or filter teams to ensure that prosecutors with a conflict do not improperly disclose information to others in the State's Attorney's Office, or conversely, that conflicted prosecutors are not improperly exposed to information by others in the office; and
- b. Accurately documenting the manner in which conflicts were handled to ensure public trust and confidence in the State's Attorney's office.

### **1-3.4 Appointment of Prosecutor from Another Jurisdiction**

Where an actual or potential conflict of interest exists that would prevent a particular State's Attorney's office from investigating or prosecuting a criminal matter, the State's Attorney should seek the assistance of the Chief State's Attorney to secure the appointment of a conflict-free prosecutor from another jurisdiction, or the Office of the Chief State's Attorney, to represent the state in such investigation and prosecution.

### **1-3.5 Police Officer Use of Force Investigations**

Consistent with Connecticut law, a police officer ("peace officer") suspected of utilizing excessive physical force in the performance of his or her duties that does not result in death may be investigated and, if warranted, prosecuted by the State's Attorney's office for the judicial district in which the incident occurred. However:

- a. If the State's Attorney for the judicial district believes that his or her office's relationship with the involved officer, or local law enforcement agency, would impact his or her office's objectively handling the case, then recusal and the appointment of replacement counsel should be considered in accordance with Standard 1-3.4; or
- b. If the State's Attorney believes that public perception of the integrity of his or her office and public confidence in the handling of the case would negatively be impacted, the State's Attorney should consider seeking the assistance of the Chief State's Attorney to secure the appointment of a prosecutor from another judicial district, or the Office of the Chief State's Attorney, to represent the state in such investigation and prosecution.

An examination of the use of deadly physical force upon a person by a peace officer (e.g., the use of a firearm) in the performance of his or her duties, or the use of physical force by a peace officer that results in death, are among the matters which by statute are no longer within the purview of the States Attorney's investigative and prosecutorial authority. Such matters are now within the scope of the duties of the independent Office of the Inspector General which, by law, shall:

- a. Conduct investigations of peace officers in accordance with statute whenever a peace officer, in the performance of such officer's duties, uses physical force upon another person and such person dies as a result thereof or uses deadly force upon another person, and upon conclusion of the investigation of the incident the Inspector General shall determine whether the use of physical force by the peace officer was justifiable under prevailing law.
- b. Prosecute any case in which the Inspector General determines a peace officer used force found to not be justifiable pursuant to statute or where a police officer or correctional officer fails to intervene in any such incident or to report any such incident, as required by statute.
- c. Conduct an investigation whenever a person dies in the custody of a peace officer or law enforcement agency, and determine whether physical force was used by a peace officer upon the deceased person, and if so, whether the use of physical force by the peace officer was justifiable under prevailing law. If the Inspector General determines the deceased person may have died as a result of criminal action not involving the use of force by a peace officer, the Inspector General shall refer such case to the Chief State's Attorney or a state's attorney for potential prosecution.
- d. Conduct an investigation whenever a person dies in the custody of the Commissioner of Correction, and determine whether the deceased person may have died as a result of criminal action, and, if so, refer such case to the Chief State's Attorney or a state's attorney for potential prosecution.
- e. Investigate any failure by a peace officer to report the death of a person to the next of kin of such deceased person as required by statute.
- f. Investigate any failure by the chief law enforcement officer of any law enforcement unit to comply with his or her statutory obligations to report to the Police Officer Standards and Training Council the results of any internal investigation that determines that a certified police officer: (1) Used unreasonable, excessive or illegal force that caused serious physical injury to or the death of another person, or was likely to do so; (2) while acting in a law enforcement capacity, failed to intervene or stop the use of unreasonable, excessive or illegal force by another police officer that caused serious physical injury or death or was likely to do so, or failed to notify a supervisor and submit a written report of such acts; (3) intentionally intimidated or harassed another person based upon actual or perceived protected class membership, identity or expression and in doing so threatened to commit or caused physical injury to another person; and (4)

was terminated or dismissed for malfeasance or other serious misconduct calling into question such person's fitness to serve as a police officer, or resigned or retired from such officer's position while under investigation for such malfeasance or other serious misconduct as defined by statute.

- g. Make recommendations to the Police Officer Standards and Training Council concerning censure and suspension, renewal, cancellation or revocation of a peace officer's certification based upon the findings of any such investigations.

### **1-3.6 Referrals to Defense Counsel**

The prosecutor should not recommend the services of particular defense counsel to accused persons or witnesses in cases being handled by the State's Attorney's office. If requested to make such a recommendation, the prosecutor should consider instead referring the person to the public defender, or to a panel of available criminal defense attorneys such as a bar association lawyer-referral service, or to the court. A prosecutor should not comment negatively upon the reputation or abilities of a defense counsel to an accused person or witness who is seeking counsel in a case being handled by the State's Attorney's office.

[NDAA Nat. Pros. Stds. Standards 1-3.1, & 1-3.3 through 1-3.5; ABA Crim. Just. Stds. Standard 3-1.7; R. Prof. Conduct Rules 1.7 through 1.11, inclusive, & 3.8; C.G.S. §§ 51-277, 51-277a & 51-277e.; DCJ Policy Nos. 103 & 110]

### **Commentary**

There are few topics of ethical orientation more pervasive than conflicts of interest. Conflicts may arise not only from relationships with family members or former clients, but also with a prosecutor's other activities — financial or otherwise.

Conflicts of interest problems are founded on the premise of the inability to serve two masters with foreseeable different interests that compete or contend.

Conflicts present themselves differently to the prosecutor, compared to the private practitioner, because the prosecutor does not initially select those subject to prosecution. Nor is there generally a choice of which State's Attorney's office has primary jurisdiction over a case. When a conflict arises due to a family relationship, either by blood or marriage, between the prosecutor and the accused, or between the prosecutor and a victim or witness to the crime, the prosecutor must recuse himself or herself from the investigation and any subsequent prosecution.

Some prosecutors join the Division of Criminal Justice after having previously worked in private practice. The standards recognize potential conflicts involving former clients or information obtained by virtue of former representation, and require the prosecutor to recuse himself or herself from the investigation and any

subsequent prosecution. Nonetheless, the commentary to Rule 1.11 of the Rules of Professional Conduct expressly declines to impute such conflicts of interest from one government lawyer to another. See Anderson v. Comm’r of Correction, 127 Conn. App. 538, 548-49 (2011) (“[R]ules of Professional Conduct do not require the imputation of conflicts of interest among public defenders working in the same office on the basis of reasoning that they are members of the same firm”). As such, other prosecutors in the same State’s Attorney’s office are not precluded from handling the matter for the state, provided appropriate procedures are followed to ensure the conflicted prosecutor is “screened” from participation in the matter (i.e., the assigned conflict-free prosecutor does not share materials or other information regarding the matter with the conflicted prosecutor and vice versa).

Other conflicts may arise if prosecutors have a familial relationship with defense lawyers practicing criminal law in the jurisdiction where the prosecutor is assigned. A prosecutor with a family relationship with a lawyer representing a defendant should recuse himself or herself from handling the matter for the state. See R. Prof. Conduct Rule 1.7(a)(2); see also DCJ Policy 110 (Workplace Relationships). However, the disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of offices or firms with whom the lawyers are associated. See R. Prof. Conduct Rules 1.7(a)(2), commentary, and 1.10(a)(1). Therefore, a prosecutor may represent the state in a criminal case where he or she has a family relationship with a colleague of the defense lawyer (e.g., a family member is an associate in the same defense firm, or a family member is an attorney in the same public defender’s office) or where another prosecutor in the same State’s Attorney’s office has the familial relationship with defense counsel. See Connecticut Bar Ass’n., Op. 86-15 (1986) (prosecutor and public defender who were married could handle cases in same court division so long as they did not directly oppose each other).

The extent to which firewalls and filters may be used depends upon the size of the office and jurisdiction, the media coverage involved, the type of matter, and the position of the conflicted prosecutor in the office. If such methods are or are likely to be ineffective, the State’s Attorney for the jurisdiction should seek the assistance of the Chief State’s Attorney in offering a conflict free resolution.

The Division of Criminal Justice recognizes the importance of avoiding conflicts of interest to ensure any investigation into a law enforcement officer’s alleged criminal misconduct is conducted with integrity and independence. Thus, State’s Attorneys should take reasonable steps to avoid actual conflicts when investigating law enforcement officers and agencies in their jurisdictions with whom they may interact with on a daily basis.

In such instances, the State’s Attorney for the judicial district where the misconduct is alleged to have occurred is in the best position to seek justice for the members

of that community; indeed, that State's Attorney has been vetted and appointed to the position by the Criminal Justice Commission to do precisely that. See Standard 1-4.6 (Appointment, Duties, and Term of State's Attorneys) & commentary, infra. The State's Attorney's investigation and, if warranted, prosecution of law enforcement officers engaged in criminal conduct within the State's Attorney's own judicial district sends a strong message to the public that: 1) no individual is above the law; and 2) the State's Attorney will take action, when justified, to hold bad actors within the local law enforcement community accountable.

Without doubt, prosecutions involving alleged criminal misconduct of police officers are some of the most emotionally charged and difficult cases to try. When the State's Attorneys are called upon to review use of physical force incidents, they can only file charges if the amount of force used was *illegal* under prevailing law; prosecutors cannot criminally charge an officer who may have used force that was just ill-advised. There is no pool of more capable, experienced, and dedicated trial lawyers to evaluate these incidents and make such critical decisions than the State's Attorneys. Nonetheless, in exercising the discretion to retain jurisdiction over such cases, the State's Attorney must weigh the public's perception, even if unfounded, of the appearance of a conflict of interest, and seek the appointment of a prosecutor from another jurisdiction, or the Chief State's Attorney's Office, when he or she deems it appropriate.

Some in the public have viewed the State's Attorneys' past investigations of incidents involving the use of deadly physical force by law enforcement ("officer involved shootings") as presenting particular concerns of conflicts of interest. This perception has caused them to question the thoroughness and transparency of such investigations. In 2020 the Connecticut Legislature created the position of Inspector General to oversee an independent office within the Division of Criminal Justice in order to promote public confidence in the independence and thoroughness of such investigations. See C.G.S. §§ 51-277a & 51-277e. The Office of the Inspector General now investigates all officer involved shootings, and any use of physical force by a peace officer that results in death, and prosecutes any criminal cases arising therefrom. Id. General Statutes Sections 51-277a and 51-277e set forth the full powers and duties of the Inspector General. Id.

#### **4. Duties, Powers, Qualifications, Jurisdiction, Appointment, and Removal of Prosecutorial Officials**

##### **1-4.1 Duties and Powers of Prosecutorial Officials Generally**

Under the Constitution of the State of Connecticut, and enabling legislation flowing therefrom, the Division of Criminal Justice is in charge of the investigation and prosecution of all criminal matters in the state.

The prosecutorial power of the state is constitutionally vested in the Chief State's Attorney and the State's Attorney for each judicial district. Statutorily, Assistant State's Attorneys and Deputy Assistant State's Attorneys, respectively, shall assist the State's Attorneys for the judicial districts and the Chief State's Attorney in all criminal matters and, in the absence from the district or disability of the State's Attorney or at his or her request, shall have and exercise all the powers and perform all the duties of State's Attorney.

In furtherance thereof, and pursuant to statute, each State's Attorney, Assistant State's Attorney and Deputy Assistant State's Attorney shall diligently inquire after and make appropriate presentment and complaint to the Superior Court of all crimes and other criminal matters within the jurisdiction of the court or in which the court may proceed, whether committed before or after his or her appointment to office.

#### **1-4.2 Qualifications of Prosecutorial Officials**

The Chief State's Attorney, each Deputy Chief State's Attorney, and each State's Attorney, Assistant State's Attorney and Deputy Assistant State's Attorney shall, at the time of his or her appointment, and for the duration of the term of office or employment, be an attorney-at-law and be a member in good standing of the Connecticut bar. At the time of his or her appointment the Chief State's Attorney, each Deputy Chief State's Attorney, and each State's Attorney shall have been admitted to the practice of law for at least three years.

The Chief State's Attorney, each Deputy Chief State's Attorney, and each State's Attorney shall devote his or her full time to the duties of his or her office, shall not otherwise engage in the practice of law, shall not be a partner, member or associate of a law firm, and shall not be an elected officer of this state or any political subdivision thereof.

Each Assistant State's Attorney and Deputy Assistant State's Attorney appointed to serve on a full-time basis shall devote his or her full time to the duties of his or her office, shall not engage in the private practice of law, shall not be a partner, member or associate of a law firm, and shall not be an elected officer of this state. No part-time Assistant State's Attorney, no part-time Deputy Assistant State's Attorney, and no partner or associate of a law firm of which such attorney is a partner or associate may engage in the private practice of criminal law.

### **1-4.3 Jurisdiction of Prosecutorial Officials**

The Chief State's Attorney and each Deputy Chief State's Attorney, State's Attorney, Assistant State's Attorney and Deputy Assistant State's Attorney, including the Deputy Chief State's Attorney acting as the Inspector General and any State's Attorney, Assistant State's Attorney or Deputy Assistant State's Attorney operating under the direction of the Office of the Inspector General, shall be qualified to act in any judicial district in the state and in connection with any matter regardless of the judicial district where the offense took place, and may be assigned to act in any judicial district at any time on designation by the Chief State's Attorney or the Inspector General, as applicable.

### **1-4.4 Appointment, Duties, and Term of the Chief State's Attorney**

The Chief State's Attorney is a constitutional officer appointed by the Criminal Justice Commission as the administrative head of the Division of Criminal Justice. The Chief State's Attorney shall administer, direct, supervise, coordinate, and control the operations, activities, and programs of the Division as provided by statute. The Chief State's Attorney shall:

- a. Establish such bureaus, divisions, facilities, and offices, and select such professional, technical, and other personnel as he or she deems reasonably necessary for the efficient operation and discharge of the duties of the Division, subject to the personnel policies and compensation plan established by the Department of Administrative Services.
- b. Adopt and enforce rules and regulations to carry out the purposes of Chapter 886 of the Connecticut General Statutes (Division of Criminal Justice).
- c. Establish guidelines, policies, and procedures for the internal operation and administration of the Division which shall be binding on all Division personnel.
- d. Enter into contracts with consultants and such other persons as are necessary for the proper functioning of the office.
- e. Engage in long-range planning and review policy and legislation concerning the administration of criminal justice in the state and recommend needed changes and additions thereto.
- f. Collect statistical data concerning administration of criminal justice in the state and furnish the data to the appropriate committee of the General Assembly.
- g. Conduct research and evaluate programs within his or her office.
- h. Establish staff development, training, and education programs designed to improve the quality of the Division's services and programs.



- i. Coordinate the activities of the Division with those of such other state, municipal, regional, federal, and private agencies as are concerned with the administration of criminal justice.
- j. Be authorized to receive and administer funds from the federal government or any charitable foundation to assist in the operations of the Division.
- k. Supervise, approve, and issue all orders concerning all purchases of commodities, equipment, and services for the Division.
- l. Supervise the administrative methods and systems employed in the Division.
- m. Submit to the Department of Administrative Services for its approval a compensation plan for all employees of the Division, which plan may include sick leave, vacation leave, absences without pay, longevity payments, increments, and all other matters regarding personnel policies and procedures.
- n. Establish with the approval of the Department of Administrative Services such job classifications as he or she deems necessary for the operation of the Division.
- o. Prepare and submit to the Office of Policy and Management estimates of appropriations necessary for the maintenance of the Division and make recommendations with respect thereto for inclusion as a separate item in the budget request of the Division.
- p. Audit bills to be paid from state appropriations for the expenses of the Division.
- q. Maintain adequate accounting and budgetary records for all appropriations by the state for the maintenance of the Division and all other appropriations assigned by the legislature or state budgetary control offices for administration by the Division.
- r. Serve as payroll officer for the Division.
- s. Have such other powers and duties as are reasonably necessary to administer the Division and implement the purposes of Chapter 886 of the Connecticut General Statutes (Division of Criminal Justice).

The term of office of the Chief State's Attorney shall be five years from July first in the year of appointment and until the appointment and qualification of a successor unless he or she is sooner removed by the Criminal Justice Commission. Any vacancy in the position of the Chief State's Attorney arising from any cause shall be filled by appointment by the Criminal Justice Commission for the balance of the vacated term.

The Chief State's Attorney may sign any warrants, informations, applications for grand jury investigations, and applications for extradition, and may, with the prior consent of the State's Attorney for the judicial district, appear in court to represent the state.

Subject to dispute resolution procedures provided by statute, the Chief State's Attorney may represent the state in lieu of a State's Attorney for a judicial district in any investigation, criminal action or proceeding if the Chief State's Attorney finds by clear and convincing evidence, misconduct, conflict of interest, or malfeasance of a State's Attorney. Disputed claims regarding such representation are statutorily to be resolved by the Criminal Justice Commission.

The Chief State's Attorney shall engage in a biennial evaluation and peer review process as per Division policy. The Division of Criminal Justice Advisory Board shall designate three State's Attorneys ("The Peer Review Committee") who shall serve as a subcommittee of the Advisory Board for the purpose of conducting the peer review of the Chief State's Attorney's performance. The peer review process should be cooperative and collaborative in nature with the goal of enhancing the performance of the individual being reviewed. In accord with established policy, the Peer Review Committee shall meet with the full Advisory Board to review the performance of the individual being peer reviewed, following which a written draft of the peer review shall be provided to the person being reviewed. Upon review of the draft, the individual being reviewed may, if they wish, provide additional information to the Peer Review Committee for consideration. Thereafter, a final written peer review will be prepared, the purpose of which is to outline administrative and operational improvements in specific areas over the next two year period in order to improve the overall functioning of the Division.

#### **1-4.5 Appointment, Duties, and Term of Deputy Chief State's Attorneys**

The members of the Criminal Justice Commission (other than the Chief State's Attorney) shall appoint two Deputy Chief State's Attorneys as assistant administrative heads of the Division of Criminal Justice, one of whom shall be Deputy Chief State's Attorney for Operations and one of whom shall be Deputy Chief State's Attorney for Personnel, Finance, and Administration, who shall assist the Chief State's Attorney in his or her duties. Each such Deputy Chief State's Attorney may sign any warrants, informations, applications for grand jury investigations, and applications for extradition.

Additionally, the members of the Criminal Justice Commission (other than the Chief State's Attorney) shall appoint one Deputy Chief State's Attorney who shall serve as Inspector General and lead the Office of the Inspector General, a separate office within the Division of Criminal Justice. The Inspector General shall receive his or her prosecutorial powers as a designee of the Chief State's Attorney and, consistent with Standard 1-3.5, shall exercise such powers and perform such duties as provided by statute.

To assure its independence, and in avoidance of conflicts of interest, pursuant to statute the Office of the Inspector General shall be at a location that is separate from the locations of the Office of the Chief State's Attorney or any of the State's Attorneys for the judicial districts.

In furtherance of his or her duties, the Inspector General may issue subpoenas to municipalities, law enforcement units, the Department of Correction, and any employee or former employee of the municipality, unit, or department requiring the production of reports, records, or other documents concerning any statutorily authorized investigation undertaken by the Inspector General, and compelling the attendance and testimony of any person having knowledge pertinent to such investigation.

The term of office of a Deputy Chief State's Attorney shall be four years from July first in the year of appointment and until the appointment and qualification of a successor unless sooner removed by the Criminal Justice Commission. Any vacancy in the position of Deputy Chief State's Attorney arising from any cause shall be filled by appointment by the Criminal Justice Commission for the balance of the vacated term.

The Deputy Chief State's Attorneys shall engage in a biennial evaluation and peer review process as per Division policy. The Chief State's Attorney shall designate two State's Attorneys who, along with the Chief State's Attorney, shall serve as a subcommittee of the Division of Criminal Justice Advisory Board ("The Peer Review Committee") for the purpose of conducting the peer review of the Deputy Chief State's Attorney's performance. The peer review process should be cooperative and collaborative in nature with the goal of enhancing the performance of the individual being reviewed. In accord with established policy, the Peer Review Committee shall meet with the full Advisory Board to review the performance of the individual being peer reviewed, following which a written draft of the peer review shall be provided to the person being reviewed. Upon review of the draft, the individual being reviewed may, if they wish, provide additional information to the Peer Review Committee for consideration. Thereafter, a final written peer review will be prepared, the purpose of which is to outline administrative and operational improvements in specific areas over the next two year period in order to improve the overall functioning of the Division.

In recognition of the public policies underlying the statutorily mandated independence of the Office of the Inspector General, the Deputy Chief State's Attorney serving as Inspector General shall be excepted from the peer review process. Nonetheless, the Chief State's Attorney and the Inspector General shall meet quarterly to review the administrative, investigative, and prosecutorial needs of the Office of the Inspector General in order to assure, to the extent practicable, that the office maintains sufficient resources to fulfill its statutory duties.

## **1-4.6 Appointment, Duties, and Term of State's Attorneys**

Connecticut's State's Attorneys (one for each of the thirteen judicial districts) are constitutional officers appointed by the Criminal Justice Commission and, along with the Chief State's Attorney, are constitutionally vested with the prosecutorial power of the state. As such, they are the chief prosecuting attorney acting on behalf of the state in each of their respective judicial districts. As the chief law enforcement officers in their jurisdictions, they hold positions of both great authority and great public trust. Thus, State's Attorneys must faithfully discharge the duties of their office, demonstrate exemplary ethical conduct in doing so, and generally provide an example for others in their charge in the fair and efficient administration of justice.

A State's Attorney, whose job it is to enforce the law, must strictly adhere to such obligations. In fulfilling his or her duties, the State's Attorney should remain mindful of the following:

- a. The State's Attorney should possess expertise in every aspect of criminal law and procedure.
- b. The State's Attorney should effectively and efficiently manage the resources provided to his or her office for the benefit of the people of our state.
- c. The State's Attorney should recognize that he or she must contribute to the overall management of the Division of Criminal Justice.
- d. The State's Attorney should recognize the importance of engaging his or her office in the community to establish relationships and foster trust in our criminal justice system.
- e. The State's Attorney should recognize that, in order to ensure efficient operations and maintain consistency throughout the Division, it is critical to adhere to agency-wide policies and directives.
- f. The State's Attorney should adopt procedures consistent with these standards that contribute to the efficient day-to-day internal operation and administration of his or her judicial district.
- g. The State's Attorney should ensure that supervisors within his or her judicial district conduct timely performance reviews of employees and provide service ratings in accordance with any collective bargaining agreements in place.
- h. The State's Attorney shall have a strategic management plan in place, monitor compliance with the plan, and revise it as necessary.
- i. The State's Attorney should incorporate training and staff development into the judicial district's strategic management plan.

The several State's Attorneys shall each hold office for eight years from July first in the year of appointment and until the appointment and qualification of a successor unless sooner removed for just cause by the Criminal Justice Commission.

The State's Attorneys shall engage in a biennial evaluation and peer review process as per Division policy. The Chief State's Attorney, the Deputy Chief State's Attorney for Personnel, Finance, and Administration, and a State's Attorney selected in descending order of seniority and designated by the Chief State's Attorney, shall serve as a subcommittee of the Division of Criminal Justice Advisory Board ("The Evaluation Committee") for the purpose of conducting the evaluation/peer review of the State's Attorney's performance. The evaluation/peer review process should be cooperative and collaborative in nature with the goal of enhancing the performance of the individual being reviewed. Upon conclusion, a final written evaluation/peer review will be prepared, which should both address the strengths of the State's Attorney and identify areas for improvement and provide concrete suggestions for addressing those areas.

#### **1-4.7 Appointment, Review, and Promotion of Assistant Prosecutors**

The Criminal Justice Commission shall appoint, from candidates recommended by the appropriate State's Attorney and deemed qualified by the Commission, as many Deputy Assistant State's Attorneys on a full-time or part-time basis for each judicial district as the criminal business of the court, in the opinion of the Chief State's Attorney, may require.

The Commission shall also appoint, from candidates recommended by the Chief State's Attorney and deemed qualified by the Commission, as many Deputy Assistant State's Attorneys as are necessary, in the opinion of the Chief State's Attorney, to assist the Chief State's Attorney.

In selecting candidates for appointment as Deputy Assistant State's Attorneys, the Chief State's Attorney and the State's Attorneys should consider the diverse interests and makeup of the communities they serve, and seek to recruit and hire a diverse group of prosecutors that reflect those communities.

Assistant prosecutors should be selected on the basis of their achievements, experience, and personal qualifications related to their ability to successfully perform the work of the prosecutor's office. Personal or political considerations that have no legitimate bearing on the ability to perform the required work should not play a role in the hiring, retention, or promotion of Deputy Assistant and Assistant State's Attorneys.

Assistant prosecutors shall be subject to annual performance reviews and service ratings in accordance with the collective bargaining agreement between the State of Connecticut Division of Criminal Justice and the Connecticut Association of Prosecutors. The Chief State's Attorney may promote any Assistant State's Attorney, or Deputy Assistant State's Attorney who assists him or her, and the appropriate State's Attorney, with approval of the Chief State's Attorney, may promote any Assistant State's Attorney or Deputy Assistant State's Attorney who assists such State's Attorney in the judicial district, all in accordance with the collective bargaining agreement. The Chief State's Attorney shall notify the Criminal Justice Commission of any such promotions.

#### **1-4.8 Competence and Workload**

A prosecutor must ensure that he or she has the requisite legal knowledge and skill to handle a case, which requires remaining abreast of changes in the law and its practice, including relevant scientific and technological developments. Although each prosecutor is responsible for assuring that he or she is capable of performing his or her duties, supervisors have an independent responsibility to ensure that prosecutors working for them are qualified to handle the cases assigned. Accordingly, supervisors should take the skill level, legal knowledge, and experience of their prosecutors into consideration when assigning cases. Overall, workload assignments should be made consistent with the prosecutor's duty to ensure that justice is done in each case.

The prosecutor's office should regularly review the workload of individual prosecutors, as well as the workload of the entire office, and adjust workloads (including intake) when necessary to ensure the effective and ethical conduct of the prosecution function.

#### **1-4.9 Discipline and Removal**

The Chief State's Attorney, Deputy Chief State's Attorneys, and each of the thirteen State's Attorneys shall hold office during his or her term of office and shall only be removed or disciplined by procedures consistent with due process and governing law.

Deputy Assistant, Assistant, Senior Assistant, and Supervisory Assistant State's Attorneys are subject to discipline and removal in accordance with the collective bargaining agreement between the State of Connecticut Division of Criminal Justice and the Connecticut Association of Prosecutors.

Factors that may not be taken into account in the discipline or removal of a prosecutorial official include, but are not limited to, the following:

- a. Characteristics of the prosecutor that are irrelevant to his or her ability to perform the job and historically have been the basis of invidious discrimination, including race, gender, religion, national origin, and sexual orientation.
- b. Partisan activities that are legal and ethical unless those activities interfere with the efficient administration of the office.
- c. The refusal to participate in partisan activities.

[NDAA Nat. Pros. Stds. Standards 1-4.1 through 1-4.7, inclusive; ABA Crim. Just. Stds. Standards 3-1.8, 3-2.1, 3-2.2, 3-2.5; R. Prof. Conduct Rules 1.1, 1.3, & 5.1(b); Conn. Const. Art. XXIII; C.G.S. §§ 7-282e, 7-294b, 18-81nn, 51-275a, 51-276, 51-277a, 51-277e, 51-278, 51-278a, 51-278b, 51-279, 51-279a, 51-280, 51-281, 51-286a & 53a-22; DCJ Policy Nos. 106, 107, 115, 117, 205, 210, 211, 333, 505 & 509]

### **Commentary**

There shall be established within the executive department a division of criminal justice which shall be in charge of the investigation and prosecution of all criminal matters. Said division shall include the chief state's attorney, who shall be its administrative head, and the state's attorneys for each judicial district, which districts shall be established by law. The prosecutorial power of the state shall be vested in a chief state's attorney and the state's attorney for each judicial district....

Article XXIII., of the Amendments to the Constitution of the State of Connecticut, adopted November 28, 1984; see C.G.S. § 51-276 (establishing Division of Criminal Justice within Executive Department, “in charge of the investigation and prosecution of all criminal matters in the Superior Court”); see also C.G.S. §§ 51-286a (duties and powers of prosecutorial officials), 51-281 (jurisdiction of prosecutorial officials), and 51-286b (duties re housing matters).

General Statutes Section 51-279a requires that these constitutional officers — the Chief State's Attorney and the State's Attorneys for each of the thirteen judicial districts — or their respective designees, along with a nonvoting member designated by the Criminal Justice Commission, meet as a body at least once per month. Collectively known as the Division of Criminal Justice Advisory Board, the group is statutorily mandated to meet and advise on state-wide prosecutorial standards and guidelines, and other policy matters, including peer review and resolution of conflicts. C.G.S. § 51-279a.

Connecticut is one of a few states that do not elect their chief prosecutors. In lieu of such elections, the Criminal Justice Commission is an autonomous body constitutionally charged with appointing all state prosecutors employed in the Division of Criminal Justice. The Commission was established with the adoption of Article XXIII, which was approved by the voters of this state in 1984. Pursuant to the state constitution, the Commission is composed of the Chief State's Attorney and six members appointed by the Governor and confirmed by the General Assembly, two of whom shall be judges of the Superior Court. The chairperson of the Commission is appointed by the Governor. C.G.S. § 51-275a.

The Criminal Justice Commission is the appointing authority for the following full-time positions: Chief State's Attorney, Deputy Chief State's Attorney (including the Deputy Chief State's Attorney who shall serve as the Inspector General), State's Attorney, Deputy Assistant State's Attorney, and Special Deputy Assistant State's Attorney. C.G.S. § 51-278. When exercising their statutory authority to appoint, discipline, or remove the Chief State's Attorney, or appoint a Deputy Chief State's Attorney, the other members of the Criminal Justice Commission shall convene without the Chief State's Attorney. C.G.S. § 51-278(a)(5).

The Chief State's Attorney is the appointing authority for all other full-time, part-time, and temporary positions in the Division of Criminal Justice. C.G.S. § 51-279. The Chief State's Attorney also is the appointing authority for the advancement or transfer of employees who have previously been appointed as Deputy Assistant State's Attorneys by the Criminal Justice Commission, with the exception of advancement to Chief State's Attorney, Deputy Chief State's Attorney, or State's Attorney, positions over which the Commission has sole appointing authority. C.G.S. § 51-278; see DCJ Policy No. 210 (Appointments to Office). Transfer requests do not require the approval of the Criminal Justice Commission.

As its administrative head, the Chief State's Attorney is responsible for the statewide administrative functions of the Division of Criminal Justice. In addition to budget, personnel, and other administrative functions, the Office of the Chief State's Attorney includes specialized units for the investigation and prosecution of certain criminal matters and for representing the state in appellate, post-conviction, and other legal matters. By statute, the Criminal Justice Commission appoints two Deputy Chief State's Attorneys to assist the Chief State's Attorney in carrying out his or her duties. In addition, the Chief State's Attorney selects one or more Executive Assistant State's Attorneys he or she deems necessary for the efficient operation and discharge of the duties of the Division.

The State's Attorneys are the highest prosecuting authority in each of their respective judicial districts which, depending upon the size of the jurisdiction, may



include multiple courthouses and office locations. The State's Attorneys are the chief law enforcement officers for the cities and towns comprising the judicial districts they serve.

The Division of Criminal Justice recognizes the importance of regular peer review and evaluation of its senior leadership team, which consists of the Chief State's Attorney, the Deputy Chief State's Attorney for Personnel, Finance, and Administration, the Deputy Chief State's Attorney for Operations, and the State's Attorneys for each of the thirteen judicial districts. As such, the Division has adopted a policy which provides for biennial peer reviews of its senior leaders in order to provide them with consistent evidence based feedback, with the goal of enhancing the performance of the individuals serving in these vital positions and ensuring that the Division is effectively discharging its constitutional and statutory duties. See DCJ Policy No. 115 (Evaluation and Peer Review of Individuals Appointed by the Criminal Justice Commission).

The Chief State's Attorney and the State's Attorneys fulfill their duties with the assistance of Deputy Assistant State's Attorneys and Assistant State's Attorneys who work at the Office of the Chief State's Attorney or at State's Attorneys' offices located in Judicial District, Geographical Area, or Juvenile courts throughout the state.

Vacant prosecutorial positions within the Division are first advertised internally in accordance with the collective bargaining agreement between the State of Connecticut Division of Criminal Justice and the Connecticut Association of Prosecutors for those seeking to transfer within the Division. DCJ Policy No. 205 (Hiring Procedures). If vacant prosecutorial positions are not filled via internal transfer, such vacant positions are publicly advertised in the Connecticut Law Journal and on the Division's website in accordance with established practice. Id. Following initial screening and interviews of candidates for vacancies in either the Office of the Chief State's Attorney or the State's Attorney's office for a particular judicial district, the Chief State's Attorney or the appropriate State's Attorney shall submit the names of such number of finalists for interviews for the position of Deputy Assistant State's Attorney as shall be required by the Criminal Justice Commission, the appointing authority. The Commission shall interview the finalists for each prosecutorial vacancy and make its appointment therefrom. C.G.S. § 51-278(b)(6); see DCJ Policy Nos. 205 and 210. For all other appointments, the State's Attorney for the respective Judicial District shall recommend to the Chief State's Attorney one or more candidates for appointment based upon the applicant pool for the advertised position. DCJ Policy Nos. 205 and 210.

In selecting individuals to join the Division of Criminal Justice as Deputy Assistant State's Attorneys, the Chief State's Attorney and the State's Attorneys, in addition to confirming that the prospective prosecutors are members in good standing of the Connecticut bar, should carefully examine the assets they would bring to the office. An assessment of their educational background, work experience, judgment, written and oral communication skills, trial advocacy skills, and other personal qualifications should form the basis for hiring, promotion, and retention decisions, without regard to who the candidate may know.

It is the responsibility of the Chief State's Attorney and the State's Attorneys to hire staff that reflects the composition of the community, where possible. The recruitment of qualified minorities is an essential aspect of this goal and should be incorporated into the hiring practices and procedures of all prosecution offices. See DCJ Policy No. 107 (Affirmative Action). While it is not the responsibility of the Chief State's Attorney or the State's Attorneys to meet predetermined quotas, the Division benefits by strong representation that reflects the community that is served.

The standard reflects the statutory requirement that an individual hired as a full-time prosecutor shall not engage in the private practice of law. See C.G.S. § 51-278a(c). Nonetheless, a prosecutor is not prohibited from acting as a self-represented party in personal matters. See DCJ Policy No. 106 (Ethics). Further, a full-time prosecutor may, without compensation, give legal advice to, and draft or review documents for, a member of the prosecutor's family. Id. However, a full-time prosecutor is prohibited from serving as the family member's lawyer in any forum. Id.

The collective bargaining agreement between the State of Connecticut Division of Criminal Justice and the Connecticut Association of Prosecutors, which sets forth the salary structure and career progression for state prosecutors, outlines the terms and conditions of probation for new hires, and for advancement from the position of Deputy Assistant State's Attorney to Assistant State's Attorney. See DCJ Policy No. 211 (Probationary Periods). The agreement also provides for the attainment and recognition of the status of Senior Assistant State's Attorney. Importantly, the agreement establishes the framework for annual service ratings, ensuring consistent review and evaluation of prosecutor performance, and affording an opportunity to identify deficiencies that may be remediated through appropriate training programs.

An Assistant State's Attorney or a Senior Assistant State's Attorney may be promoted by the Chief State's Attorney or an appropriate State's Attorney, with the approval of the Chief State's Attorney, to supervise the operational and

administrative functions and activities of a prosecutorial work unit. Prosecutorial work units designated for supervisory purposes by the Chief State's Attorney shall include all Geographical Areas, specialized units as designated by the Chief State's Attorney, and Judicial Districts as designated by the Chief State's Attorney. The standard recognizes the integral role supervisors play in monitoring case assignments and balancing workloads. See R. Prof. Conduct Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers). A prosecutor has the responsibility to seek justice in every case. Ensuring that a matter has been properly investigated and evaluating how it should be handled are time consuming. In those cases that go to trial, the preparation required to proceed effectively is filled, in many instances, with education regarding experts in various fields and creation of technological presentations and exhibits which are increasingly necessary to effectively explain the prosecution's theory of the case. Because of the need to thoroughly investigate, evaluate, prepare, and try a variety of cases, prosecutors should not be overwhelmed by large numbers of cases needing disposition. If they are, the quality of representation afforded the people suffers and the difficulty in retaining good, experienced prosecutors increases.

Without addressing specific reasons for the removal of prosecutors from office, the standard requires that such actions be subject to procedural due process. Equally important is the necessity that such removals not be undertaken because of prejudice against the prosecutor's race, gender, religion, national origin, or sexual orientation. Engaging in partisan political activities, or the refusal to engage in the same should not be a basis for removal unless the activity interferes with the efficient operation of the office.

Connecticut General Statutes Section 51-278b vests authority in the Criminal Justice Commission to discipline, or remove from office, the Chief State's Attorney, Deputy Chief State's Attorneys, and State's Attorneys under conditions set forth therein. The Chief State's Attorney and the State's Attorneys may discipline for due cause Supervisory Assistant, Assistant, or Deputy Assistant State's Attorneys who assist them, consistent with the collective bargaining agreement between the State of Connecticut Division of Criminal Justice and the Connecticut Association of Prosecutors. Discipline for due cause may include written reprimand, demotion, or suspension with or without pay. Serious misconduct by a Supervisory Assistant, Assistant, or Deputy Assistant State's Attorney may result in discharge. See DCJ Policy Nos. 334 (Administrative Investigations) and 511 (Prosecutorial Impropriety) ("in all matters that have reached final adjudication in which a judge or panel of judges has found prosecutorial misconduct or impropriety involving Division of Criminal Justice personnel, including State's Attorneys, the Division will review the employee's conduct to determine if disciplinary, remedial, educational, or other measures are appropriate").

Prosecutors should remain ever mindful of their responsibility to seek justice. Should a prosecutor find himself or herself in a situation in which the public trust in the office has diminished to the extent that he or she can no longer fulfill that primary responsibility, resignation should be considered.

## **5. Training and Guidance**

### **1-5.1 Orientation and Continuing Legal Education**

At the time they commence their duties and at regular intervals thereafter, prosecutors should participate in formal training and education programs. Prosecutors should seek out continuing legal education opportunities that focus specifically on the prosecution function and:

- a. The Chief State's Attorney and the State's Attorneys should develop and maintain programs of training and continuing education for both new and experienced prosecutors and staff.
- b. The Chief State's Attorney and the State's Attorneys should ensure that all prosecutors under their direction, as well as non-attorney staff, participate in appropriate training and education programs.
- c. The Chief State's Attorney and the State's Attorneys should be knowledgeable of and make use of appropriate state and national training programs for both orientation and continuing legal education for both themselves and the prosecutors in their offices, and should make available opportunities for training and continuing education programs outside the office, including training for non-attorney staff.
- d. The Chief State's Attorney and the various State's Attorneys should participate in national conferences sponsored by a national association or organization in order to remain abreast of trends and issues affecting the criminal justice system nationwide.
- e. Prosecutors with supervisory responsibilities over prosecutors or staff should receive training in how to supervise effectively.
- f. The Chief State's Attorney and the various State's Attorneys should ensure that each new prosecutor becomes familiar with these standards, as well as rules of ethical conduct and professionalism that have been adopted in the jurisdiction.
- g. The Chief State's Attorney and the various State's Attorneys should ensure that prosecutor training includes review of Division of Criminal Justice policies and procedures.
- h. The Chief State's Attorney and the various State's Attorneys should identify one or more sources, both within and outside the office, to which the prosecutors can turn for guidance on questions related to ethical conduct and professionalism.

- i. Prosecutors should be diligent in meeting or exceeding the mandatory requirements for continuing legal education provided by statute and Division policy.
- j. Adequate funds should be requested and allocated within the Division of Criminal Justice budget to allow for both internal training programs and attendance at external training events.

### **1-5.2 Training Curriculum**

In addition to knowledge of substantive legal doctrine and courtroom procedures, a prosecutor's core training curriculum should address the overall mission of the criminal justice system. A core training curriculum should also seek to address: investigation, negotiation, and litigation skills; compliance with applicable discovery procedures; knowledge of the development, use, and testing of forensic evidence; available conviction and sentencing alternatives, reentry, effective conditions of probation, and collateral consequences; civility, and a commitment to professionalism; relevant office, court, and defense policies and procedures and their proper application; exercises in the use of prosecutorial discretion; appreciation of diversity and elimination of improper bias; and available technology and the ability to use it. Some training programs might usefully be open to, and taught by, persons outside the Division of Criminal Justice such as defense counsel, court staff, and members of the judiciary.

### **1-5.3 Internship Opportunities**

In order to foster strong relationships with law schools and increase the pool of qualified applicants for vacant prosecutorial positions, the Chief State's Attorney and the State's Attorneys should implement and maintain a system for allowing qualified law students to learn about and assist with the prosecution function.

### **1-5.4 Policies and Procedures**

The Chief State's Attorney and the State's Attorneys should develop written and/or electronically retrievable Division-wide statements of policies and procedures that guide the exercise of prosecutorial discretion and that assist in the performance of those who work in the Division of Criminal Justice. The objectives of such policies and procedures should be to achieve fair, efficient, and effective enforcement of the criminal law across the state. Division-wide policies and procedures should be augmented by instruction and training, and are not a substitute for regular training programs.

The Division's policies and procedures should be reviewed periodically and amended when necessary. Division policies and procedures whose disclosure would not adversely affect the prosecution function should be made available to the public.

The Chief State's Attorney and the various State's Attorneys should develop written and/or electronically retrievable standard operating procedures that guide those who work in their respective offices.

[NDAA Nat. Pros. Stds. Standards 1-5.3 & 1-5.4; ABA Crim. Just. Stds. Standards 3-1.13, 3-2.1 & 3-2.4; C.G.S. § 51-279c; P.B. §§ 2-27A, 2-29 et seq.; DCJ Policy Nos. 220, 221, & 324]

### **Commentary**

The Division of Criminal Justice endeavors to provide all employees with appropriate professional development opportunities on a regular basis to maintain and enhance the performance of their official duties. Professional development activities include in-service training, whether by the Division, another state agency, or through the Department of Administrative Services in-service training program. Other training opportunities include, for example, those provided by federal agencies, professional organizations, and the state bar.

Legal education programs approved and presented by the Division for prosecutors are designed to exceed the minimum continuing education standards applicable to other attorneys admitted to the Connecticut bar set forth in Practice Book § 2-27A (no less than twelve (12) credit hours of appropriate continuing legal education, at least two hours of which shall be in ethics/professionalism). Pursuant to General Statutes Section 51-279c and the prosecutors' collective bargaining agreement with the Division, each prosecutor shall participate in a minimum of sixteen (16) hours of professional development each calendar year. Newly appointed prosecutors, those holding the title of Deputy Assistant State's Attorney, shall participate in a minimum of forty (40) hours of professional development yearly.

Conceptually, staff training can be divided into two broad categories. The first, which might be termed "orientation," seeks to provide new prosecutors with an understanding of their responsibilities in the criminal justice system, and with the technical skills they will be required to utilize. A basic orientation package for assistants may include familiarization with office structure, procedures, and policies; the local court system; the operation of local police agencies; and training in ethics, professional conduct, courtroom decorum, and relations with the court and the defense bar.

As an introduction to the Division of Criminal Justice, and in satisfaction of statutory professional development requirements, the Division established and maintains a week-long "DASA Bootcamp," which all newly appointed Deputy Assistant State's Attorneys are required to attend. During the week, in addition to meeting and interacting with their peers, new prosecutors are exposed to all facets of the

criminal justice system through presentations and lectures by, among others, senior prosecutors, court personnel, victims' advocates, bail commissioners, community leaders, and judges. Tours of correctional facilities and exposure to Department of Correction programs is an integral part of this introductory experience.

In addition to this introductory training, it is the policy of the Division of Criminal Justice that, upon entering service with the Division, each newly appointed Deputy Assistant State's Attorney will be assigned a mentor from the judicial district or office where he or she is stationed, who will help guide that new prosecutor's development. See DCJ Policy No. 221 (Professional Development/Mentor Program). Specifically, the mentor will assist the newly-appointed prosecutor in:

- a. understanding the role of the prosecutor as not only an advocate, but also a minister of justice;
- b. developing appropriate demeanor and practices, both inside and outside the courtroom;
- c. understanding and applying relevant laws, Practice Book rules, and diversionary programs;
- d. understanding plea-bargaining principles and strategies; and
- e. learning and applying Division practices and policies.

Pursuant to the mentoring policy, the Chief State's Attorney and the State's Attorneys — as practicable and consistent with the sound management of cases and resource availability — should attempt to ensure that the newly-appointed Deputy Assistant State's Attorney participates in Division of Criminal Justice trial and advocacy training, as available, and participates in at least two trials in his or her first two years of employment. During that same time period, the State's Attorney, in conjunction with the Office of the Chief State's Attorney, should attempt to ensure that the newly-appointed Deputy Assistant State's Attorney monitors at least two appeals, including participating in any pre-argument preparation sessions and attending the appellate arguments, and further, that the new prosecutor works together with a senior prosecutor assigned to handle post-judgment matters on at least two habeas corpus petitions.

A second aspect of the Division of Criminal Justice training program is continuing education. First and foremost, prosecutors must abide by the continuing legal education requirements of the jurisdiction. The content of the training should be relevant to the duties of the prosecutor. For the Chief State's Attorney, the Deputy Chief State's Attorneys, the State's Attorneys, and other prosecutors in management or supervisory positions, training on personnel, management skills, and, where applicable, budget issues would be appropriate. For other prosecutors, concentration on substantive law, rules of evidence, forensic evidence, trial advocacy, implicit bias, and other matters relevant to their duties should be sought.

While the Division can provide much of the training needed in-house, the Chief State's Attorney and the State's Attorneys should be cognizant that it is important to have exposure to what is going on throughout the national criminal justice community. Prosecutors benefit from this exposure because it allows them to stay current regarding new defenses, jointly address concerns confronting prosecutors, and learn techniques that can improve their ability to seek justice for their communities.

To assist prosecutors in satisfying the statutory hourly minimum professional development requirements, the Division of Criminal Justice hosts an annual Connecticut Prosecutor Conference, which provides, among other instruction, a minimum of two hours devoted exclusively to ethics. All prosecutors are required to attend the full-day training unless excused in advance by their respective State's Attorneys for operational needs. In addition to the annual conference, the Division maintains a robust training program run by the Director of the Office of Ethics and Professional Standards, which provides opportunities for training, both in-person and virtually, throughout the year, and monitors prosecutors' training hours to ensure compliance with statutory professional development requirements.

Apart from providing opportunities for prosecutors to learn the information and hone skills required to perform their duties, the Chief State's Attorney and the State's Attorneys must also be diligent in requiring a prosecutor in their charge be thoroughly familiar with his or her rules of ethical conduct and professional responsibilities. At minimum, the Chief State's Attorney and the State's Attorneys must ensure that all prosecutors in their offices have a working knowledge of the ethical rules and professional codes applicable to the jurisdiction, as well as these standards. In addition, the Chief State's Attorney and the State's Attorneys should work to create an atmosphere in which the discussion of ethical and professional considerations is encouraged. The Chief State's Attorney and the State's Attorneys should also make known persons and procedures that can be utilized if more private consultation is desired (e.g., the Director of the Office of Ethics and Professional Standards at the Office of the Chief State's Attorney).

By calling for the allocation of funds in the Division of Criminal Justice budget, this standard emphasizes the essential role of training in assuring efficient and effective performance of prosecutorial duties while disabusing the notion that training is a frill or an extra to be cut at the first sign of any pressure on the budget.



## 6. Prosecutorial Immunity

### 1-6.1 Scope of Immunity

When acting within the scope of his or her prosecutorial duties, a prosecutor should enjoy the fullest extent of immunity from civil liability. The Chief State's Attorney and the Deputy Chief State's Attorney for Personnel, Finance, and Administration should take steps to see that all costs, including attorneys' fees and judgments, associated with suits claiming civil liability against any prosecutor within the Division arising from the performance of their duties should be borne by the State.

[NDAA Nat. Pros. Stds. Standard 1-6.1; C.G.S. §§ 5-141 & 5-141d; DCJ Policy No. 333]

#### Commentary

In Imbler v. Pachtman, 424 U.S. 408 (1976), the United States Supreme Court ruled that prosecutors enjoy absolute immunity from Civil Rights Actions brought under 42 U.S.C. Section 1983, when acting within the scope of their duties in initiating and pursuing a criminal prosecution and in presenting the state's case. See, e.g., Root v. Liston, 363 F.Supp.2d 190, 193 (D. Conn. 2005) (prosecutor's participation in process of setting bail protected by absolute immunity); Sanchez v. Doyle, 254 F.Supp.2d 266, 273-75 (D. Conn. 2003) (same); Greene v. Wright, 389 F. Supp. 2d 416, 427-28 (D. Conn. 2005) (absolute immunity granted prosecutor in relation to charging function); Nicholson v. Lenczewski, 356 F.Supp.2d 157, 163 (D. Conn. 2005) (prosecutor entitled to absolute immunity in charging and prosecuting case); Campbell v. City of Waterbury et al., 585 F.Supp.3d 194, 204-06 (D. Conn. 2022) (prosecutor entitled to absolute immunity in relation to asset forfeiture proceeding). As the District Court observed in Greene, "[p]rosecutorial immunity affords prosecutors the freedom they need to do their jobs effectively." Greene, 389 F. Supp. 2d at 428.

In Imbler, the Supreme Court noted that although such immunity leaves the genuinely wronged criminal defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty, the alternative of qualifying a prosecutor's immunity would outweigh the broader public interest in that it would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Imbler, 424 U.S. at 427. The Court continued on to state that "the immunity of prosecutors from liability in [civil] suits . . . does not leave the public powerless to deter misconduct or to punish that which occurs," observing that prosecutors, like judges and other government officials "cloaked with absolute immunity, [can] be punished criminally for *willful* deprivations of constitutional rights [under federal law]." (Emphasis added) Id. at 428-29. "Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his

amenability to professional discipline by an association of his peers.” Id. at 429; see Massameno v. Statewide Grievance Committee, 234 Conn. 539 (1995) (judicial branch may exercise jurisdiction to supervise and discipline prosecutors concurrently with executive branch); see also Standards 1-1.6 (Duty to Report and Respond to Misconduct of Others), 1-4.9 (Discipline and Removal) & commentary.

The Supreme Court did not extend such absolute immunity to actions taken by a prosecutor outside of the scope of his or her duties as aforesaid. Thus, Imbler did not change pre-existing law with respect to the performance of duties that traditionally are viewed as investigative duties falling primarily within the police function. See Burns v. Reed, 500 U.S. 478, 496 (1991) (qualified immunity for advice given to officers conducting criminal investigations). The Court later observed, “[q]ualified immunity represents the norm for executive officers, so when a prosecutor functions as an administrator rather than as an officer of the court he [or she] is entitled only to qualified immunity.” (Internal quotation marks and citations omitted) Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993) (qualified immunity applies to prosecutor’s statements to the press). Under qualified immunity, “government officials are not subject to damages liability for the performance of their discretionary functions when ‘their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” Id. at 268, quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Although there has been a multitude of case law subsequent to Imbler discussing the prosecutor’s immunity for “administrative” and “investigative” duties, no bright line rule has been established.

Given the litigious nature of some persons involved in the criminal justice system, a program providing indemnification or insurance to pay all costs incurred by the prosecutor in defending against civil lawsuits and in paying judgments arising from the performance of his or her official duties is essential. That benefit will enable a prosecutor to seek justice despite the threats of civil litigation that, even if totally unfounded, can consume time and resources to defend.

In order to ensure that prosecutors are free to vigorously and fearlessly perform their essential duties, the state should provide the costs, including attorney fees and judgments associated with civil suits against the prosecutor and his or her staff. No prosecutor should be expected to function without full coverage for actions arising out of the performance of his or her duties.

Toward that end, Connecticut General Statutes Section 5-141d provides:

The state shall save harmless and indemnify any state [prosecutor] from financial loss and expense arising out of any claim, demand, suit or judgment by reason of his [or her] alleged negligence or alleged deprivation of any person's civil rights or other act or

omission resulting in damage or injury, if the [prosecutor] is found to have been acting in the discharge of his [or her] duties or within the scope of his [or her] employment and such act or omission is found not to have been wanton, reckless or malicious.

C.G.S § 5-141d. Consistent with statute and practice, the defense of any such civil lawsuit against a prosecutor will be handled by the Office of the Attorney General, except where the Attorney General, based on his or her investigation of the facts and circumstances of the case, determines that it would be inappropriate to do so. See C.G.S. § 5-141d(b); see also DCJ Policy No. 333 (Bar Grievances, Civil Suits, & Subpoenas). In instances where the Attorney General declines representation, and the prosecutor is obliged to hire private counsel, the prosecutor may recoup from the state his or her legal fees and costs incurred in defending the civil action (subject to a reasonableness determination), provided the prosecutor is found to have acted in the discharge of his or her duties or in the scope of his or her employment, and not to have acted wantonly, recklessly, or maliciously. C.G.S. § 5-141d(c).

Pursuant to Division of Criminal Justice Policy, any prosecutor served with a writ, summons, and complaint naming the prosecutor as a defendant in any state or federal civil suit seeking injunctive relief and/or money damages, shall, within two days of service, forward the same to the Deputy Chief State's Attorney for Personnel, Finance, and Administration together with a brief written explanation of the facts and circumstances to which the claim relates. Upon receipt of the complaint, the Deputy Chief State's Attorney or his or her designee shall review the complaint and written explanation and, consistent with applicable statutes and policy, determine the appropriate course of action. See DCJ Policy No. 333.

## **PART II. RELATIONS**

- 1. Ancillary Local and State Public Services**
- 2. National Criminal Justice Organizations**
- 3. Community Engagement**
- 4. Other Prosecutorial Entities**
- 5. Law Enforcement**
- 6. The Court**
- 7. Suspects and Defendants**
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- 13. Board of Pardons and Paroles**
- 14. The Media**
- 15. Funding Entity**
- 16. Non-Governmental Entities**

### **1. Ancillary Local and State Public Services**

#### **2-1.1 Boards and Commissions**

In addition to their core prosecutorial and administrative duties, the Chief State's Attorney, and the State's Attorneys where indicated, are statutorily mandated as designated members of various statewide commissions, councils, advisory boards, review panels, committees, and task forces committed to, among other things, social services, crime prevention, forensic science protocols, law enforcement responses to identified developing trends, and enhancing the overall effectiveness, efficiency, and fairness of the criminal justice system. Recognizing the importance of each of these entities, the Chief State's Attorney and the various State's Attorneys should, to the extent possible, devote sufficient time and resources to fulfilling each of these commitments.

The additional obligations a prosecutor undertakes with respect to speaking engagements, panels, working groups, and the like should extend only to those that he or she believes can be fulfilled in a diligent and competent manner.

#### **2-1.2 Data Collection and Sharing**

The Division of Criminal Justice acknowledges the importance of capturing, tracking, analyzing, and sharing statewide criminal justice system data in order to identify trends and potential disparities, promote transparency, increase efficiency, properly allocate resources, and ensure fair, equal, and effective enforcement of the state's criminal laws.

In furtherance of this objective, prosecutors shall comply with all policies and procedures related to the Division of Criminal Justice's electronic case management system, also known as "eProsecutor," designed to collect criminal justice system data as mandated by statute.

### **2-1.3 Professional Associations**

A prosecutor may participate in state and local bar associations for the purpose of enhancing and advancing the goals of the prosecution function in the legal community and in furtherance of their own education.

[NDAA Nat. Pros. Stds. Standards 2-1.1, 2-1.2, 2-1.5, 2-2.2, & 2-3.1; C.G.S. §§ 4-68ff, 51-279, & 51-286j; DCJ Policy No. 520]

### **Commentary**

Beyond their core prosecutorial duties, activities that the Chief State's Attorney and the State's Attorneys might be required to undertake include providing information and advice to governmental bodies and citizens' groups, review and consideration of pending state and national legislation, and participation in criminal justice-related programs or projects.

The Connecticut General Statutes require the Chief State's Attorney, or his or her designee, play an active part in representing the interests of the Division of Criminal on a vast number of committees, review boards, commissions, and the like. The Chief State's Attorney should ensure that the Division is well represented and positively contributing to each of these entities. Those statutory commitments include, but are not limited to, the following:

- C.G.S. § 7-294b      Police Officer Standards and Training Council (POST)
- C.G.S. § 7-294t      Eyewitness Identification and Emerging Technologies Task Force
- C.G.S. § 17a-667      Connecticut Alcohol and Drug Policy Council
- C.G.S. § 18-87j      Criminal Justice Policy Advisory Commission (CJPAC)
- C.G.S. § 19a-112a      Commission on the Standardization of the Collection of Evidence in Sexual Assault Investigations
- C.G.S. § 21a-254a      Prescription Drug Monitoring Working Group
- C.G.S. § 29-38f      State-Wide Firearms Trafficking Task Force Policy Board
- C.G.S. § 29-179      State-Wide Narcotics Task Force Advisory Board
- C.G.S. § 29-179i      State-Wide Cooperative Crime Control Task Force

- C.G.S. § 31-57h Joint Enforcement Commission on Employee Misclassification (Workers' Compensation Fraud)
- C.G.S. § 46a-13l Child Fatality Review Panel
- C.G.S. § 46a-170 Trafficking in Persons Council
- C.G.S. § 46b-38j Family Violence Model Policy Governing Council
- C.G.S. § 46b-381 Domestic Violence Offender Program Standards Advisory Council
- C.G.S. § 46b-121n Juvenile Justice Policy and Oversight Committee
- C.G.S. § 51-10c Commission on Racial and Ethnic Disparity in the Criminal Justice System
- C.G.S. § 51-275a Criminal Justice Commission
- C.G.S. § 51-279a Division of Criminal Justice Advisory Board
- C.G.S. § 51-279f State-Wide Hate Crimes Advisory Council
- C.G.S. § 54-1s Racial Profiling Prohibition Advisory Board
- C.G.S. § 54-102m DNA Data Bank Oversight Panel
- C.G.S. § 54-142q Criminal Justice Information System Governing Board
- C.G.S. § 54-300 Sentencing Commission

Consistent and accurate recording of criminal case level data is a key component of the prosecutorial function. Division-wide data collection can help achieve several outcomes, including: policy and budget development; statewide administration of prosecutorial operations; communication to media and the public; tracking performance metrics, both statewide and in each court; and, sharing and use of case level information by line prosecutors across judicial districts.

The Division of Criminal Justice is committed to its role in fostering transparency in the criminal justice system through the collection and public dissemination of criminal justice system data as required by Connecticut General Statutes Sections 4-68ff and 51-286j. See DCJ Policy No. 520 (Case Management System). Toward that end, prosecutors are required to fully comply with Division-wide policies and procedures related to the Division's electronic case management system, "eProsecutor," which serves multiple purposes, including enabling prosecutors to shift from paper to electronic storage of information, and producing data for detailed analysis of prosecutorial decision-making operations and caseflow.

## **2. National Criminal Justice Organizations**

### **2-2.1 Enhancing Prosecution**

The Chief State's Attorney and the State's Attorneys should take an active role, to the extent possible, in national criminal justice organizations, such as the National District Attorneys Association, that exist for the purpose of enhancing and advancing the goals of the prosecution function. The obligations a prosecutor

undertakes in national organizations should extend only to those that he or she believes can be fulfilled in a diligent and competent manner.

## **2-2.2 Prosecutorial Input**

The Chief State's Attorney and the State's Attorneys should seek to ensure that national criminal justice organizations undertake all reasonable measures to include the substantial involvement and views of state prosecutors in the research and studies and promulgation of standards, rules, and protocols that impact on the prosecutor and the prosecution function.

[NDAA Nat. Pros. Stds. Standards 2-3.1 & 2-3.2]

# **3. Community Engagement**

## **2-3.1 Prosecutor's Involvement**

The Division of Criminal Justice should engage in outreach efforts geared toward establishing trust and building relationships in the communities it serves. The Office of the Chief State's Attorney and each State's Attorney's office should establish and maintain relationships with local community-based organizations that are committed to protecting public safety through crime prevention, seek to enhance the effectiveness, efficiency, and fairness of the administration of criminal justice, and/or are invested in the punishment and rehabilitation of offenders. The obligations a prosecutor undertakes on behalf of community organizations should extend only to those that he or she can fulfill in a diligent and competent manner.

## **2-3.2 Staff Liaison**

With respect to such organizations, and to the extent that each office has the resources to do so, the Chief State's Attorney or respective State's Attorney should assign an appropriate staff member(s) to act as liaison to such organizations to coordinate the office's outreach efforts and provide qualified speakers from the prosecutor's office to address and appear before such groups on matters of common interest.

## **2-3.3 Community Engagement Boards**

The Chief State's Attorney and the State's Attorneys should, where appropriate, consider the formation and maintenance of Community Engagement Boards to serve as the centerpieces of community outreach efforts on both a statewide and local level. Typically comprised of members of the State's Attorney's office, the law enforcement community, civic leaders, non-profit organizations, and the local clergy, such boards afford an opportunity, among other things, to review

community relations and provide recommendations for improvement, raise awareness of concerning trends, share information regarding available services, identify areas of mutual concern and pool resources to develop and coordinate appropriate responses.

### **2-3.4 Community Prosecution**

The State's Attorney should be mindful of opportunities to engage school officials, community youth organizations, social service agencies, neighborhood crime watch groups, and other such organizations with law enforcement agencies, including the prosecutor's office, in efforts to prevent and detect crime.

### **2-3.5 Public Education**

The Chief State's Attorney and the State's Attorneys should use all available resources to encourage citizen involvement in the support of law enforcement and prosecution programs and issues. Prosecutors should seek to heighten the visibility of the State's Attorney's Office in the community, especially through speaking opportunities that afford a platform to educate the public about the programs, policies, and goals of his or her office and alert the public to the ways in which the public may be involved and benefit from those programs, policies, and goals. Where possible such efforts should be directed toward at-risk populations, advising of available resources and assisting with connecting individuals with appropriate services.

### **2-3.6 Advisory Role**

Because the prosecutor has the responsibility of exercising discretion and making ultimate decisions, the role of public interest and citizen groups must be understood to be advisory only.

[NDAA Nat. Pros. Stds. Standards 2-1.1, 2-1.3, 2-1.4, & 2-16.1 through 2-16.4, inclusive; ABA Crim. Just. Stds. Standard 3-1.2(f)]

### **Commentary**

To the extent possible, community engagement efforts should be directed across all communities and populations served within the judicial district. Prosecutor visibility in the community affords opportunities for meaningful interactions that contribute to the building or rebuilding of trust in the criminal justice system. Prosecutors should be familiar with the unique issues related to the neighborhoods and people they serve, which can best be accomplished through getting to know the residents in settings other than the courthouse or prosecutor's office.



The State's Attorney's office should be available to assist community efforts addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system. The standards encourage the formation of relationships between the prosecutor's office and established entities working to improve the criminal justice system, and recognize the rapid growth in community organizations devoted to specific interests, such as DUI enforcement, rape prevention/counseling programs, spousal and child abuse prevention, drug education programs, and neighborhood watch programs, to name just a few. An interested and informed citizenry can be a valuable partner in law enforcement.

Since the prosecutor's work is intimately involved with crime in the community, the prosecutor can contribute significantly to crime prevention by lending personal support and the support of the prosecutor's office to existing community crime prevention programs. Further, the prosecutor can lend expertise to criminologists, city planners, and others as they make plans for the growth and development of the community in a way best suited to deter criminal activity.

The standard has been developed to serve as a guide to prosecutors in implementing their role in community crime prevention and recognizes the need for the prosecutor to interact with community crime prevention and social service organizations that are community-based. Development of, and active participation on, community engagement boards allows the prosecutor's office with limited resources to focus and direct its outreach efforts to impact as many citizens as possible.

#### **4. Other Prosecutorial Entities**

##### **2-4.1 Prosecutorial Cooperation**

In recognition of their mutual goal of serving the interests of justice, the prosecutor should cooperate with other federal, state, military, and tribal prosecutorial entities in the investigation, charging, dismissal, or prosecution of cases that may be of common concern to their respective offices.

##### **2-4.2 Coordinated Prosecutions**

Prosecutors should ascertain, to the extent possible, the likelihood that the defendant will be investigated and/or prosecuted by other jurisdictions for similar conduct, and coordinate prosecutions with the relevant prosecutorial agencies, in order to avoid unnecessarily duplicative investigations and/or prosecutions and to avoid impediments to prosecution such as defense claims of double jeopardy or grants of immunity. Prosecutors should work to identify potential issues of conflict, coordinate with other prosecution offices in advance, and resolve inter-office disputes amicably and in the public interest.

Upon request of the United States Attorney for the District of Connecticut, and consistent with statute, the Chief State's Attorney may designate any Assistant State's Attorney from the Office of the Chief State's Attorney, or any other Assistant State's Attorney on request of the appropriate State's Attorney, for appointment as a Special Assistant United States Attorney to assist in the investigation and prosecution of specific criminal matters in federal court.

### **2-4.3 Resource Sharing**

The prosecutor should share resources and investigative information with other prosecutorial entities, when permitted by law and to the extent necessary, to ensure the fullest attainment of the interests of justice, without regard to political affiliation or partisan interest.

### **2-4.4 Duty to Report Misconduct**

When a prosecutor has knowledge of misconduct or incompetence by another prosecutor, he or she should report that information in accordance with Standard 1-1.6. When the misconduct or incompetence involves the conduct of a prosecutor from another prosecutorial entity and it has the potential to interfere with the proper administration of justice, the Chief State's Attorney or appropriate State's Attorney should report such conduct to the supervisor of the other prosecutorial entity. When the Chief State's Attorney or appropriate State's Attorney has direct knowledge of a violation of the rules of ethical conduct by a prosecutor in another office, he or she shall also report such ethical misconduct to the appropriate bar disciplinary authority in the relevant jurisdiction, provided such misconduct raises a substantial question as to the prosecutor's fitness to practice law.

### **2-4.5 Furtherance of Justice**

The Office of the Chief State's Attorney and the Office of the Attorney General for the State of Connecticut should cooperate whenever practicable in the furtherance of justice. Upon the request of the Attorney General, the Chief State's Attorney may designate any attorney requested by the Attorney General as a Special Assistant State's Attorney to prosecute criminal offenses, except as limited by statute.

[NDAA Nat. Pros. Stds. Standards 2-4.1 through 2-4.5, inclusive; ABA Crim. Just. Stds. Standard 3-3.1(d); C.G.S. § 51-285]

### **Commentary**

Every prosecutor, regardless of jurisdiction, has the responsibility to seek justice. Given our highly mobile society and the increasing methods by which crimes are

committed, the quest for justice must sometimes cross jurisdictional lines. For that reason and to fully comply with their primary responsibility, prosecutors at all levels should cooperate to the fullest extent possible. Such cooperation can result in more efficient and effective investigations, the avoidance of double jeopardy claims, and a fuller awareness of the consequences of grants of immunity.

With increased cooperation, there is the increased possibility of a prosecutor gaining knowledge of another prosecutor's misconduct or incompetency. Just as one cannot turn a blind eye or deaf ear to such conduct in one's own jurisdiction, a prosecutor cannot ignore misconduct in another. The standard outlines the required course of action.

## **5. Law Enforcement**

### **2-5.1 Communication**

The Chief State's Attorney and the State's Attorneys should actively seek to develop and maintain communications between their offices and other law enforcement agencies. The Division of Criminal Justice should encourage the use of uniform information sharing systems by all criminal investigative agencies within the state.

### **2-5.2 Interactions**

The prosecutor should maintain respectful yet independent judgment when interacting with law enforcement personnel. The prosecutor should become familiar with and respect the experience and specialized expertise of law enforcement personnel. The prosecutor should promote compliance by law enforcement personnel with applicable legal rules, including rules against improper bias. Prosecutors may exercise supervision over law enforcement personnel involved in particular prosecutions when in the best interests of justice and the public.

### **2-5.3 Case Status Advisements**

The prosecutor should, when reasonably practicable, keep local law enforcement agencies informed of cases in which they were involved and provide information on those cases in order to aid law enforcement officers in the performance of their duties. Prosecutors should remain particularly mindful that, in all criminal cases involving a charge of assault on a peace officer, the involved police officer is a victim entitled to all the rights and notice accorded to any other victim of crime, consistent with Standard 2-9.1, et seq., and the commentary thereto.

## **2-5.4 Law Enforcement Training**

As the chief law enforcement officers for their respective judicial districts, the State's Attorneys should also serve as the lead trainers for the police in their jurisdictions. As such, they should assist in developing and administering training programs for law enforcement personnel regarding criminal matters and cases being investigated, matters submitted for charging, and the law related to law enforcement activities generally.

The Chief State's Attorney and the State's Attorneys should encourage experienced prosecutors in their offices to pursue the appropriate certifications from the Police Officer Standards and Training Council (POST) to permit them to conduct both introductory courses for new police recruits as well as continuing education courses for more seasoned officers. The Chief State's Attorney and the State's Attorneys should designate certified prosecutors to assist in the on-going training of law enforcement officers by conducting periodic classes, discussions, or seminars to acquaint law enforcement agencies within their jurisdiction with recent court decisions, legislation, and changes in the rules of criminal procedure.

Prosecutors should recognize that educating police officers in the law is a core prosecutorial responsibility and should, whenever possible, assist in law enforcement training. The prosecutor should also urge local law enforcement officers to participate in national, state, and regional training courses available to them.

The Chief State's Attorney's Office, and the various State's Attorneys offices, should keep law enforcement personnel informed of relevant legal and legal ethics issues and developments as they relate to prosecution matters, and advise law enforcement personnel of relevant prosecution policies and procedures. Representatives of the prosecutor's office should meet and confer regularly with law enforcement agencies regarding prosecution as well as law enforcement policies.

## **2-5.5 Legal Advice**

Although law enforcement agencies or individual law enforcement officers are not clients in criminal cases or employees of the State's Attorney's office, the prosecutor may provide independent legal advice to law enforcement about actions in specific criminal matters and about law enforcement practices in general. 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. The prosecutor should serve in such an advisory capacity to promote lawful investigatory methods

that will withstand later judicial inquiry. The prosecutor should encourage law enforcement officers to seek legal advice as early as possible in the investigation of a criminal case. Where possible, the State's Attorney should identify a primary point of contact within the State's Attorney's office to receive and refer legal inquiries from particular law enforcement agencies.

[NDAA Nat. Pros. Stds. Standards 2-5.1 through 2-5.4, inclusive, 2-5.6; ABA Crim. Just. Stds. Standard 3-3.2; C.G.S. § 7-294a et seq.]

### **Commentary**

The maintenance of good relations between the State's Attorney's office and the law enforcement agencies within the community is essential for the smooth functioning of the criminal justice system. Both parties have the burden of fostering, maintaining, and improving their working relationship and developing an atmosphere conducive to a positive exchange of ideas and information.

The criminal justice system, of which the police are only one element, is a structure of law. Many times this structure suffers from seemingly contradictory court decisions, public pressure, and the problems that arise in trying to balance effective law enforcement and the protection of the rights of individuals. The police face many of these problems. To alleviate these problems, the prosecutor should educate the police in the area of pre-trial criminal procedure, including search and seizure law, the arrest process, the use of force, and interrogation. In particular, with respect to the various exclusionary rules pertaining to the admissibility of evidence, the prosecutor has a responsibility to educate the police on the effect of court decisions in general and their application in specific cases where evidence was suppressed by a trial court.

The Division of Criminal Justice has a large stake in the training and professionalization of local law enforcement. Its handling of a case is often crucial to a prosecution's success. Therefore, prosecutors should encourage the local police to participate to the fullest extent possible in training programs operated on state, regional, and national levels. Such training should result in more successful prosecutions.

In Connecticut, the Police Officer Standards and Training Council (POST) has, among other duties, the statutory responsibility and powers to develop and periodically update and revise comprehensive state and municipal police training plans, as well as to set the minimum courses of study required of approved state and municipal police training schools. C.G.S. § 7-294d. Additionally, POST is authorized to set the minimum qualifications for law enforcement instructors and to issue appropriate certification to such instructors in the field of expertise that such instructors will be teaching. Id. The standard encourages the Chief State's

Attorney and the various State's Attorneys to identify qualified prosecutors to obtain such POST instructor certification and take an active part in sharing their expertise with police officers. Through its relationship with POST, and state and local police departments, the Division of Criminal Justice provides statewide training to police officers and police officer trainees on a variety of subjects, including, among others, constitutional law, search and seizure law, laws of arrest, juvenile law, trial procedures, cold case investigations, and laws of evidence.

The Office of the Chief State's Attorney, in conjunction with POST, the Division of State Police within the Department of Emergency Services and Public Protection, and the Connecticut Police Chiefs Association, annually hosts a training program named "The John M. Bailey Seminar on New Legal Developments Impacting Police Policies and Practices." The yearly seminar, offered to the chief law enforcement officer of each municipality, or his or her designee, provides instruction on the subject of new legal developments which affect police policies and practices concerning the investigation, detection, and prosecution of criminal matters. See C.G.S. § 7-294m.

The prosecutor should advise the police on the legal aspects of criminal investigations. This advisory function pertains only to criminal matters and should not be confused with the function of police in-house counsel. Assuming the role of an advisor to any member of the police department on civil or personal matters is beyond the scope of the duties of a prosecuting attorney. In many cases, such a role would place the prosecutor in a position of possible conflict of interest with other duties the prosecution is obliged to perform. Municipal police officers with such inquiries should be directed to their department's in-house counsel or the corporation counsel for their municipality. Similarly, State Police can be referred to in-house counsel or the Office of the Attorney General.

Furthermore, the prosecuting attorney may be restricted from any active participation in the police function by the threatened loss of immunity to civil damages in instances where participation is beyond the scope of advisor and, therefore, not an integral part of the judicial process. The prosecutor must always be cognizant that his or her quasi-judicial immunity afforded by the courts in civil liability suits is limited to actions taken in advancement of the traditional prosecution function. See Standard 1-6.1, commentary.

## **6. The Court**

### **2-6.1 Judicial Respect**

A prosecutor shall display proper respect for the judicial system and the court at all times. The prosecutor should develop and maintain courteous and civil working relationships with judges, and should cooperate with them in developing solutions

to address ethical, scheduling, or other issues that may arise in particular cases or generally in the criminal justice system.

A prosecutor shall not make a statement that the prosecutor knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.

### **2-6.2 Respect in the Courtroom**

A prosecutor should vigorously pursue all proper avenues of argument. However, such action must be undertaken in a fashion that does not undermine respect for the judicial function.

### **2-6.3 Improper Influence**

In all contacts with judges, the prosecutor should maintain a professional and independent relationship. A prosecutor should not seek to unfairly influence the proper course of justice by taking advantage of any personal relationship with a judge.

### **2-6.4 Ex parte Communications or Submissions**

A prosecutor should not engage in ex parte discussions with, or submission of material to, a judge relating to a particular matter which is, or is likely to be, before the judge, other than as authorized by law or court order. With regard to generalized matters requiring judicial discussion (for example, case-management or administrative matters), the prosecutor should invite a representative defense counsel to join in the discussion to the extent practicable.

When ex parte communications or submissions are authorized, the prosecutor should inform the court of material facts known to the prosecutor, including facts that are adverse, 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.

### **2-6.5 Suspicion of Criminal Misconduct**

If a prosecutor has a reasonable suspicion of criminal conduct by a member of the judiciary he or she should immediately report such suspicion directly to the State's Attorney for the judicial district, who shall notify the Chief State's Attorney. When the State's Attorney has a reasonable suspicion of criminal conduct by a member of the judiciary, the State's Attorney should take all lawful investigatory steps necessary to substantiate or dispel such suspicions and, if substantiated, should

initiate prosecution or, if the State's Attorney believes he or she has a conflict, should refer the case to the Chief State's Attorney to secure the appointment of a conflict-free prosecutor from another jurisdiction, or the Office of the Chief State's Attorney, to represent the state in such investigation and subsequent prosecution, if any. The Chief State's Attorney shall inform the Chief Court Administrator of such investigation, provided such disclosure does not compromise any such investigation.

### **2-6.6 Responsibility to Report Misconduct**

A prosecutor shall not knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. 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 his or her supervisor, or if the State's Attorney, directly to the relevant judicial conduct authority in his or her jurisdiction.

### **2-6.7 Application for Recusal**

When a prosecutor reasonably believes that it is warranted by the facts, circumstances, law, or rules of judicial conduct, the prosecutor may properly seek that judge's recusal from the matter.

[NDAA Nat. Pros. Stds. Standards 2-6.1 through 2-6.6, inclusive; ABA Crim. Just. Stds. Standard 3-3.3; R. Prof. Conduct Rules 3.3, 3.5, 8.2(a), 8.3(b) & 8.4(6); C.G.S. §§ 51-39, 51-183c, 51-183h, 51-277b; P.B. § 1-22(a)]

### **Commentary**

The prosecutor is an officer of the court, a public official accountable to those of his or her jurisdiction, and a hub of the criminal justice system. All of these dimensions influence the prosecutor's relations with the court.

The standard recognizes that judges, like all figures in the criminal justice system, are individuals of diverse talents, skills, and temperaments. While some are of superior character, others suffer from human frailties not uncommon in our society. Thus, while the prosecutor needs to have proper respect for the institution of the judiciary, at the same time, he or she has a responsibility to guard against the infrequent abuses from those who fail to honor their responsibilities while serving on the bench.

While this approach may require a delicate balance, it is necessary both inside and out of the courtroom. As is true of all prosecution standards, effective justice is the



paramount issue. Therefore, the prosecutor should neither undermine respect for the judicial function nor in any manner attempt to unfairly influence the court.

Standard 2.6.4, regarding *ex parte* communications or submissions, incorporates the provision of Rule 3.3(d) that “[i]n an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.” R. Prof. Conduct Rule 3.3(d).

When judicial scandals are uncovered, they become an indictment of the entire criminal justice system, creating a public perception that all those involved in the system are corrupt. The prosecutor must assume the role of guardian against injustice and corruption. It is unacceptable to turn a deaf ear to suspicions of criminal activity or misconduct. The standard places a duty on the prosecutor to follow through with a thorough investigation when there is reasonable suspicion of criminal activity by a member of the judiciary. If the investigation dictates prosecution, the prosecutor must take the appropriate steps to see that it is commenced. See C.G.S. § 51-277b (any law enforcement agency conducting investigation which may affect any judge of the Superior Court to notify appropriate State’s Attorney and Chief State’s Attorney, the latter of whom shall notify the Chief Court Administrator of such investigation, provided such disclosure does not compromise investigation).

The standards make it clear that the prosecutor has responsibilities not only when misconduct is at the level of criminal activity, but also when a judge demonstrates the inability to carry out his or her duties with a minimal level of competence. See Rules of Professional Conduct Rule 8.3(b) (“A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.”).

If warranted, a prosecutor may seek that a judge disqualify himself or herself from a matter. Connecticut Practice Book § 1-22(a) provides in relevant part that:

A judicial authority shall, upon motion of either party . . . be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Rule 2.11 of the Code of Judicial Conduct or because the judicial authority previously tried the same matter and a new trial was granted therein or because the judgment was reversed on appeal [see General Statutes § 51-183c]. A judicial authority may not preside at the hearing of any motion attacking the validity or sufficiency of any warrant the judicial authority issued [see General Statutes § 51-183h] . . .

Rule 2.11(a) of the Code of Judicial Conduct provides that “[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.” The Rule goes on to provide a non-exhaustive list of circumstances under which a judge must recuse himself or herself. Many of the circumstances enumerated thereafter involve relationships similar to those discussed in the Commentary to Standard 1-3.2, supra, deemed specific conflicts for a similarly situated prosecutor. See also C.G.S. § 51-39 (disqualification by relationship or interest).

Even in the absence of actual bias, a judge must disqualify himself or herself in any proceeding in which, under the totality of the circumstances, his or her impartiality might reasonably be questioned because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority. State v. Lane, 206 Conn. App. 1, 9-10, cert. denied, 338 Conn. 913 (2021), citing State v. Milner, 325 Conn. 1, 12 (2017). “[T]he reasonableness standard is an objective one; thus, the question is not only whether the particular judge is, in fact, impartial, but also whether a reasonable person would question the judge's impartiality on the basis of all the circumstances.” (Internal quotation marks omitted). Lane, 206 Conn. App. at 9.

With certain well-defined exceptions, a judge's participation in the preliminary stages of a case, and the knowledge he or she thereby gains, will not ordinarily preclude his or her continued participation in the same case thereafter. State v. Sumler, 199 Conn. App. 187 (2020) (no statute or rule expressly prohibits judge who issues arrest warrant or search warrant for a particular defendant from later presiding at that defendant's trial), remanded on other grounds, 343 Conn. 916 (2022). However, a judge's active participation in plea negotiations usually requires that judge's disqualification from presiding over defendant's trial. State v. Washington, 39 Conn. App. 175 (1995); see State v. Niblack, 220 Conn. 270, 280 (1991) (Connecticut Supreme Court approved procedure whereby trial court may participate in negotiation of plea agreement between state and defendant, so long as different judge presides at trial and sentencing if negotiations are unsuccessful (“the Niblack rule”).

## **7. Suspects and Defendants**

### **2-7.1 Communications with Represented Persons**

A prosecutor should respect a suspect's and defendant's constitutional right to the assistance of counsel. The prosecutor should also take steps to ensure that those persons working at his or her direction respect a suspect's and defendant's constitutional right to the assistance of counsel. Notwithstanding the foregoing:

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.

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 so long as the prosecutor does not discuss the criminal charges pending against the witness, and provided the prosecutor has not been informed that counsel also represents the witness with respect to the matter in which he or she is a witness.

### **2-7.2 Communications with Unrepresented Defendants**

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

The prosecutor should identify himself or herself to the defendant as a prosecutor and make clear that he or she does not represent the defendant. If legally required under the circumstances, the prosecutor should advise the defendant of his or her rights.

A prosecutor shall make reasonable efforts to assure that the accused has been advised of the right to counsel and has been given a reasonable opportunity to obtain counsel. When appropriate, the prosecutor should advise the defendant on the procedures for obtaining appointed counsel.

If a prosecutor is engaged in communications with a charged defendant who is not represented by counsel and the defendant changes his or her mind and expresses a desire to obtain counsel, the prosecutor should terminate the communication to allow the defendant to obtain counsel, or to secure the presence of counsel.

A prosecutor shall not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, unless the accused is appearing as a self-represented party with the approval of the tribunal.

### **2-7.3 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 he or she has 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 his or her 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 his or her attorney, and if so should thereafter communicate with the defendant only if authorized by law or court order.

#### **2-7.4 Plea Negotiations**

If a prosecutor enters into a plea negotiation with a defendant who is not represented by counsel (a “pro se defendant”), the prosecutor should not give legal advice to the pro se defendant, other than the advice to secure counsel. The prosecutor should never take unfair advantage of a pro se defendant and should seek to ensure that the pro se defendant understands his or her rights, duties, and liabilities pursuant to any potential plea agreement.

Apprising a pro se defendant of diversionary programs legally available to the defendant is not giving legal advice, and the prosecutor, in the interests of fairness and justice, should do so when the defendant appears eligible for such a program.

#### **2-7.5 Right to Counsel**

If a prosecutor is engaged in communications with a defendant who is not represented by counsel or whose counsel is not present, and the defendant changes his or her mind and expresses a desire to obtain counsel, or to have counsel present, the prosecutor should terminate the communication in order to allow the defendant to obtain counsel, or to secure the presence of his or her counsel. When appropriate, the prosecutor should advise the defendant on the procedures for obtaining appointed counsel.

#### **2-7.6 Communications with Represented Persons During Investigations**

A prosecutor performing his or her duty to investigate criminal activity should neither be intimidated nor discouraged from communicating with a defendant or suspect in the absence of his or her 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.

[NDAA Nat. Pros. Stds. Standards 2-7.1 through 2-7.6, inclusive; ABA Crim. Just. Stds. Standard 3-5.6(b); R. Prof. Conduct Rules 3.8(2), 3.8(3), 4.2, & 4.3; Conn. Const. art. I, § 8; P.B. §§ 39-2, 44-1 through 44-4, inclusive]

### Commentary

Relations with defendants is a sensitive area of a prosecutor's function. There must be a balancing of the general desirability to have defendants represented by counsel in their dealings with prosecutors and the right of defendants to represent themselves in traffic cases and minor misdemeanors, and even in felonies or serious misdemeanors under certain circumstances.<sup>3</sup> See Conn. Const. art. I, § 8 ("In all Criminal prosecutions, the accused shall have a right to be heard by himself and by counsel . . .").

When dealing with a self-represented defendant, a prosecutor should assure that the defendant understands that the prosecutor represents the state and is not the defendant's attorney. See R. Prof. Conduct Rule 4.3. Along those lines, a prosecutor should not give legal advice to an unrepresented defendant, other than the advice to secure counsel. Id. If the defendant has not been advised of his or her right to counsel, the prosecutor should so advise the defendant and advise the defendant of the procedure for obtaining counsel. See R. Prof. Conduct Rule 3.8(2). If a defendant indicates he or she wants representation, the prosecutor must make sure the defendant is given a reasonable opportunity to obtain counsel. Id.

Nonetheless, a defendant has a constitutional right to proceed without counsel when he or she knowingly, voluntarily, and intelligently elects to do so. Faretta v. California, 422 U.S. 806, 833-36 (1975) (allowing defendant to elect self-representation consistent with framers' belief in "the inestimable worth of free choice"); State v. Gethers, 193 Conn. 526, 533 (1984); see also McKaskle v. Wiggins, 465 U.S. 168, 176-77 (1984) ("The right to appear pro se exists to affirm

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<sup>3</sup> It bears noting that a recent report authored by the non-profit Center for Court Innovation (now "Center for Justice Innovation") discussed the fact that Connecticut's prosecutors face a much higher rate of individuals representing themselves than observed in other states. See Center for Court Innovation, *Moving Justice Forward: Needs Assessment Report*, October 2022, at 11, 14, & 25. It was unclear to the authors of the report whether the income thresholds to qualify for public defender services in Connecticut (over which prosecutors have no control) was a contributing factor to the inordinately high rate of pro se defendants. Id. at 25. Regardless of the underlying reason, the reality, as the report noted, is that "the high rate of pro se defendants requires [Connecticut's] prosecutors to fill the role of explaining the criminal legal process to those individuals," a role which "is typically not filled by prosecutors outside of Connecticut." Id. Included in this role is advising of available diversionary programs and explaining how to apply, explaining plea offers, and answering any and all questions about how the case will proceed. Id. Thus, given the high incidence of prosecutor contact with unrepresented individuals in Connecticut, standards addressing such contact are particularly important.

the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense.”). A defendant “need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation ...” Faretta, supra, 422 U.S. at 835. Rather, a record that affirmatively shows that “[the defendant] was literate, competent, and understanding, and that he [or she] was voluntarily exercising his [or her] informed free will” sufficiently supports a waiver. Id.

In Faretta, the Court acknowledged that, before being allowed to waive the benefit of counsel, an accused “should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his decision is made with open eyes.’”(Citation omitted) Id. at 835. However, the Supreme Court has not “prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel.” Iowa v. Tovar, 541 U.S. 77, 88 (2004); see P.B. § 44-3 (Waiver of Right to Counsel); see also P.B. § 39-2 (plea discussions directly with defendant proper following waiver of right to counsel).

The standard recognizes that Rule 3.8(3), prohibiting a prosecutor from seeking to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, does not apply when the prosecutor is dealing with a defendant who has elected to proceed without counsel. Similarly, the rule does not forbid the lawful questioning of a suspect who has waived his right to counsel and silence. See R. Prof. Conduct Rule 3.8, commentary.

Prosecutors must be aware that in dealing with represented defendants, there are not only constitutional limitations on their communications, but also limitations imposed by ethical rules, which generally, unlike the Sixth Amendment right to counsel, cannot be waived by the represented defendant. For example, Rule 4.2 of the Rules of Professional Conduct provides that “a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” See R. Prof. Conduct Rule 4.2. Thus, it is the represented defendant's lawyer who must provide consent, not the defendant. The purpose of this rule “is to preserve the integrity of the lawyer-client relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer. The rule is designed to prevent situations in which a represented party may be taken advantage of by opposing counsel.” Pinsky v. Statewide Grievance Committee, 216 Conn. 228, 236 (1990).

There are times when represented defendants express a wish to engage with a prosecutor without their counsel knowing of the interaction. This scenario may present itself if the represented defendant indicates that he or she would like to cooperate with law enforcement by providing information regarding the criminal

activity of others, but does not want his or her own attorney to know of the cooperation. The represented defendant's stated reason for not including the attorney may be that he or she fears for his or her personal safety, or the safety of family members, if this person with relationships with other members of a criminal enterprise were to know of the defendant's status as a cooperator. Invariably, the underlying basis for the desire to cooperate lies in the defendant's hope to receive consideration in his or her own case in which he or she is represented. As such, the communication ultimately does, in fact, concern "the subject of the representation" as contemplated by Rule 4.2 of the Rules of Professional Conduct. If a prosecutor is approached by a represented defendant who initiates such a conversation regarding cooperation, he or she must be told in no uncertain terms that the prosecutor cannot speak to the defendant unless the defendant obtains a new attorney. The prosecutor should take extra care to make a record of any communications with represented defendants that take place in the absence of counsel. To guard against any claims of impropriety, it is wholly advisable that a prosecutor who engages in any such conversation ensure, to the extent practicable, that there is a witness to the interaction.

That being said, prosecutors may have the right under some uncommon circumstances to communicate with a represented defendant without the prior knowledge or presence of his or her attorney. The standard recognizes that prosecutors are sometimes contacted by defendants, without the knowledge of their counsel, citing good reasons for their direct communications with the prosecutor. For example, a defendant may express that his or her attorney was hired by another person with an interest in keeping the defendant quiet, to his or her own legal detriment. In drug cases where couriers are caught transporting large amounts of drugs or cash, defendants may have attorneys appear, bail them out, and begin representation without the express authority of the defendant. Defendants may complain that these attorneys are working for other interests, but they are afraid to discharge them because of actual or assumed danger. Similarly, a defendant may be the officer, employee, or agent of a corporation and face individual charges in addition to those against the corporation, where counsel for the corporation represents that he or she is also counsel for the individual. This situation may exist without the individual's knowledge or without the individual's knowledge of an inherent conflict of interest in the representation. In these and other circumstances where the prosecutor may have a question regarding the propriety of communicating with a represented defendant, prosecutors should consult with supervisors to discuss the proper handling of the matter, and might be advised to seek authority from the court or the appointment of "shadow counsel," such as a public defender, to interview the defendant and report to the court concerning what action might be appropriate.

An important corollary to bear in mind is that Rule 8.4 of the Rules of Professional Conduct provides that lawyers are subject to discipline when they personally

violate said rules, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. In other words, if a prosecutor is prevented by ethical rules from having contact with a represented defendant, the rules cannot be circumvented by having an inspector or investigator speak with the represented defendant. See R. Prof. Conduct Rule 8.4. Moreover, Rule 5.3 indicates that lawyers who have direct supervisory authority over nonlawyers associated with the lawyer (i.e., a prosecutor providing direction to an investigator or inspector), may not order or ratify specific known conduct that would be a violation of the Rules of Professional Conduct if engaged in by the lawyer. See R. Prof. Conduct Rule 5.3.

Prosecutors occasionally receive unsolicited letters from defendants. They should have the right to receive them and use them in any legal manner. Keep in mind, however, that such communications are a one-way street. The prosecutor cannot write directly to a represented person regarding, for example, a plea proposal. Nor should a prosecutor copy the defendant on any letter sent to his or her attorney. Importantly, prosecutors must recognize and appreciate the distinction between written correspondence expressly directed to the prosecutor and correspondence intended by the defendant for his or her own counsel but inadvertently misdirected to the prosecutor. Such instances, though rare, do occur and should be handled in accordance with Standard 3-1.5 (Privileged Materials Inadvertently Obtained or Viewed) and the commentary thereto.

The standard provides that prosecutors communicating with unrepresented defendants should be certain that they are treated fairly and that defendants be made aware of what could happen to them as the result of whatever actions are taken. For example, suppose a defendant wishes to become a witness for the state in return for a recommendation by the prosecutor that the defendant receive a suspended sentence. The prosecutor must make it known that he or she cannot guarantee the desired sentence but can only make a recommendation (if that be the case) and that the defendant might indeed be sentenced to a jail term, even with his or her cooperation on behalf of the state. If the legal circumstances require *Miranda*-type warnings be given, the prosecutor should so advise the defendant before any conversation. The standard assumes that a prosecutor will tell a defendant if he or she intends to use the communications against the defendant. There are circumstances in which a prosecutor will agree to receive information from a defendant but not use it against him or her. However, to ensure fairness to an unrepresented defendant, he or she should not be subjected to the liability of incriminating statements without a prior warning and waiver of rights.

The standard acknowledges that many defendants wish to negotiate a plea agreement with the prosecutor without representation. Many such defendants are experienced with the system or do not qualify for the services of the Public



Defender and do not wish the expense of representation. In these circumstances, the prosecutor is held to full disclosure of the defendant's liabilities and a standard of fairness. In this regard, the standard distinguishes between the forbidden act of giving legal advice to an unrepresented person and the acceptable action of apprising an unrepresented defendant of diversionary programs legally available to the defendant — the latter of which is, in fact, strongly encouraged. Overall, the prosecutor should make certain that a defendant receives as favorable a disposition as he or she would have had had he or she been represented in the circumstances.

It bears noting that Connecticut Code of Evidence Section 4-8A(a)(3), effective February 1, 2018, expressly prohibits the admission of statements made by a pro se defendant during unsuccessful plea negotiations at any subsequent trial in the case. See C.C.E. § 4-8A(a)(3) & 4-8A(b) (providing limited exceptions); see also E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) §§ 4.20.1 through 4.20.4, *Criminal Pleas, Plea Negotiations, and Related Statements*.

Standard 2-7.5 recognizes the general legal requirement of fulfilling a defendant's desire for counsel — even if he or she originally expressed a desire not to be represented or to have counsel present and assisting him or her — or to obtain counsel if he or she cannot afford to pay for representation. The defendant's wishes in this regard are recognized as paramount.

Prosecutors have a duty to investigate criminal activity. See Standard 3-1.1 & commentary. This may involve communicating with witnesses who are also defendants or suspects in unrelated cases. Ordinarily such communications must be made with the approval of the witness/defendant's counsel because the witness is seeking some benefits in the "subject matter of the representation." Whenever a witness/defendant seeks any benefit in his own case, the communication does involve the "subject matter of the representation," and counsel must be included. In circumstances that remain completely unrelated to the witness/defendant's case (the subject of the representation), a communication may be "authorized by law" even though counsel was not consulted. In circumstances involving "undercover" investigations of an uncharged but represented suspect, a prosecutor can advise police officers to communicate with the suspect so long as the communication is specifically "authorized by law."

## **8. Defense Counsel**

### **2-8.1 Propriety of Relations**

The prosecutor should strive to develop and maintain proper courteous and civil working relationships with all members of the defense bar, and should attempt to maintain a uniformity of fair dealing among different defense counsel.

## **2-8.2 Standards of Professionalism**

The prosecutor should comply with the provisions of professionalism, as identified in Standard 1-2.1, in his or her relations with defense counsel, regardless of prior relations with or animosity toward the attorney.

In written filings, the prosecutor should respectfully evaluate and respond as appropriate to opposing counsel's arguments and representations, and avoid unnecessary personalized disparagement.

## **2-8.3 Cooperation to Assure Justice**

The prosecutor should cooperate with defense counsel at all stages of the criminal process in developing solutions to address ethical, scheduling, or other issues that may arise in particular cases to ensure the attainment of justice and the most appropriate disposition of each case. The prosecutor need not cooperate with defense demands that are abusive, frivolous, or made solely for the purpose of harassment or delay.

## **2-8.4 Disclosure of Exculpatory Evidence**

The prosecutor shall make timely disclosure of exculpatory or mitigating evidence, as required by law and/or applicable rules of ethical conduct, as detailed in Standard 4-8.1 et seq.

## **2-8.5 Suspicion of Criminal Conduct**

When a prosecutor has reasonable suspicion of criminal conduct by defense counsel, the prosecutor has a responsibility to take appropriate action.

## **2-8.6 Responsibility to Report Ethical Misconduct**

A prosecutor who knows that defense counsel has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority. When such misconduct occurs during the course of litigation, the prosecutor should also report it to the judge presiding over the case and may seek sanctions as appropriate.

## **2-8.7 Avoiding Prejudice to Client**

When the prosecutor believes that the defense counsel has engaged in misconduct, remedial efforts should be directed at the attorney and not at his or her client. The prosecutor should at all times make efforts to ensure that a

defendant who is not involved in misconduct is not prejudiced by the unlawful or unethical behavior of his or her attorney.

[NDAA Nat. Pros. Stds. Standards 2-8.1 through 2-8.7, inclusive; ABA Crim. Just. Stds. Standards 3-1.9(c), 3-3.3(c) & (d), 3-5.4; R. Prof. Conduct Rules 3.4, 3.8, 8.3(a), & 8.4; P.B. § 2-32]

### **Commentary**

As with the judiciary, appropriate professional consideration is due opposing counsel. All actions directed at opposing counsel and all deliberations with opposing counsel should be conducted with candor and fairness and should be presented without any express or implied animosity or disrespect. The prosecutor should strive to maintain uniformity of fair dealing with all defense counsel and should endeavor to not allow any prior animosity or bad feelings toward a particular defense attorney to work to the detriment of that attorney's client.

In the spirit of seeking justice in all cases, the prosecutor should cooperate with defense counsel in providing information and other assistance as volunteered by the prosecutor or reasonably requested by defense counsel. In the event defense counsel makes demands that are abusive, frivolous, or made solely for the purpose of delay, the prosecutor need not cooperate with such demands and may seek court guidance on what must be provided. The prosecutor must be mindful that at all times, even when defense counsel is not acting in a professional manner, there are discovery obligations dictated by law and ethical codes that must be fulfilled.

If at any time during his or her association with defense counsel a prosecutor suspects the attorney of involvement in criminal activity, the prosecutor should take such action as necessary, including speaking to a supervisor, the State's Attorney, a Superior Court Judge, law enforcement, statewide bar counsel, or other proper authority.

The standard imposing the duty to report professional misconduct of defense counsel mirrors the obligation set forth by Rule 8.3(a) of the Rules of Professional Conduct. Prosecutors need to be aware that failure to report a defense attorney's misconduct that raises a *substantial question* as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects may, in itself, be deemed misconduct by the prosecutor. See R. Prof. Conduct Rule 8.4. Nonetheless, a prosecutor who is uncertain as to whether the conduct he or she observed should be reported to the bar disciplinary authority should be mindful of the Commentary to Rule 8.3, which provides:

This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A

measure of judgment is, therefore, required in complying with the provisions of this Rule. The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

(Internal quotation marks in original) R. Prof. Conduct Rule 8.3., commentary. As such, prior to initiating a report to the bar grievance counsel pursuant to Practice Book § 2-32, a prosecutor should consider discussing the matter with his or her supervisor, the State's Attorney for the judicial district, and/or the Director of the Office of Ethics and Professional Standards at the Office of the Chief State's Attorney for guidance in determining whether the defense attorney engaged in ethical misconduct that raises a substantial question as to the attorney's fitness to practice law. Moreover, if the decision is made to report the defense attorney's misconduct, the timing of such report should be coordinated so as not to prejudice the defendant.

One continuing myth that pervades the judicial process is the misconception that the defense attorney should be allowed greater leeway in the presentation of his or her case than the prosecutor. This leeway is often sought to be justified on the grounds that it is necessary to counter-balance the more prolific resources of the state brought to bear upon a single individual. Such reasoning is fallacious, however, when viewed in relation to the purpose of the adversary proceeding and the safeguards already provided therein. The courtroom is not a stage but a forum, and uniformity of trial decorum by defense and prosecuting attorneys should be maintained by the court to prevent undue influence on judge and jury that might result from theatrical behavior. The prosecutor should be able to bring to the court's attention the failure to maintain such uniformity and should maintain the high standards of conduct befitting a professional advocate in public service.

## **9. Victims**

### **2-9.1 Responsibilities to Victims of Crime**

Prosecutors shall fully discharge their constitutional, statutory, and professional responsibilities to victims of crime, and in doing so should be mindful of the economic, physical, and psychological impact of the offense, and subsequent prosecution, on any victims. Throughout the course of any investigation and subsequent prosecution, prosecutors should strive to maintain a cordial and courteous professional relationship with victims and their families, and should not engage in any inappropriate personal relationship with any victim.

In fulfilling their responsibilities to crime victims, prosecutors should endeavor, to the extent possible, to establish consistent and open communication with the victim regarding the prosecution of the case, and should provide victims with a point of

contact within the State's Attorney's office to address any concerns they might have. If the prosecutor is informed that a victim has obtained legal representation with respect to the criminal case, the prosecutor should keep the victim's counsel apprised of all court proceedings in the matter and arrange any out-of-court contacts with the victim regarding the criminal case through the victim's counsel.

The prosecutor should take care to balance the extent of information provided to the victim with the need to protect the integrity of the case and process.

### **2-9.2 Recognition of Victims' Rights**

Prosecutors shall know the rights afforded to victims of crime by the Connecticut state constitution and shall comply with any provision of the General Statutes and Superior Court rules promulgated to implement, protect, preserve, and enforce the following such victims' rights:

- a. the right to be treated with fairness and respect throughout the criminal justice process;
- b. the right to timely disposition of the case following arrest of the accused, provided no right of the accused is abridged;
- c. the right to be reasonably protected from the accused throughout the criminal justice process;
- d. the right to notification of court proceedings;
- e. the right to attend the trial and all other court proceedings the accused has the right to attend, unless such person is to testify and the court determines that such person's testimony would be materially affected if such person hears other testimony;
- f. the right to communicate with the prosecution;
- g. the right to object to or support any plea agreement entered into by the accused and the prosecution and to make a statement to the court prior to the acceptance by the court of the plea of guilty or nolo contendere by the accused;
- h. the right to make a statement to the court at sentencing;
- i. the right to restitution which shall be enforceable in the same manner as any other cause of action or as otherwise provided by law; and
- j. the right to information about the arrest, conviction, sentence, imprisonment, and release of the accused.

### **2-9.3 Victim Assistance and Orientation**

Prosecutors should be familiar with the services provided to victims of crime by the Judicial Branch's Office of Victim Services, as well as any non-profit agencies providing victim advocates and/or specialized support for victims in their jurisdiction. Prosecutors should work cooperatively with the victim services

advocate in their court to ensure that victims are apprised of their rights and the assistance available to them in exercising those rights, that they are provided with proper notice of court proceedings, and that their right to be heard is adequately protected.

Prosecutors should know the role of the Office of the Victim Advocate, which is statutorily charged with the promotion and protection of the constitutional and statutory rights of crime victims in Connecticut, provides oversight of state and private agencies providing victim services, and advocates on behalf of crime victims when a violation of their rights is at issue.

To the extent feasible and when it is deemed appropriate by the State's Attorney, the prosecutor's office should provide an orientation to the criminal justice process for victims of crime and should explain prosecutorial decisions, including the rationale used to reach such decisions. Special orientation should be given to child and spousal abuse victims and their families, whenever practicable.

#### **2-9.4 Cooperative Assistance**

Prosecutors should work with other law enforcement agencies to:

- a. Cooperate with victim advocates for the benefit of providing direct and referral services to victims of crime;
- b. Assist in the protection of a victim's right to privacy regarding a victim's Social Security number, birth date, address, telephone number, place of employment, name (when the victim is a minor or a victim of sexual assault), or any other personal information unless either a court finds it necessary to that proceeding or disclosure is required by law; and
- c. Provide for the victim's personal safety.

#### **2-9.5 Facilities**

Whenever possible, the State's Attorney should take steps to ensure that victims have a secure and comfortable waiting area within the courthouse that avoids the possibility of making contact with defendants or friends and families of defendants.

#### **2-9.6 Victim Compensation Program**

Prosecutors should be knowledgeable of the criteria for victim compensation under Connecticut law, should inform victims with potential compensable claims of the existence of the Criminal Injuries Compensation Fund, and refer them to the Office of Victim Services for assistance in pursuing any eligible claims.

## 2-9.7 Victim Protection

Prosecutors should be mindful of the possibility of intimidation and harm arising from a victim's cooperation with law enforcement. Prosecutors should be aware of the Leroy Brown, Jr., and Karen Clarke Witness Protection Program maintained by the Office of the Chief State's Attorney, which is available to protect witnesses to crime, and should make referrals and recommendations for program participation where appropriate.

## 2-9.8 Access to Free Transcript of Criminal Proceeding

Whenever a transcript of a criminal proceeding is prepared, the prosecutor shall provide a copy of such transcript to any victim of the crime without charge upon request of such victim.

[NDAA Nat. Pros. Stds. Standards 2-9.1 through 2-9.8, inclusive; ABA Crim. Just. Stds. Standard 3-3.4; Conn. Const. art. XXIX; Conn. Const. art. I, § 8.b., as amended; C.G.S. §§ 1-1k, 46a-13b et seq., 46b-38c(h)(2), 46b-124(f), 51-196(c), 51-286d et seq., 53a-39(d), 54-56d(l), 54-56e, 54-56g, 54-56l, 54-76q, 54-82s through 54-82u, inclusive, 54-91c, 54-126a, 54-201 through 54-218, inclusive, 54-223, 54-224, 54-227(a), 54-230, & 54-230a; P.B. § 43-10(2); DCJ Policy No. 521]

### Commentary

General Statutes Section 1-1k states that, unless otherwise provided by the general statutes, a "victim of crime" or "crime victim" is "an individual who suffers direct or threatened physical, emotional or financial harm as a result of a crime and includes immediate family members of a minor, incompetent individual, or homicide victim, and a person designated by a homicide victim [by power of attorney, will, or similar written instrument executed prior to death] ...." C.G.S. § 1-1k. General Statutes Section 51-286e(a) provides that the term " 'victim' includes the legal representative of the victim or a member of the deceased victim's immediate family." C.G.S. § 51-286e(a); see also C.G.S. § 54-91c(a) ("For the purposes of this section, 'victim' means a person who is a victim of a crime, the legal representative of such person, a member of a deceased victim's immediate family or a person designated by a deceased victim in accordance with [General Statutes] section 1-56r.").

"It is a basic tenet of the criminal justice system that prosecutions are undertaken and punishments are sought by the state on behalf of the citizens of the state, and not on behalf of particular victims or complaining witnesses." (Citation and internal quotation marks omitted) State v. Gault, 304 Conn. 330, 342-43 (2012); see Standard 1-1.2 (prosecutor generally serves the public, not any particular victim). Nonetheless, Standard 2-9.1 recognizes that prosecutors have particular state

constitutional, statutory, and professional responsibilities to victims of crime that they must, and do, ardently strive to fulfill. See State v. Damato-Kushel, 327 Conn. 173, 194 (2017) (Connecticut Supreme Court expressing they “have every reason to believe that state’s attorneys will fully discharge [these] responsibilities to victims,” and that, “in the unlikely case of a willful failure to do so, such misconduct will not be taken lightly”).

The standards recognize that a victim in a criminal case has, among other rights – a right to be notified of, and to receive information regarding, the procedural posture of the case; a right to be heard; and most importantly, a right to be treated with fairness and respect throughout the criminal justice process. The rights set forth in Standard 2-9.2, mirror the rights enumerated in Article XXIX (b), of the Amendments to the Constitution of the State of Connecticut, commonly known as “the victim’s rights amendment,” adopted November 27, 1996. See Conn. Const. art. I, § 8.b., as amended. “After enumerating ten substantive rights, the victim’s rights amendment provides that ‘[t]he [G]eneral [A]ssembly shall provide by law for the enforcement of this subsection [identifying these rights].’” State v. Gault, supra, 304 Conn. at 341, quoting Conn. Const., amend. XXIX (b). Thus, by its explicit terms, the victim’s rights amendment contemplates additional implementing legislation to give effect to its provisions. Id. at 340. Importantly, however, the amendment explicitly states that “[n]othing in this subsection [enumerating the ten victim’s rights] or in any law enacted pursuant to this subsection shall be construed as creating a basis for vacating a conviction or ground for appellate relief in any criminal case.” Conn. Const., amend. XXIX (b); C.G.S. § 54-223 (violation of victim’s rights not basis for vacating otherwise lawful conviction or voiding otherwise lawful sentence or parole determination); see State v. Gault, 304 Conn. at 347 (crime victim does not enjoy full party status and lacks standing to appeal conviction or sentence); see also State v. Skipwith, 326 Conn. 512, 524-27 (2017) (writ of error is proper vehicle for victims seeking to enforce their constitutional rights).

In a concurring opinion in Skipwith, Justice McDonald observed that “[t]he victim’s rights amendment to our state constitution was adopted to ensure that crime victims would no longer be relegated to the sidelines as largely silent, passive observers of a process in which their sole role was as witness and informant.” State v. Skipwith, 326 Conn. at 528 (McDonald, J., concurring); see, e.g., State v. Thomas, 296 Conn. 375, 390 n.11 (2010) (legislature sought to give victims “‘true role’” in plea bargaining process by giving victim right to be heard prior to acceptance of plea); but see State v. Damato-Kushel, supra, 327 Conn. at 196 (notwithstanding right to be heard, neither victim nor his or her authorized representative has right to attend in-chambers, off-the-record disposition conferences between prosecuting attorney, defense counsel, and presiding judge). Further, “[s]tatutes elaborate on the obligations of both the prosecution and the court to ensure that crime victims have notice and an opportunity to take advantage of these rights.” State v. Skipwith, 326 Conn. at 530 (McDonald, J.,



concurring). However, because the appellate courts are barred from providing any form of appellate relief to victims and there is no legislatively enacted enforcement mechanism to address instances where judges or prosecutors fail to fulfill their statutory obligations to victims, Justice McDonald expressed his concern that the promise of the amendment is “largely illusory.” Id. at 528 (McDonald, J., concurring); see, e.g., C.G.S. 54-224 (no liability for prosecutor’s failure to afford victim of crime any rights provided by statute, or for failure to provide any notice provided by statute). Observing that “a constitutional right, unadorned by a remedy to enforce that right, is a hollow one,” Justice McDonald encouraged the Court to invoke its supervisory powers to direct the trial courts, at the outset of a sentencing hearing or any judicial proceeding concerning the acceptance of a plea pursuant to a plea agreement, to undertake procedures he prescribed to specifically elicit information from the state regarding steps undertaken to protect the victim’s rights. Id. at 537-39 (McDonald, J., concurring).

Although a majority of the Court declined to exercise its supervisory powers to implement the proffered procedures, Justice McDonald’s concurring opinion in Skipwith stands as a stark reminder to prosecutors that it is they, and the trial courts, who are responsible for remaining vigilant in ensuring that the rights accorded victims are recognized and honored. As such, prosecutors must be thoroughly familiar with those rights and appreciate the integral role the prosecutor plays in protecting victims’ rights throughout the criminal process.

A detailed review of each statute giving effect to the purpose of the victim’s rights amendment is beyond the scope of this commentary. While the following provides an overview and general guidance regarding victims’ rights, it is not intended to serve as a comprehensive resource. It is incumbent upon each prosecutor to familiarize himself or herself with the pertinent statutes and practice rules in order to fully understand the obligations imposed. In addition, prosecutors would be well-advised to review the cases cited in this commentary, as well as available training materials addressing the subject.

Prosecutors should familiarize themselves with those statutes that impart mandatory victim notification requirements upon the State’s Attorney’s office. For instance, General Statutes Section 51-286d provides that, “[i]n any case in which a person has committed an offense (including any motor vehicle violation) which results in the death of another person, the State’s Attorney shall identify and notify a member of the immediate family of the victim or the next of kin of the victim, if any, of the arraignment of the person accused of the offense or violation.” C.G.S. § 51-286d. In doing so, the State’s Attorney “shall provide information on the date, time, and place of the arraignment, and shall furnish the designated family member or next of kin with the name and telephone number of a person to contact for additional information or for information on the status of the case.” Id.

Thereafter, and in all non-death related cases, pursuant to Connecticut law crime victims must take affirmative steps in order to receive notification from the prosecution of certain court proceedings. See, e.g., C.G.S §§ 51-286e (requiring victim request notice and provide current address) and 54-91c(c)(1) & (d) (requiring victim request notice and submit stamped, self-addressed postcard for purposes of notification). Other statutes, for example those addressing applications for certain diversionary programs, place the onus upon the defendant to provide notice to the victim by registered or certified mail. See, e.g., Accelerated Pretrial Rehabilitation (AR), C.G.S. § 54-56e; Supervised Diversionary Program for Veterans and Persons with Psychiatric Disabilities, C.G.S. § 54-56l; Family Violence Education Diversionary Program, C.G.S. § 46b-38c(h)(2); Alcohol Education Program (AEP), if the victim suffered a serious physical injury, C.G.S. § 54-56g.

If any victim of an offense (which by statutory definition includes the legal representative of the victim or a member of the deceased victim's immediate family) has requested notification and has provided the State's Attorney with a current address, the State's Attorney, Assistant State's Attorney, or Deputy Assistant State's Attorney in charge of the case in the judicial district wherein the offense has been committed shall notify such victim "of any judicial proceedings relating to the victim's case including: (1) the arrest of the defendant; (2) the arraignment of the defendant; (3) the release of the defendant pending judicial proceedings; and (4) proceedings in the prosecution of the defendant, including the dismissal of the charges against the defendant, the entry of a *nolle prosequi* to the charges against the defendant, the entry of a plea of guilty by the defendant, and the trial and sentencing of the defendant." C.G.S. § 51-286e.

In accordance with law, "the State's Attorney, Assistant State's Attorney, or Deputy Assistant State's Attorney in charge of the case shall notify the victim of such crime of the date, time, and place of the original sentencing hearing, or any judicial proceeding concerning the acceptance of a plea pursuant to a plea agreement, provided the victim has informed [the prosecutor] in charge of the case that the victim wishes to make or submit a statement . . . and has complied with a request from [the prosecutor] to submit a stamped, self-addressed postcard for the purpose of such notification." C.G.S. § 54-91c(c)(1).

Prosecutors should be aware of General Statutes Section 54-91c(c)(2), which imposes personal notification obligations upon the prosecution when the victim is a peace officer, providing that "[p]rior to the imposition of sentence upon a defendant originally charged with a violation of [General Statutes] Section 53a-167c for assaulting a peace officer, and prior to the acceptance of a plea pursuant to a plea agreement, the State's Attorney, Assistant State's Attorney or Deputy Assistant State's Attorney in charge of the case shall *personally notify* the peace officer who was the victim of such crime of the date, time, and place of the original sentencing hearing or any judicial proceeding concerning the acceptance of a plea pursuant to a plea agreement." (Emphasis added) C.G.S. § 54-91c(c)(2); see

Standard 2-5.3. If the prosecutor is unable to notify the peace officer victim, the prosecutor shall sign a statement attesting to his or her attempted notification. See C.G.S. § 54-91c(c)(3).

If requested by a victim, prior to the acceptance by the court of a plea of a defendant pursuant to a proposed plea agreement, the prosecutor in charge of the case shall provide such victim with the terms of any proposed plea agreement in writing. See C.G.S § 54-91c(d); see also DCJ Policy No. 521 (Victims' Rights in Plea Bargaining). Per Division policy, whenever a prosecutor provides a victim with written notice of the terms of a proposed plea agreement, the prosecutor shall ensure that a copy of the communication is scanned for inclusion within the Division's electronic case management system, eProsecutor.

If the terms of the plea agreement provide for a total effective sentence of more than two years' imprisonment, the prosecutor in charge of the case must comply with the four enumerated requirements of subsection (d) of the statute, namely indicating to the victim: (1) the maximum period of imprisonment that may apply to the defendant; (2) whether the defendant may be eligible to earn risk reduction credits pursuant to General Statutes Section 18-98e; (3) whether the defendant may be eligible to apply for release on parole pursuant to General Statutes Section 54-125a; and (4) whether the defendant may be eligible for automatic erasure of such defendant's criminal conviction pursuant to subsection (e) of General Statutes Section 54-142a. See C.G.S § 54-91c(d).

In order to effectively comply with the above statutory requirement, prosecutors shall familiarize themselves with the parameters of the Risk Reduction Earned Credit (RREC) Program, which allows eligible inmates to earn up to 5 days a month off their sentence. See C.G.S § 18-98e. For purposes of General Statutes Section 54-91c(d), any defendant entering into a proposed plea agreement with the State will be eligible to earn risk reduction credits unless the crime(s) encompassed by the plea are specifically excepted by General Statutes Section 18-98e. In addition to familiarity with the RREC Program, prosecutors should know those crimes that are not eligible for parole pursuant to General Statutes Section 54-125a, as well as those crimes that are not eligible for automatic erasure from a defendant's criminal history pursuant to subsection (e) of General Statutes Section 54-142a (the "erasure statute"). See DCJ Policy No. 521 (Victims' Rights in Plea Bargaining) (providing list identifying those crimes statutorily ineligible for RREC and parole, as well as those criminal offenses not eligible for erasure).

General Statutes Section 54-91c(b) provides that, "[p]rior to the imposition of sentence upon any defendant who has been found guilty of any crime or has pleaded guilty or nolo contendere to any crime, and prior to the acceptance by the court of a plea of guilty or nolo contendere made pursuant to a plea agreement with the state wherein the defendant pleads to a lesser offense than the offense with which such defendant was originally charged, the court shall permit any victim

of the crime to appear before the court for the purpose of making a statement for the record, which statement may include the victim's opinion of any plea agreement." C.G.S. § 54-91c(b); see also §§ C.G.S 54-76q (victim maintains same right to provide oral or written statement in youthful offender proceeding pursuant to C.G.S. §§ 54-76b through 54-76n) and 46b-138b (juvenile proceedings). It is important to note that, although victims are constitutionally and statutorily afforded the opportunity to voice their approval or displeasure before the court concerning any plea agreement, victims do not possess veto power over plea agreements or dispositions. See State v. Skipwith, supra, 326 Conn. at 527, n.19 (citing remarks of Representative Michael P. Lawlor ("[i]t is certainly not the intent [of the proposed amendment] to provide a veto power to a victim of a crime"))).

Rather than appear in person, "the victim may submit a written statement or, if the victim of the crime is deceased, the legal representative or a member of the immediate family of such deceased victim may submit a statement of such deceased victim to the State's Attorney, Assistant State's Attorney or Deputy Assistant State's Attorney in charge of the case." C.G.S. § 54-91c(b). "Such State's Attorney, Assistant State's Attorney or Deputy Assistant State's Attorney shall file the statement with the sentencing court and the statement shall be made a part of the record at the sentencing hearing. Any such statement, whether oral or written, shall relate to the facts of the case, the appropriateness of any penalty and the extent of any injuries, financial losses and loss of earnings directly resulting from the crime for which the defendant is being sentenced." Id.

General Statutes Section 54-91c(b) further provides that "[t]he court shall inquire on the record whether any victim is present for the purpose of making an oral statement or has submitted a written statement. If no victim is present and no such written statement has been submitted, the court shall inquire on the record whether an attempt has been made to notify any such victim . . . ." C.G.S. § 54-91c(b). In order to ensure a complete and proper record of their efforts toward compliance with these statutory obligations, prosecutors should be prepared at the outset of a sentencing hearing, or any judicial proceeding concerning the acceptance of a plea pursuant to a plea agreement, in which the victim is not present or has not submitted a written statement, to apprise the trial court of the measures taken by the State to notify the victim. If the prosecutor is unable to notify the victim, the prosecutor shall sign a statement as to such notification. See C.G.S. § 54-91c(c)(3).

Be aware that a victim's rights to notice and an opportunity to be heard extend beyond sentencing. See, e.g., C.G.S § 51-196(c) (victim's right to attend and make statement for record at any sentence review hearing); § 53a-39(d) (same rights at sentence modification hearing); § 54-126a (same rights at any hearing before the Board of Pardons and Paroles). Pursuant to General Statutes Section 54-227(a), any inmate making application for release to the Board of Pardons and Paroles, applying for sentence modification pursuant to Section 53a-39, or applying for sentence review pursuant to Section 51-195, must notify the Office of Victim

Services and the Victim Services Unit within the Department of Correction of such application on a form prescribed by the Office of the Chief Court Administrator — no such application may be accepted unless the applicant provides proof of such notice as part of the application. See C.G.S. § 54-227(a). In turn, the Office of Victim Services and the Victim Services Unit within the Department of Correction are required by law to notify by mail all persons who have requested to be notified of any such prisoner applications. See C.G.S. §§ 54-230 and 54-230a.

No matter who is statutorily responsible for notifying victims of crime, prosecutors should take care to ensure that victims have been properly informed of any post-judgment proceedings so that they may exercise their right to be heard should they so choose. Prosecutors handling habeas corpus matters should be acutely aware that there is no statutory provision requiring the petitioner to alert a victim of crime to the filing of a habeas corpus petition. Because post-judgment actions are often initiated years after the conviction, prosecutors handling post-judgment petitions and applications should work closely with the trial prosecutor and victim's advocate in the jurisdiction where the conviction originated to ensure that victims are aware of the pendency of any post-judgment proceedings.

It is important that prosecutors be familiar with General Statutes Section 54-56d(l), as the statute places the onus upon the prosecutor to provide victim notice when a defendant fails to return to a treatment facility in accordance with the terms and conditions of his or her release. C.G.S. § 54-56d(l). This particular statute is unique, in that most statutes requiring victim notice with regard to escapes or authorized releases from custody provide for such notice to be provided to the Office of Victim Services, whose responsibility it is to thereafter notify the victim. See, e.g., C.G.S. § 54-231 (Department of Correction to provide notification to Office of Victim Services of scheduled inmate release); see also Standards 2-12.5 & 2-13.6. In contrast, this statute provides that, “[i]f a defendant who has been ordered placed for treatment on an inpatient basis at a mental health facility or a facility for persons with intellectual disability is released from such facility on a furlough or for work, therapy or any other reason and fails to return to the facility according to the terms and conditions of the defendant's release, the [facility] shall, within twenty-four hours of the defendant's failure to return, report the failure *to the prosecutor* for the court which ordered the placement of the defendant.” (Emphasis added) C.G.S. § 54-56d(l). Upon receipt of such a report, *the prosecutor shall*, within available resources, make reasonable efforts to notify any victim of the crime for which the defendant is charged of such defendant's failure to return to the facility. (Emphasis added) Id.

The standards provide that prosecutors should know the services provided to victims of crime by the Judicial Branch's Office of Victim Services, whose legal obligation, among other things, is to:

- a. provide information and instruction to victims about the rights afforded them by the state constitution and how to exercise those rights;
- b. provide victims with referrals to community and state social service agencies, as needed;
- c. explain the criminal justice process to victims;
- d. serve as a liaison between the victim and the State's Attorney's office in order to provide victims with periodic updates on the status of the criminal case, to the extent practicable;
- e. provide notification to victims of scheduled court proceedings;
- f. attend court proceedings with victims and advocate for their rights when needed;
- g. assist the victim, when necessary, with preparing a victim impact statement and reading the statement in court; and
- h. assist with requests for restitution, the return of seized property held in evidence, and the coordination and filing of an application for victim compensation when eligible.

See C.G.S. § 54-203. Among its many duties, the Office of Victim Services is charged with providing a training program for judges, prosecutors, police, probation and parole personnel, and others, to inform them of victims' rights and available services. See C.G.S. § 54-203(b)(16). All prosecutors should avail themselves of this training when offered.

The Office of Victim Services also provides targeted services to victims of domestic/family violence, contracting with the Connecticut Coalition Against Domestic Violence to provide Family Violence Victim Advocates, who work in collaboration with the Family Relations Office, where the majority of domestic/family violence matters are first referred and assessed. In addition to providing the general assistance identified above, the Family Violence Victim Advocate may also assist victims of domestic violence with safety planning, orders of protection, and other services specific to domestic/family violence. The Office of Victim Services also gives funding to several other non-profit agencies to provide community victim advocates for victims of sexual assault, homicide, and drunk drivers at the Geographical Area (GA) courts, namely: The Connecticut Alliance to End Sexual Violence, Survivors of Homicide, and the Connecticut Chapter of Mothers Against Drunk Driving. Prosecutors should work cooperatively with the victim services advocates in their court to ensure that victims of crime receive all the assistance available to them.

Prosecutors should understand the distinction between the Office of Victim Services and the Office of the Victim Advocate. In 1998, responding to concerns of victim advocacy groups that passage of the victim's rights amendment had yet to result in the anticipated improved treatment of crime victims, the legislature created the Office of the Victim Advocate. State v. Gault, supra, 304 Conn. at 343; see C.G.S. § 46a-13b. The Office of the Victim Advocate, within the Office of

Governmental Accountability, is an independent state agency, charged with the responsibility of promoting, protecting and enforcing the state constitutional and statutory rights of crime victims throughout the state. See C.G.S. § 46a-13c. The Office of the Victim Advocate provides oversight of state and private agencies, and advocacy to crime victims when a violation of their rights is at issue. Id. Among other things, the Office of the Victim Advocate has the statutory responsibility to monitor the provision of services provided to victims of crime; receive and investigate complaints, where necessary, regarding their treatment within the criminal justice system; advocate for legislative and/or policy improvements for the betterment of victims; and conduct programs of public education and outreach regarding the services available to crime victims in the state. Id. Moreover, prosecutors should be aware that, pursuant to General Statutes Section 46a-13c(5), the Victim Advocate may file a limited special appearance in any court proceeding for the purpose of advocating for any right guaranteed to a crime victim by the Constitution of the state or any right provided to a crime victim by any provision of the general statutes. See C.G.S. § 46a-13c(5).

Prosecutors should be familiar with the Criminal Injuries Compensation Fund operated by the Office of Victim Services. See C.G.S. §§ 54-201 through 54-218, inclusive. The fund is available to qualifying victims of crime for reimbursement of certain expenses related to the crime. Examples of qualifying expenses include: medical/dental expenses not covered by insurance or other collateral source; counseling services; loss of support in cases of homicide; lost wages resulting from physical injury or death; assistance with funeral/burial expenses; and assistance with the costs of crime scene clean-up. See C.G.S. §§ 54-210 & 54-211. The victim compensation program does not include reimbursement for property loss or damage. Id. Prosecutors may access the website maintained by the Office of Victim Services for further information regarding the compensation program at: [www.jud.ct.gov/crimevictim](http://www.jud.ct.gov/crimevictim).

Pursuant to General Statutes Sections 54-82s through 54-82u, inclusive, the Chief State's Attorney's Office maintains a witness protection program, named after the late Leroy Brown, Jr., and Karen Clarke. This program provides for the protection of witnesses/victims testifying in serious felony cases where there is evidence of substantial danger that the witness/victim may suffer from intimidation or retaliatory violence. The witness protection program services may include: moving a witness/victim and immediate family members to temporary or semi-permanent housing within or outside of Connecticut; providing basic living expenses; and coordinating police protection. In any investigation or prosecution of a serious felony offense, the State's Attorney for the Judicial District may identify any witness/victim as a witness at risk of harm and certify such witness/victim into the Witness Protection Program.

Lastly, prosecutors should know that victims of crime are statutorily entitled to a free copy of any transcript produced in their perpetrator's criminal case. The law provides that "[w]henver a transcript of a criminal proceeding is prepared, the

prosecuting official shall provide a copy of such transcript to any victim of the crime without charge upon request of such victim.” C.G.S. § 51-286g.

## **10. Witnesses**

### **2-10.1 General Interactions and Communications**

As used in this standard, “witness” means any person who has or might have information about a matter, including victims. Prosecutors should know and abide by all laws and ethics rules regarding witnesses, including those addressing the use of deceit in communicating with witnesses, and engaging in communications with represented and unrepresented persons.

The prosecutor or the prosecutor’s agents should seek to interview all witnesses in a criminal matter. In doing so, the prosecutor or his or her agents shall not misrepresent their status, identity, or interests when communicating with a witness and shall not act to intimidate or unduly influence any witness. The prosecutor shall not use means that have no substantial purpose other than to embarrass, delay, or burden, nor shall the prosecutor use methods of obtaining evidence that violate legal rights.

Throughout the course of any investigation and subsequent prosecution, prosecutors should strive to maintain a cordial and courteous professional relationship with witnesses, and should not engage in any inappropriate personal relationship with any witness.

### **2-10.2 Dealing with Represented Witnesses**

When the 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.

### **2-10.3 Scheduling and Notification**

The prosecutor should keep witnesses informed of all pre-trial hearings which the witnesses may be required to attend, as well as expected trial dates. To the extent practicable, the prosecutor should give witnesses reasonable advance notice of when their testimony at a proceeding is expected, and should not require witnesses to attend judicial proceedings unless their testimony is reasonably expected at that time, or their presence is required by law.

When a witness’s attendance is required, the prosecutor should seek to reduce to a minimum the time the witness must spend waiting at the proceedings. The prosecutor should ensure that witnesses are given notice as soon as practicable



of scheduling changes which will affect their required attendance at judicial proceedings.

#### **2-10.4 Avoiding the Prosecutor as Witness Scenario**

A prosecutor should avoid the prospect of having to testify personally about the content of any witness interview. The prosecutor's interview of most routine or government witnesses (for example, custodians of records or law enforcement agents) should not require a third-party observer. However, when the need for corroboration of an interview is reasonably anticipated, the prosecutor should be accompanied by, for example, an inspector, investigator, victim's advocate, or police officer during the interview. Moreover, the prosecutor should avoid being alone with any witness who the prosecutor reasonably believes has potential or actual criminal liability, or those foreseeably hostile witnesses.

#### **2-10.5 Advising Witnesses of Their Rights**

The prosecutor should advise a witness who is to be interviewed of his or her 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 the witness may provide self-incriminating information and the witness appears not to know his or her rights. However, a prosecutor should not so advise, or 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.

#### **2-10.6 Witness Interviewing and Preparation**

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

#### **2-10.7 Proper Use of Subpoena Power**

A prosecutor may not compel a witness to attend an interview or trial preparation session through the use of a subpoena. If the prosecutor anticipates the need for a witness's testimony at a court proceeding or legally authorized deposition, the witness's appearance may properly be compelled by the issuance of a subpoena or, in the event documentary evidence is required, a subpoena duces tecum.

Notwithstanding the preceding, the Inspector General may, consistent with Standard 1-4.5 and governing law, issue subpoenas concerning any statutorily authorized investigation undertaken by his or her office.

### **2-10.8 Addressing Witness Contact by Defense Counsel**

The prosecutor should not discourage or obstruct communication between witnesses and the defense counsel. The prosecutor shall not advise any witness (including victims) to decline to meet with the defense.

The prosecutor should not advise any person, or cause any person to be advised, to decline to provide defense counsel with information which such person has a right to give. The prosecutor may, however, advise a witness that they are not required to provide information to the defense outside of court and the prosecutor may also fairly and accurately inform a witness of the implications and possible consequences of providing information to the defense, but only if done in a manner that does not discourage communication.

### **2-10.9 Cooperating Witnesses**

As used in this standard, a “cooperating witness” is a person who: (1) provides information to a law enforcement agency regarding the commission of a crime, or concerning a person suspected of, or charged with, committing a crime; and (2) agrees to testify for the State in the trial of a criminal matter; and (3) might reasonably expect to obtain, or has sought, been offered, or obtained, a benefit from the State in exchange for his or her testimony.

A prosecutor should know and abide by written Division of Criminal Justice policies regarding the use of cooperating witnesses. The Prosecutor should be familiar with how a “benefit” is defined by policy, and who, by virtue of his or her involvement with the criminal justice system, is identified as a person who “might reasonably expect to obtain a benefit from the State in exchange for his or her testimony.”

In compliance with Division policy, any cooperation agreement, or understanding, between the State and a cooperating witness shall be reduced to writing and signed by the witness. Any such written agreement shall promptly be disclosed to the defense, consistent with Standard 4-8.1. In the event an agreement or understanding is reached and a cooperating witness declines to execute an agreement in writing, the negotiating prosecutor shall prepare and sign a memorandum which accurately reflects the entirety of the agreement between the cooperating witness and the State, which shall promptly be disclosed to the defense. The prosecutor should seek to make the memorandum or its contents part of the trial record.

Consistent with Standard 3-5.2, no prosecutor shall provide a cooperating witness with immunity from prosecution for providing perjured testimony, or for providing testimony or engaging in conduct in connection with his or her cooperation that hinders or obstructs the administration of justice. A prosecutor shall strictly comply with the terms of any cooperation agreement entered and, in exchange for the witness's cooperation in the case or cases specified therein, shall not provide any additional consideration or benefit to said witness.

The prosecutor trying the case shall ensure that any testimony that is given by the cooperating witness concerning the cooperation agreement is true, accurate, and not misleading. False, inaccurate, or misleading testimony may be corrected with the use of leading questions, as permitted by the trial court.

### **2-10.10 Jailhouse Witnesses**

A prosecutor should be familiar with the special statutory considerations, including tracking and reporting, associated with the use of those cooperating witnesses legislatively identified by the nomenclature "jailhouse witness." As used in the General Statutes and this standard, "jailhouse witness" means a person who (1) offers or provides testimony concerning statements made to such person by another person with whom he or she was incarcerated, or (2) an incarcerated person who offers or provides testimony concerning statements made to such person by another person who is suspected of or charged with committing a criminal offense.

The prosecutor should evaluate evidence provided by a jailhouse informant to ensure the information provided is truthful. In doing so, the prosecutor should consider factors such as the history of the informant, the motive of the informant, the source of the information, and whether there is independent corroborating evidence.

In addition to abiding by Division policy relating to cooperating witnesses generally, a prosecutor shall comply with all statutory requirements particular to the use of jailhouse witnesses at trial, including those relating to disclosure, tracking, and reporting. The prosecutor should seek appropriate limits upon further disclosure of such information by defense counsel, and pursue protective orders pursuant to statute when necessary and appropriate to protect such witnesses from physical harm.

### **2-10.11 Expert Witnesses**

An expert may be engaged for consultation only, or to prepare an evidentiary report or testimony. The prosecutor should know and abide by all relevant rules governing expert witnesses.

When a prosecutor determines that the testimony of an expert witness is necessary, and engages such expert to provide a testimonial opinion, the independence of the expert should be respected and the prosecutor should not seek to dictate the substance of the expert's opinion on the relevant subject. Nonetheless, a prosecutor should evaluate all expert advice, opinions, or testimony independently, and not simply accept the opinion of a government or other expert based on employer, affiliation, or prominence alone.

Before retaining the services of a paid expert witness, a prosecutor should consult with a supervisor to obtain all necessary approvals. When warranted by the complexities of a particular case, approval for the retention of an expert witness should not be unreasonably withheld.

If it is determined that a fee be paid to an expert witness, the fee should be reasonable and should not depend upon a contingency related to the outcome of the case. The prosecutor should not pay or withhold any fee or provide or withhold a benefit for the purpose of influencing the substance of an expert's testimony. Nor should the prosecutor promise or imply the prospect of future work for the expert based on the expert's testimony.

Before engaging an expert, the prosecutor should investigate the expert's credentials, relevant professional experience, and reputation in the field. The prosecutor should also examine a testifying expert's background and credentials for potential impeachment issues.

If an expert is retained, the prosecutor should provide the expert with all information reasonably necessary to support a full and fair opinion. The prosecutor should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. The prosecutor should be aware of expert discovery rules and act to protect confidentiality and the public interest, for example by not sharing with the expert confidences and work product that the prosecutor does not want disclosed.

Before offering an expert as a witness, the prosecutor should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify. The prosecutor should seek to learn enough about the substantive area of the expert's expertise, including ethical rules that may be applicable in the expert's field, to enable effective preparation of the expert, as well as effective cross-examination of any defense expert on the same topic. The prosecutor should explain to the expert that the expert's role in the proceeding will be as an impartial witness called to aid the fact-finders, explain the manner in which the examination of the expert is likely to be conducted, and suggest likely impeachment questions the expert may be asked.

Consistent with Standard 4-8.1, et seq., and his or her constitutional and statutory obligations, the prosecutor should timely disclose to the defense all evidence or information learned from an expert that tends to negate the guilt of the accused or mitigate the offense, even if the prosecutor does not intend to call the expert as a witness.

### **2-10.12 Child Witnesses**

Prosecutors handling the prosecution of cases involving the assault, sexual assault, or abuse of a minor child should be familiar with statutes and caselaw permitting accommodations to provide comfort and support to child witnesses in order to ensure reliable testimony. Prosecutors should be aware of evidentiary rules which permit the use of leading questions when necessary to develop the testimony of a young witness who is apprehensive or reticent.

When appropriate under the circumstances, a prosecutor should file a motion in limine seeking approval for such accommodations, up to, and including, eliciting the child victim's trial testimony outside of the presence of the defendant through the use of closed circuit television equipment in the courtroom, or a video recording for later showing before the court.

### **2-10.13 Witness Assistance**

Prosecutors should provide witnesses with a point of contact within the State's Attorney's office to respond to their inquiries, address any concerns they might have, and give them assistance as permitted by law. To the extent feasible, the State's Attorneys should develop procedures within their respective offices for providing services to witnesses of crimes including, but not limited to, the following:

- a. assisting in applying to the clerk of the Superior Court for statutory witness fees and appropriate compensation for travel as provided for by law;
- b. providing appropriate employer intervention concerning required court appearance(s);
- c. aiding in securing necessary transportation and lodging arrangements, if appropriate;
- d. minimizing the time the witness has to wait for any court appearance; and
- e. reducing overall inconvenience whenever possible and appropriate.

In accordance with their legal obligations encompassed by Standard 4-8.1, et seq., prosecutors should disclose to the defense any assistance or compensation provided to a state's witness.

## **2-10.14 Facilities**

Whenever possible, the State's Attorney should take steps to ensure that witnesses have a secure and comfortable waiting area that avoids the possibility of the witnesses making contact with defendants or the families and friends of defendants.

## **2-10.15 Witness Protection**

Prosecutors should be mindful of the possibility of intimidation and harm arising from a witness's cooperation with law enforcement. When good cause can be shown, the prosecutor should make a written request that the address of any witness whose name was disclosed by the state not be disclosed to the opposing party.

Prosecutors should be aware of the Leroy Brown, Jr., and Karen Clarke Witness Protection Program maintained by the Office of the Chief State's Attorney, which is available to protect witnesses to crime, and should make referrals and recommendations for program participation where appropriate. Prosecutors shall obtain from the program coordinator an itemization of all costs and benefits provided to program participants for purposes of disclosure to the defense.

## **2-10.16 Enforcement of Crimes Committed Against Witnesses**

The prosecutor, working with other law enforcement agencies, should assign a high priority to the investigation and prosecution of any type of witness intimidation, harassment, coercion, or retaliation, including any such conduct or threatened conduct against family members or friends.

[NDAA Nat. Pros. Stds. Standards 2-10.1 through 2-10.11, inclusive; ABA Crim. Just. Stds. Standards 3-3.4 & 3-3.5; R. Prof. Conduct Rules 3.4, 3.7, 4.2, & 4.4; C.G.S. §§ 51-286k, 52-260, 54-82s, 54-86g & 54-86o; P.B. §§ 40-11, 40-13, & 40-44; DCJ Policy Nos. 512, 512a, & 515]

### **Commentary**

Effective prosecution includes a sound understanding of the value of victims and other witnesses within the criminal justice system. The necessity of individuals reporting crimes and following through with identifications, statements, and testimony is self-evident. The standards identify obligations of the prosecutor and others to facilitate the relationship with victims and witnesses.

In any criminal matter, the prosecutor should, with the assistance of police, investigators, and/or inspectors, seek to identify and locate any and all witnesses

who might have information about the matter. In order to properly assess the strength of the state's case, and evaluate the reliability of witness accounts, the prosecutor must conduct personal interviews with witnesses. The standards provide guidance for proper conduct in such interactions. Standard 2-10.1 incorporates the language set forth in Rule 4.4 of the Rules of Professional Conduct that, in representing a client, "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." R. Prof. Conduct Rule 4.4.

In instances where a witness has retained the representation of an attorney regarding his or her role as a witness in a criminal case, Standard 2-10.2, consistent with the Rules of Professional Conduct, provides that all contact with the witness be had through the witness's attorney. Specifically, Rule 4.2 states, in relevant part, ". . . a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." R. Prof. Conduct Rule 4.2. Be aware that, although Rule 4.2 utilizes the word "party," the commentary to the rule indicates that "[the] Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." R. Prof. Conduct Rule 4.2, commentary. Remain mindful that it is also impermissible under both Rules 5.3 and 8.4 for a prosecutor to direct an investigator or inspector to interview a witness whom the prosecutor knows to be represented by counsel without the lawyer's consent. See R. Prof. Conduct Rules 5.3 (responsibilities regarding nonlawyer assistance — lawyer may not order or ratify conduct not compatible with professional obligations of lawyer) and 8.4 (misconduct for lawyer to violate the rules of professional conduct "through the acts of another"); see also Standard 2-7.1, commentary, supra.

Both victims and witnesses need notice of developments in criminal cases. Witnesses need to make arrangements in order to be available to testify, while victims may be more concerned with release decisions in apprehension of their personal safety and the safety of their families. The prosecution should not assume that victims or witnesses are familiar with the terminology, procedures, or even location of the courts. At a minimum, prosecutors should be sensitive to this and provide a point of contact, such as an investigator or inspector, to assist witnesses in their interactions with the State's Attorney's Office.

The Rules of Professional Conduct provide that a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness. See R. Prof. Conduct Rule 3.7(a). Standard 2-10.4 cautions prosecutors to avoid interactions with witnesses which may inadvertently expose them to becoming a necessary witness in the case, thereby requiring their recusal from any further

involvement. The standard advises the presence of a third party during any interview where there is the possibility of, for example, a witness changing his or her story later, a witness completely recanting an earlier statement, or a witness providing self-incriminating remarks. Without the presence of a third party, such as an inspector, the prosecutor risks becoming a necessary witness in the case, even if just for impeachment purposes. Moreover, the presence of a third party will aid in overcoming any attempt by the defense to call the prosecutor as a witness in the case, as the defendant has the burden of proof to “demonstrate a compelling need before a participating prosecutor will be permitted to testify . . . [and therefor, t]he defendant who wants to call [the] prosecutor as a witness must demonstrate that the testimony is necessary and not merely relevant, and [the defendant] must show that he has exhausted other available sources of comparably probative evidence.” State v. Thompson, 20 Conn. App. 290, 296-297 (1989); Ullmann v. State, 230 Conn. 698, 716-717 (1994).

Standard 2-10.6 incorporates Rule 3.4(2), which provides that it is professional misconduct for a lawyer to “counsel or assist a witness to testify falsely.” See R. Prof. Conduct Rule 3.4(2).

The law provides specifically that a prosecutor may issue subpoenas for witnesses to be sworn before the court in criminal cases. See C.G.S. § 51-286a(b); see also C.G.S. § 54-47f(b) (issuance of subpoena in grand jury proceedings). Additionally, as a Commissioner of the Superior Court, a prosecutor maintains the ability, like any attorney, to issue subpoenas to witnesses for any lawful purpose. See C.G.S. § 52-143. For example, witnesses may be subpoenaed to attend depositions related to habeas corpus proceedings, or to appear at habeas corpus evidentiary hearings. The standards stress, however, that apart from the narrowly crafted exception of the subpoena powers granted to the Inspector General, Connecticut law does not provide for the issuance of investigative subpoenas. See Standard 1-4.5, see also C.G.S. § 51-277e(d). Therefore, witnesses may not be compelled by subpoena to appear at the State’s Attorney’s office, a police department, or anywhere else, for the purpose of conducting an interview or preparing the witness for anticipated trial testimony. Nor may a witness be served with a subpoena duces tecum directing them to provide documents directly to the prosecution.

Standard 2-10.8 incorporates the principles set forth in Rule 3.4 that a lawyer shall not “request a person . . . to refrain from voluntarily giving relevant information to another party . . .,” nor shall he or she, “[u]nlawfully obstruct another party’s access to evidence . . .” See R. Prof. Conduct Rules 3.4(1) and (6).

The standard recognizes that prosecutors have additional legal obligations imposed by statute and caselaw with regard to certain witnesses, namely cooperating witnesses and jailhouse informants. Division of Criminal Justice policy defines a “cooperating witness” as a person who: (1) provides information to a law



enforcement agency regarding the commission of a crime, or concerning a person suspected of, or charged with, committing a crime; and (2) agrees to testify for the State in the trial of a criminal matter; and (3) might reasonably expect to obtain, or has sought, been offered or obtained, a benefit from the State in exchange for his or her testimony. Any person who, at the time that he or she offers or provides information or testimony, is charged with a criminal offense; has pled guilty to, or been convicted of, a criminal offense, and is awaiting sentencing; or is serving a sentence as a result of a criminal conviction, shall be considered a person who “might reasonably expect to obtain a benefit from the State in exchange for his or her testimony.” A “benefit” is any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, immunity, financial payment, reward, or amelioration of current or future conditions of incarceration offered or provided in connection with, or in exchange for, testimony that is offered or provided. See DCJ Policy No. 515 (Cooperating Witnesses) (providing detailed instructions regarding obligations related to the use of cooperating witnesses); Gomez v. Commissioner of Correction, 336 Conn. 168, 185-86 (2020) (prosecutor has duty to correct material, false or misleading testimony regarding cooperation agreement even if agreement at issue has been disclosed to defense counsel); see also Standard 4-8.1, et seq. (Discovery) and DCJ Policy No. 512a (Policy Regarding Disclosure of Exculpatory and Impeachment Evidence).

General Statutes Section 54-86o sets forth disclosure requirements relating to “jailhouse witnesses,” which the statute defines as “a person who offers or provides testimony concerning statements made to such person by another person with whom he or she was incarcerated, or an incarcerated person who offers or provides testimony concerning statements made to such person by another person who is suspected of or charged with committing a criminal offense.” C.G.S. § 54-86o(d). This definition does not include someone who is testifying about observed events. State v. Bruny, 342 Conn. 169, 205 (2022).

The “jailhouse witness statute” requires that, upon written request from the defendant, a prosecutor confirm whether he or she will be relying on the testimony of a jailhouse witness, and if so, make disclosures relating to such witness within forty-five days of the request. See C.G.S. § 54-86o(a)(1)-(5) (listing information and materials which must be disclosed). Thus, like many of the disclosure requirements in the Practice Book (see Standard 4-8.1, et seq., commentary, infra), the disclosure requirements in Section 54-86o are contingent upon a written request by the defendant. Nevertheless, in cases where the state intends to rely on the testimony of a jailhouse witness, the prosecutor should ensure compliance with the requirements of Section 54-86o(a) even in the absence of a request from the defense.

To ensure proper compliance with the statute, prosecutors shall consult and provide timely updates to the jailhouse witness tracking database: <https://www.appsvcs.opm.ct.gov/WitnessTracking/Login/Index>. See C.G.S. § 51-

286 (re tracking use of testimony by jailhouse witnesses); see also DCJ Policy No. 512a (Policy Regarding Disclosure of Exculpatory and Impeachment Evidence).

Subsection (c) of the statute provides the court with authority to limit the disclosure of information relating to jailhouse witnesses to defense counsel only and restrict the defendant or others from viewing the information if the court finds that disclosure “may result in the possibility of bodily harm to the jailhouse witness.” C.G.S. § 54-86o(c). Prosecutors should seek protective orders pursuant to these provisions when necessary and appropriate.

Prosecutors should also be familiar with Section 54-86p, which permits the defendant, in certain cases, to file a pre-trial motion for an evidentiary hearing for the purpose of having the trial court determine whether the prosecutor can make a prima facie showing that any jailhouse witness’s testimony is reliable and, therefore, admissible. See C.G.S. § 54-86p. In making this determination, the court may consider the following factors: (1) The extent to which the jailhouse witness's testimony is confirmed by other evidence; (2) The specificity of the testimony; (3) The extent to which the testimony contains details known only by the perpetrator of the alleged offense; (4) The extent to which the details of the testimony could be obtained from a source other than the defendant; and (5) The circumstances under which the jailhouse witness initially provided information supporting such testimony to [law enforcement agents or prosecutors], including whether the jailhouse witness was responding to a leading question. Id.

The Connecticut Code of Evidence provides that “a witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue.” C.C.E. § 7-2. The Connecticut Supreme Court has explained that “[g]enerally, expert testimony is admissible if (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues.” (Internal quotation marks omitted.) State v. Leniart, 333 Conn. 88, 142 (2019), quoting State v. Taylor G., 315 Conn. 734, 760 (2015); see generally, E. Prescott, Tait’s Handbook of Connecticut Evidence (6th Ed. 2019) § 7.3, et seq., *Expert Witnesses*.

A prosecutor’s use of expert witnesses is obviously a matter of trial strategy, determined on a case-by-case basis and dependent upon the issues presented. Depending upon the charge, expert testimony may be required in a case in order for the state to meet its burden of proof. For example, the case may require the testimony of a toxicologist in order to prove that what the defendant possessed was, in fact, heroin. See, e.g., State v. Johnson, 26 Conn. App. 553, 555-57, cert. denied, 222 Conn. 905 (1992). Other cases, while not requiring expert testimony to prove an element of the crime, may nonetheless benefit from such testimony.

This might be the case, for instance, where expert testimony regarding historical cellular site location information provides evidence regarding communications between a defendant and other accused parties, as well as their whereabouts and movements, in relation to the time and location of the subject crime. See, e.g., State v. Patel, 194 Conn. App. 245, 283-95 (2019), affirmed, 342 Conn. 445 (2022). Some cases may require no expert testimony at all. The standards provide guidance for the exercise of discretion in making the determination whether to consult an expert, in retaining an expert, and in offering an expert as a witness at trial.

Prosecutors should remain mindful that the Appellate Bureau maintains an Expert Witness Bank which can be accessed for copies of transcripts of previous testimonies provided by expert witnesses. This is a tremendous resource for those considering retaining an expert or preparing for direct or cross examinations.

Practice Book § 40-11(a)(3), provides that, upon written request by a defendant, the state shall disclose any “reports or statements of experts made in connection with the offense charged including results of . . . scientific tests, experiments or comparisons which are material to the preparation of the defense or are intended for use by the prosecuting authority as evidence in chief at the trial . . .” The state has a continuing duty to disclose such documents, and, if there is a failure to comply with disclosure, the trial court must take appropriate action, including the imposition of an appropriate sanction. State v. Jackson, 334 Conn. 793, 810 (2020), citing State v. Festo, 181 Conn. 254, 265 (1980); see also Practice Book §§ 40-3 and 40-5.

For prosecutors, presenting the testimony of child victims is a difficult, but sometimes unavoidable, aspect of pursuing particular crimes, like sexual assault or abuse of a minor, through trial. Standard 2-10.12 encourages prosecutors to be aware of appropriate procedures available to minimize the emotional effects upon the child witness which may arise from facing their abuser when testifying at trial, while simultaneously protecting the defendant’s right of confrontation.

Special provisions apply to the examination of a victim of child abuse who is age 12 or younger. On the motion of any party to a criminal case, the court may order that the testimony of the child be taken in a room other than the courtroom. The testimony is taken under the supervision of the trial judge and is to be televised by closed-circuit equipment [or recorded for later showing before the court]. The only persons to be present are the judge, attorneys for prosecution and defense, equipment personnel, and any person “who would contribute to the welfare and well-being of the child.” The court must ensure that the child will not see or hear the defendant. The defendant may observe and hear the child’s testimony on television and may consult with his or her attorney.

(Quotation marks in original) E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 6.17.2(a) *Victims of Child Abuse*, citing C.G.S. § 54-86g.

In State v. Jarzbek, 204 Conn. 683, 704-705 (1987), cert. denied, 484 U.S. 106 (1988), the Connecticut Supreme Court held that in criminal prosecutions involving alleged sexual abuse of children of tender years, in order to satisfy a defendant's right to confrontation, "a trial court must determine, at an evidentiary hearing, whether the state has demonstrated a compelling need for excluding the defendant from the witness room during the videotaping of a minor victim's testimony." Id. at 704. The state's burden is to show the compelling need by clear and convincing evidence. Id. "In determining whether the state has met its burden, the trial court balances . . . the defendant's sixth amendment right of confrontation with the state's interest in obtaining reliable testimony. To demonstrate a compelling need, the state must show that the trustworthiness of the testimony of the child complainant seriously would be called into question because he or she would be so intimidated, or otherwise inhibited, by the physical presence of the defendant." (Citations omitted) Ruiz v. Comm'r of Correction, 195 Conn. App. 847, 849 (2020).

Prosecutors should file motions in limine pursuant to General Statutes Section 54-86g and State v. Jarzbek, supra, seeking to elicit the child victim's trial testimony outside of the presence of the defendant through the use of a video recording or closed-circuit television whenever warranted.

If the child is to testify in the courtroom, the state may move that the following statutorily suggested procedures be used when the testimony of the child is taken: (1) persons shall be prohibited from entering and leaving the courtroom during the child's testimony; (2) an adult who is known to the child and with whom the child feels comfortable shall be permitted to sit in close proximity to the child during the child's testimony, provided such person shall not obscure the child from the view of the defendant or the trier of fact; (3) the use of anatomically correct dolls by the child shall be permitted; and (4) the attorneys for the defendant and for the state shall question the child while seated at a table positioned in front of the child, shall remain seated while posing objections and shall ask questions and pose objections in a manner which is not intimidating to the child. See C.G.S. § 54-86g(b). The motion in limine may also be used to seek other reasonable accommodations that are within the discretion of the trial court to provide for the comfort and support of children witnesses if it will permit the witness to testify truthfully, completely, and reliably. See, e.g., State v. Aponte, 249 Conn. 735, 744-45 (1999) (trial court may exercise its discretion to permit child witness to testify with special doll or comfort object from home); State v. McPhee, 58 Conn. App. 501, 506-08 (trial court did not abuse its discretion in permitting child witness to hold stuffed animal while testifying), cert. denied, 254 Conn. 920 (2000); State v. Devon D., 321 Conn. 656,

686 (2016) (trial court may exercise its discretion to permit a dog to provide comfort and support to testifying witness).

Moreover, in presenting the testimony of child witnesses, prosecutors should be familiar with Connecticut Code of Evidence Section 6-8(b)(3), which provides, in relevant part, that “[l]eading questions shall not be used on the direct or redirect examination of a witness, *except* that the court may permit leading questions, in its discretion, in circumstances such as . . . *when necessary to develop a witness’ testimony*[.]” (Emphasis added) C.C.E. § 6-8(b)(3). The commentary to this Code section provides:

Under exception (3), the court may allow the calling party to put leading questions to a young witness who is apprehensive or reticent; *e.g.*, State v. Salamon, 287 Conn. 509, 559-60, 949 A.2d 1092 (2008) (nervous minor victim of assault who needed repeated reassurances from court); State v. Hydock, 51 Conn. App. 753, 765, 725 A.2d 379 (minor victim who “evinced fear and hesitancy to testify”), cert. denied, 248 Conn. 921, 733 A.2d 846 (1999); State v. Parsons, 28 Conn. App. 91, 104, 612 A.2d 73 (minor victims of sexual assault who had been “hesitant to testify, and had difficulty testifying in open court”), cert. denied, 223 Conn. 920, 614 A.2d 829 (1992).

C.C.E. § 6-8(b)(3), commentary.

State’s Attorneys should develop office procedures, and identify points of contact within the office, for providing appropriate assistance to witnesses. The standard suggests the type of assistance that should be available, such as employer intervention and reduction in inconvenience. In addition to a program of assistance, the standard calls for appropriate facilities for victims and witnesses. They should avoid the possibility of contact with the defendant or his or her friends and family.

The standard recognizes that victims and other witnesses are, at times, vulnerable to threats, harassment, intimidation, or other attempts to influence their anticipated testimony. Such actions by defendants, and/or their associates, and similar offenses against the administration of justice, adversely affect the very integrity of the judicial system. Prosecutors should be familiar with, and stridently enforce, statutes designed to curb such affronts to the rule of law. *See, e.g.*, C.G.S. §§ 53a-149 (Bribery of a Witness); 53a-153 (Bribe Receiving by a Witness); 53a-151 (Tampering with a Witness); & 53a-151a (Intimidating a Witness); *see also* C.G.S. §§ 54-82q (Temporary Restraining Order Prohibiting Harassment of Witness) & 54-82r (Protective Order Prohibiting Harassment of Witness).

As central a figure as the prosecutor is to relations with victims and witnesses, he or she is certainly not the sole source to accommodate the needs of victims and witnesses. These needs should be a cooperative effort. For example, one of the greatest needs of victims and witnesses is the assurance of their safety. Their protection is primarily a law enforcement function. While the prosecutor should work with the police to minimize this, it is essentially a cooperative effort. When witnesses are subjected to credible threats of harm, a prosecutor should consult with his or her supervisor regarding the potential of placing the witness and family members into the Witness Protection Program maintained by the Office of the Chief State's Attorney. See C.G.S. § 54-82s, et seq.; see also Standard 2-9.7, and commentary, supra.

## **11. Community-Based Programs**

### **2-11.1 Knowledge of Programs**

Prosecutors should be cognizant of, and familiar with, all community-based programs to which offenders may be sentenced, referred as a condition of probation or parole, or referred as part of a prosecutor led or court based pre-trial diversionary disposition such as identified in Standard 4-3.1, et seq.

The Division of Criminal Justice should be available as a source of public information for such community-based agencies.

### **2-11.2 Review of Programs**

Where community agencies provide services such as employment, education, housing assistance, reentry programs, mental health treatment, family counseling, anger management counseling, and/or substance abuse treatment and counseling as part of a sentence, referral as a condition of probation or parole, and/or referral as part of a prosecutorial or court sanctioned diversionary program, the State's Attorney's office should, to the extent practicable, take steps to monitor outcomes or success rates in order to evaluate the effectiveness of such programs. Such independent program review is an essential component to establishing that the goals and objectives of providing enhanced community services to those having contact with the criminal justice system are being met and ensuring that the services provided are adequately fulfilling both the needs of those so referred and the criminal justice system overall.

In the event the State's Attorney's office determines that the services provided by such community agencies, particularly those administering community based programs as part of a prosecutorial or court sanctioned diversionary program, are deficient in any manner, or are failing to fulfill the goals and objectives of such diversion, the State's Attorney should share this determination with other

stakeholders, including the Judicial Department, and should, where appropriate, advocate for program improvement, alternative programming, or different program providers altogether.

[NDAA Nat. Pros. Stds. Standards 2-11.1 & 2-11.2; ABA Crim. Just. Standard 3-4.4(f); C.G.S. §§ 51-286i, 46b-38c(h)(2), 54-56e, 54-56g & 54-56l; P.B. § 39-33]

### **Commentary**

As indicated by Standard 4-3.1, infra, and the commentary thereto, it is recognized that diversion from the criminal justice system to community-based programs represents a viable alternative for less-serious offenders. For those convicted of low-level offenses, the sentencing court may view mandatory participation in such a program as an appropriate disposition of the charges. In addition, the concept of supplementing incarceration upon release with community-based services has greatly advanced in recent years.

The responsibilities placed upon community-based agencies mandates an increasing need for coordination and communication with the State's Attorney's office. At the most basic level, the prosecutor must be cognizant of all community services which offenders in the jurisdiction may be sentenced to, referred to as a condition of probation, or referred to as part of a diversionary program. The State's Attorney's office should be available as a resource to these service providers, as the prosecutor is often in the best position to supply these agencies with information concerning clients whom the prosecutor has had contact with.

Standard 2-3.3, supra, and commentary, discuss the importance of the prosecutor's interaction with community engagement boards. As noted, they serve as important cornerstones for the identification of the need for services in a jurisdiction, as well as an opportunity for the pooling of resources to meet those needs. The establishment of viable diversionary and citizen volunteer programs are examples of the input the State's Attorney's office may have. In addition, representatives of the Division of Criminal Justice should be active in local, regional, and statewide planning boards with an emphasis on identifying and/or developing appropriate programs. The State's Attorney's involvement in such planning and advisory boards is important because of his or her position as the chief local law enforcement official. The standards recognize the role that the State's Attorneys' offices should play in assessing whether the programs to which offenders are referred as part of a diversionary program, sentence, or condition of probation or parole, are in fact fulfilling their stated purpose. When it appears that such community-based programs are not adequately meeting the goals and objectives of the criminal justice system, the State's Attorneys should not hesitate to advocate for change.

## **12. Prisons**

### **2-12.1 Knowledge of Facilities**

Prosecutors should be cognizant of, and familiar with, all correctional facilities located within the state to which offenders prosecuted in the jurisdiction may be sentenced.

Where practicable, the Chief State's Attorney and/or State's Attorneys should attempt to ensure that all new prosecutors hired by the Division of Criminal Justice have an opportunity, as part of their initial training, to tour the correctional institutions in the state to which defendants may be sentenced.

### **2-12.2 Improvements at Correctional Institutions**

The Chief State's Attorney and the State's Attorneys should support the creation of innovative programs in institutions, including educational/behavioral services, provided that such programs do not adversely impact justice and appropriate offender accountability.

Consistent with their duties identified in Standard 2-1.1, the Chief State's Attorney and the State's Attorneys should actively participate in any statewide commissions, advisory boards, committees, or the like, to which they may be appointed for the purpose of review and improvement of any aspect of the correctional system.

### **2-12.3 Prosecutor as Resource**

The State's Attorneys' offices should be available as a source of information for the Department of Correction, particularly those units tasked with offender classification and sentence calculation.

### **2-12.4 Notice**

The Chief State's Attorney and the State's Attorneys should, to the extent practicable, take steps to ensure that the Department of Correction, and any institution holding an offender, are compliant with their statutory notification requirements at the time of an escape, or prior to any temporary or final release, and they should address any failure to provide notice that comes to their attention.

[NDAA Nat. Pros. Stds. Standards 2-12.1 through 2-12.5, inclusive; C.G.S. §§ 54-56d(l) & 54-231]



## **Commentary**

It must be recognized that there is a need for the prosecutor's involvement in the prisons and their programs. A prosecutor should be cognizant of detention facilities and the services they offer to which offenders in the jurisdiction may be sentenced. Also, just as for probation and community agencies, the prosecutor's insight into the background and behavior of individuals should be viewed as a resource by officials in this area. The Department of Correction employs an elaborate intake formula based, in part, upon previously developed background information concerning offenders and their associates. The Division of Criminal Justice should make itself available as a resource both to offer initial information and to verify facts derived from other sources. Further, the Division should support improvements to services within the prison setting, with the over-arching goal of reducing criminal activity through the provision of meaningful and effective rehabilitation and reintegration of the offender in order to prevent recidivism.

### **13. Board of Pardons and Paroles**

#### **2-13.1 Prosecutor as Resource**

To the extent permitted by law, the State's Attorneys' offices should be available as a source of information for the Board of Pardons and Paroles or any other supervisory agency considering or monitoring an offender's release from custody.

Prosecutors shall comply with their statutory obligation to give the Board, upon request, such information as they may possess with reference to the habits, disposition, career, and associates of any prisoner.

#### **2-13.2 Release Discretion**

Prosecutors should be cognizant of the broad discretion vested in the Board of Pardons and Paroles by law to make release from custody decisions, whether by parole, pardon, commutation, or medical or compassionate parole. The Chief State's Attorney and the State's Attorneys should address abuses of this discretion that come to their attention.

#### **2-13.3 Right to Notice and Opportunity to Submit Reports and Documents**

The Chief State's Attorney and the State's Attorneys should, to the extent practicable, seek to ensure that the Board of Pardons and Paroles complies with its statutory obligation to provide timely notice prior to holding any hearing to determine the suitability of an offender for parole release, and they should address any failure to provide notice that comes to their attention.

The Chief State's Attorney and the State's Attorneys should seek to ensure that the State's Attorneys are provided, in a timely fashion, copies of all documentation upon which the Board will rely in making a release from custody decision so that the State's Attorney may review such documentation for the purpose of providing an informed report to the Board regarding the offender's suitability for release.

The State's Attorneys should avail themselves of the statutory opportunity to submit reports and other documents to the Board regarding the offender's suitability for release on parole.

#### **2-13.4 Early Release**

The Chief State's Attorney and the State's Attorneys should oppose the early release of offenders where the release decision is made by authorities solely or primarily on the basis of overcrowding of the correctional facility, unless such release is mandated by court order.

#### **2-13.5 Notice of Release**

The Chief State's Attorney and the State's Attorneys should, to the extent practicable, take steps to ensure that the Board of Pardons and Paroles are compliant with their statutory notification requirements regarding any decision to grant release from confinement to any individual, whether by parole, pardon, commutation, or medical or compassionate parole. The Chief State's Attorney and the State's Attorneys should address any failure to provide notice that comes to their attention.

[NDAA Nat. Pros. Stds. Standards 2-13.1, & 2-13.3 through 2-13.6, inclusive; C.G.S. §§ 51-286f, 54-123a, 54-123d, & 54-124a, et seq.]

### **Commentary**

The Board of Pardons and Paroles is an autonomous agency that receives administrative support from the Department of Correction. See C.G.S. § 54-124a(a)(1). The Board has independent decision-making authority for all aspects of the parole process and setting all terms and conditions of parole. See C.G.S. § 54-124a(f). Jurisdiction and authority to grant commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state, and to grant pardons, conditioned, provisional or absolute, or certificates of rehabilitation for any offense against the state at any time after the imposition and before or after the service of any sentence are also vested in the Board. See C.G.S. § 54-130a(a) & (b).

Prosecutors should be aware that the law imposes certain responsibilities upon them regarding assisting the function of the Board of Pardons and Paroles. Pursuant to statute, “[t]he prosecuting official in a criminal proceeding shall request on the record that a transcript be prepared of any sentencing hearing at which a defendant is sentenced to a definite, non-suspended sentence of more than two years imprisonment.” C.G.S. § 51-286f. The statute provides further that the Chief Court Administrator shall provide the requested transcript to the Board of Pardons and Paroles. Id. Additionally, the state's attorney for the judicial district is required, within three weeks after the commitment of each person sentenced to more than two years, to send to the Board of Pardons and Paroles the record, if any, of such person. See C.G.S. § 54-125a(a). Under its authority, the Board “may institute inquiries by correspondence or otherwise as to the previous history or character of any prisoner, and *each prosecuting officer, judge, police officer or other person shall give said board, upon request, such information as he may possess with reference to the habits, disposition, career and associates of any prisoner.*” (Emphasis added) C.G.S. § 54-130c.

Connecticut law authorizes the Board to release an inmate on parole if it appears “that there is a reasonable probability that the inmate will live and remain at liberty without violating the law, and that such release is not incompatible with the welfare of society.” See C.G.S. § 54-125a(a). Any offender serving a total effective sentence of more than two years (apart from certain statutory and policy exclusions) is eligible for parole. Id.; see Standard 2-9.1, et seq., commentary; see also DCJ Policy No. 521 (Victims’ Rights in Plea Bargaining) (providing list identifying those crimes statutorily ineligible for parole).

Whenever a person becomes eligible for parole release pursuant to statute, the board holds a hearing to determine such person's suitability for parole release. See C.G.S. § 54-125a(f)(3). At least twelve months prior to such hearing, the board must notify the Office of the Chief Public Defender, the appropriate state's attorney, the Victim Services Unit within the Department of Correction, the Office of the Victim Advocate and the Office of Victim Services within the Judicial Department of such person's eligibility for parole release. Id. As provided by statute, “[a]t any hearing to determine such person's suitability for parole release . . . the board shall permit (A) such person to make a statement on such person's behalf, (B) counsel for such person and the state's attorney to submit reports and other documents, and (C) any victim of the crime or crimes to make a statement . . .” Id.

It bears noting that, unlike the opportunity afforded to the person whose parole is being considered, and the victim (whose right is guaranteed by the state constitution), the statute *does not* make provision for the State’s Attorney to “make a statement” or otherwise address the Board at such hearing. By statute the State’s Attorney’s participation is limited to the submission of reports and other

documents. See C.G.S. § 54-125a(f)(3)(B). Nonetheless, in practice, the State's Attorneys are presently being afforded an opportunity to address the Board. However, in order for the State's Attorney to view the materials upon which the Board will base its decision, the State's Attorney must file a Freedom of Information Act (FOI) request.

Significantly, the statutes granting jurisdiction and authority to the Board to grant commutations of punishment, releases, or pardons, do not require notice to the State's Attorney of any sessions scheduled for such purpose, nor do they provide an opportunity for the State's Attorney to make a statement or otherwise address the Board, in any manner, at such sessions. See C.G.S. § 54-130a, et seq. Again, as with parole hearings, the present practice is to afford State's Attorneys an opportunity to address the Board, but the State's Attorney must similarly pursue an FOI request to obtain a copy of the written materials upon which the Board will base its decision.

Fundamental to the protective function of the prosecutor, State's Attorneys should not hesitate to oppose release decisions that are not in the best interest of the community, and should address any abuse of the Board's discretion that comes to their attention.

## **14. The Media**

### **2-14.1 Media Relationships**

The prosecutor should seek to maintain a relationship with the media that will facilitate the appropriate flow of information to and from the public. An appropriate and professional relationship with the media is necessary to promote public accountability and transparency in government.

### **2-14.2 Press Releases**

In furtherance of the goals outlined in Standard 2-14.1 of promoting public accountability and transparency in government, the Division of Criminal Justice should regularly provide press releases to the media. Press releases produced by the Division should be coordinated through the Director of Communications at the Office of the Chief State's Attorney and should not include statements that violate any applicable law, court order, standard, rule of ethical conduct, or Division policy.

### **2-14.3 Balancing Interests**

The prosecutor should strive to protect both the rights of the individual accused of a crime and the needs of citizens to be informed about public dangers and the conduct of their government. The prosecutor may provide sufficient information to

the public so that citizens may be aware that the alleged perpetrator of a crime has been arrested and that there exists sufficient competent evidence with which to proceed with prosecution. Subject to Standard 2-14.5, applicable rules of ethical conduct and Division policy, information may be released by the prosecution if such release will aid the law enforcement process, promote public safety, dispel widespread concern or unrest, or promote confidence in the criminal justice system. The prosecutor should refrain from making extrajudicial comments before or during trial that promote no legitimate law enforcement purpose and that serve solely to heighten public condemnation of the accused. The prosecutor should not allow prosecutorial judgment to be influenced by a personal interest in potential media contacts or attention.

#### **2-14.4 Information Appropriate for Media Dissemination by Prosecutors**

Prior to and during a criminal trial the prosecutor may comment on the following matters:

- a. The accused's name, age, residence, occupation, and family status;
- b. The substance or text of the charge, as contained in the complaint, information, or other public documents, 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; and
- f. Information contained in a public record, the disclosure of which would serve the public interest.

#### **2-14.5 Restraints on Information**

Prior to and during a criminal trial the prosecutor 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;
- e. Any opinion as to the defendant's guilt, or the possibility of a plea of guilty to the offense charged or to a lesser offense, or the contents of any plea agreement.
- f. The fact that a defendant has been charged with a crime unless accompanied by an explanation that the charge is merely an accusation and the defendant is presumed innocent until and unless proven guilty.

The 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 or providing non-public information that the prosecutor would be prohibited from making or providing under this Standard or other applicable rules, law, or Division policy.

#### **2-14.6 Public Responses**

The prosecutor may make a reasonable and fair reply to comments of defense counsel or others. A public comment made by a prosecutor pursuant to this paragraph shall be limited to statements reasonably necessary to mitigate the effect of undue prejudice created by the public statement of another. In no event should a prosecutor make statements prohibited by Standard 2-14.5, applicable rules of ethical conduct, or Division policy.

#### **2-14.7 Law Enforcement Policy on Information**

The Division of Criminal Justice should assist state and local law enforcement, and other investigative agencies, in understanding their statutory responsibilities with respect to the release of criminal justice information. The Division should also assist in the training of law enforcement agencies on subject matters to avoid when discussing pending criminal investigations or prosecutions with the media.

#### **2-14.8 Judicial Decisions**

The prosecutor may inform the public of judicial decisions that are contrary to law, fact, or public interest, but consistent with Standard 2-6.1, a prosecutor should not make any public statement that he or she knows to be false, or with reckless disregard for its truth or falsity, as to the integrity or qualifications of a judge.

## **2-14.9 Verdicts**

A prosecutor 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 statements made about the judiciary, jurors, other lawyers, or the criminal justice system should be respectful even if expressing disagreement.

## **2-14.10 Re-enactments**

During the pendency of a criminal matter, the prosecutor should not re-enact, or assist law enforcement in re-enacting, law enforcement events for the media. Absent a legitimate law enforcement purpose, the prosecutor should not display the accused for the media, nor should the prosecutor invite media presence during investigative actions without careful consideration of the interests of all involved, including suspects, defendants, and the public. A prosecutor may, however, reasonably accommodate media requests for access to public information and events.

## **2-14.11 Prosecutor as Media Commentator**

Subject to any applicable Division policy, a prosecutor uninvolved in a matter who is commenting as a media source may offer generalized commentary concerning a specific criminal matter that serves to educate the public about the criminal justice system and does not risk prejudicing a specific criminal proceeding. A prosecutor acting as such a media commentator should make reasonable efforts to be well-informed about the facts of the matter and the governing law. The prosecutor should not offer commentary regarding the specific merits of an ongoing criminal prosecution or investigation, except in a rare case to address a manifest injustice and the prosecutor is reasonably well-informed about the relevant facts and law.

## **2-14.12 Media Coverage of Court Proceedings**

Prosecutors should have familiarity with the Superior Court rules governing the broadcasting, televising, recording, or photographing by the media of arraignments and other court proceedings and trials in the Superior Court.

Consistent with such rules, a prosecutor should object in advance of electronic coverage of a criminal proceeding or trial if there exists a substantial reason to believe that such coverage will undermine the legal rights of a party or will significantly compromise the safety of a witness or other person or impact significant privacy concerns.

[NDAA Nat. Pros. Stds. Standards 2-14.1 through 2-14.8, inclusive; ABA Crim. Just. Stds. Standard 3-1.10; C.G.S. § 1-215; R. Prof. Conduct Rules 3.6 & 3.8(5); P.B. §§ 1-10B, 1-11A, & 1-11C; DCJ Policy No. 118]

### **Commentary**

For purposes of these standards, a “public statement” is any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication or media, including social media. An extrajudicial statement is any oral written or visual presentation not made either in a courtroom during criminal proceedings or in court filings or correspondence with the court or counsel regarding criminal proceedings.

A prosecutor’s interactions with the media implicate numerous important rights belonging to the state, the defendant, and the public, including, but not limited to, the First Amendment’s guarantee of free speech, the defendant’s due process right to a fair trial, the presumption of innocence, and the defendant’s Fifth Amendment right to remain silent. Protecting a prosecutor’s right to speak while simultaneously ensuring that the defendant receives a fair trial requires a difficult, but critical, balancing of competing interests. Given the significant rights and interests at stake when dealing with issues concerning prosecutors and the press, it is advisable for a prosecutor to consult with his or her Supervisory Assistant State’s Attorney or State’s Attorney before speaking with the media.

Standard 2-14 is intended to assist prosecutors navigate their relationship with the media generally. When Division policy, court order, rule, or other applicable law provides more specific limitations on a prosecutor’s interaction with the media, that policy, order, rule or law controls. See, e.g., DCJ Policy No. 118 (social media policy prohibiting prosecutors from (1) disseminating any information or statements via social media outlets on behalf of the Division unless his or her State’s Attorney or Chief State’s Attorney has expressly requested that prosecutor do so and approved content in advance, and (2) commenting on any case handled by Division whether pending or closed on any social media site without advance approval from his or her State’s Attorney, Chief State’s Attorney, or their designees).

Standard 2-14.4 provides guidance as to what constitutes proper subject matter of a public, extrajudicial statement and is consistent with information provided in the commentary to the related rule of professional conduct. See R. Prof. Conduct Rule 3.6, commentary subsections (4) (a) through (g). Prosecutors should be mindful of their responsibilities pursuant to Rule 3.6 of the Rules of Professional Conduct.

Standard 2-14.5 incorporates the tenet, also contained in our rules of professional conduct, that a lawyer not make any public, extrajudicial statement that has a



substantial likelihood of materially prejudicing a judicial proceeding. See R. Prof. Conduct Rule 3.6(a). It provides guidance as to what topics may not serve as the basis of a public, extrajudicial statement, unless otherwise part of the public record. See also R. Prof. Conduct Rule 3.6, commentary subsections (5) (a) through (f) (discussing subjects that are more than likely to have materially prejudicial effect). Finally, Standard 2-14.5 integrates into these standards the special burden prosecutors bear under our rules of professional conduct 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 our rules of professional conduct. See R. Prof. Conduct Rule 3.8(5).

Our courts have not yet defined what constitutes “the public record of the criminal proceeding” as that term is used in this Standard. A record of arrest is a public record, subject to certain limitations. See C.G.S. § 1-215 (record of arrest as public record). Prosecutors should know, however, that special rules apply in juvenile and youthful offender proceedings. See, e.g., C.G.S. §§ 46b-124 (confidentiality of records in juvenile matters); 54-76l (records or other information of youth to be confidential); 54-76o (erasure of police and court records of youthful offender). In addition, prosecutors should be vigilant in complying with any law protecting the confidentiality of victims of certain crimes; see, e.g., C.G.S. §§ 54-86d & 54-86e; and statutes governing the erasure of criminal records. See, e.g., C.G.S. §§ 54-142a & 54-142d. Given the undefined contours of the term public record as that term is used in this Standard, it is advisable for prosecutors to err on the side of caution when assessing whether a piece of information is, in fact, part of the public record of the case. Prosecutors should not place statements or evidence into the court record to circumvent this Standard and should not secretly or anonymously provide non-public information to the media, on or off the record, without proper authorization.

Standard 2-14.6 recognizes that public extrajudicial statements that otherwise might raise a question under this Standard, or Rule 3.6 of the Rules of Professional Conduct, may be permissible when made in response to statements made by another party where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the state. See R. Prof. Conduct Rule 3.6 (b) & commentary subsection (7); Gentile v. Nevada, 501 U.S. 1030, 1039-43 (1991). Before deciding to make a responsive statement, prosecutors should recall that: (1) criminal jury trials, as opposed to civil trials or other nonjury proceedings, are most sensitive to extrajudicial speech, and (2) any statement so issued should include only such information as is necessary to mitigate the undue prejudice or adverse publicity created by the statements made by others.

As part of its overall law enforcement training program, the Division of Criminal Justice should take an active role in training law enforcement agencies on the

limitations on public statements. By conducting such advance training, the Division proactively reduces the possibility of comments by law enforcement personnel that are in conflict with the law and legal rules. By that means, the Division also reduces the incidents of challenges to venue and other matters relating to the ability of a defendant to receive a fair trial.

Prosecutors should be aware of Practice Book provisions governing media access to criminal court proceedings, particularly with respect to any limitations imposed. See P.B. §§ 1-10B, 1-11A, & 1-11C. Rules of practice provide that “[a]ny party, attorney, witness or other interested person may object in advance of electronic coverage of a criminal proceeding or trial if there exists a substantial reason to believe that such coverage will undermine the legal rights of a party or will significantly compromise the safety of a witness or other person or impact significant privacy concerns.” P.B. § 1-11C(e). Whenever any such objection is filed, the burden of proving that electronic coverage of the criminal proceeding or trial should be limited or precluded is on the person who filed the objection. Id. The judicial authority, in deciding whether to limit or preclude electronic coverage of a criminal proceeding or trial, shall consider all rights at issue and shall limit or preclude such coverage only if there exists a compelling reason to do so, there are no reasonable alternatives to such limitation or preclusion, and such limitation or preclusion is no broader than necessary to protect the compelling interest at issue. P.B. § 1-11C(f); see, e.g., State v. Patel, 174 Conn. App. 298, 305-06, cert. dismissed, 327 Conn. 955 (2017) (trial court setting limitations based upon State’s motion). Additionally, Practice Book Section 1-11C(i), provides that “[t]he judge presiding over the proceeding or trial in his or her discretion, upon the judge's own motion or at the request of a participant, may prohibit the broadcasting, televising, recording or photographing of any participant at the trial. The judge shall give great weight to requests where the protection of the identity of a person is desirable in the interests of justice, such as for the victims of crime, police informants, undercover agents, relocated witnesses, juveniles, and individuals in comparable situations.” P.B. § 1-11C(i). For purposes of this latter section, “participant” means any party, lawyer, or witness. Id.

## **15. Funding Entity**

### **2-15.1 Assessment of Need**

The Chief State’s Attorney should, consistent with his or her statutory obligations, cooperate with the Office of Policy and Management, and the Appropriations Committee of the Connecticut General Assembly, by providing an assessment of resources needed to effectively administer the duties of the Division of Criminal Justice.

## 2-15.2 Independent Revenue

The budget for the Division of Criminal should be independent of, and unrelated to, revenues resulting from law enforcement and criminal justice activities, such as fines, forfeitures, and program fees. The Division of Criminal Justice may receive and expend revenues from forfeited assets only in accordance with statute or court order.

[NDAA Nat. Pros. Stds. Standards 2-15.1, 2-15.2; ABA Crim. Just. Stds. Standard 3-1.8(c); C.G.S. § 51-279]

### Commentary

The basic premise of this standard is that adequate funding must be pursued and allocated for the Division of Criminal Justice to fulfill its many duties and responsibilities. Little can happen in the way of improvements to the criminal justice system in general, and the Division of Criminal Justice in particular, without necessary funding. Among the duties of the Chief State's Attorney, he or she "shall prepare and submit to the Office of Policy and Management estimates of appropriations necessary for the maintenance of the division and make recommendations with respect thereto for inclusion as a separate item in the budget request of the Division of Criminal Justice." C.G.S. § 51-279.

The standard addresses any misconceptions that the budget allocated to the Division of Criminal Justice should, in any manner, be tied to the funds generated from fines and forfeitures. As a practical matter, the appearance of impropriety arising from such an arrangement is simply untenable. Moreover, it breeds cynicism amongst the public regarding the prosecutor's motivations when pursuing a fine or forfeiture. As discussed in the commentary to Standard 4-7.1, et seq., infra, the purpose of forfeiture is to deter conduct giving rise to forfeiture and to remove the instrumentalities and proceeds of such conduct. The court's imposition of an appropriate fine should similarly be intended to act as a deterrent to inappropriate behavior, particularly in the realm of motor vehicle infractions, not as a revenue generator. Such remedies were never intended to be primary sources of revenue, and the notion that they can be "budgeted" into criminal justice agencies is totally misguided. To the extent that such remedies provide some funds for law enforcement agencies, this benefit is at best collateral to their primary purpose. Such revenues are not predictable and, therefore, it is doubly wrong for funding sources to rely upon them when considering budget requests from the Division.

## 16. Non-Governmental Entities

### 2-16.1 Generally

In all dealings with a non-governmental entity, the Chief State's Attorney should place the public interest above all other considerations.

### 2-16.2 Financial and Resource Assistance

- a. As permitted by law, the Division of Criminal Justice may accept financial or resource assistance from a non-governmental source when such assistance is specifically approved by the Chief State's Attorney;
- b. When determining whether to accept assistance from a non-governmental source, the Chief State's Attorney should give priority consideration to the public interest over the private interests of a non-governmental source, especially when the assistance relates to a specific case or cases rather than Division-wide assistance;
- c. The Chief State's Attorney should consider whether accepting assistance from a non-governmental source will create the appearance of undue influence; and
- d. The Chief State's Attorney should have office procedures in place that protect the independent exercise of discretion of the office from the undue influence of a non-governmental resource that has provided assistance to the office during the investigation and prosecution of specific cases or types of cases. These procedures should include requirements for strict bookkeeping and accounting of any assistance received, whether financial or resource assistance, and as required by law, disclosure procedures.

[NDAA Nat. Pros. Stds. Standards 2-17.1 & 2-17.2; ABA Crim. Just. Stds. Standard 3-1.8(c); C.G.S. §§ 51-279 & 51-286i]

### Commentary

By law, the Chief State's Attorney "is authorized to receive and administer funds from the federal government *or any charitable foundation* to assist in the operations of the Division." (Emphasis added) C.G.S. § 51-279(a)(10). In furtherance of this authorization, the Office of the Chief State's Attorney employs a Grants and Contracts Manager whose duties, among others, is to seek to secure private, state, and federal funding for Division of Criminal Justice programs and initiatives through a variety of available program grants.

In times of strained budgets and inadequate resources, an offer of assistance from a non-government funding source is a temptation. Such arrangements need to be carefully examined to make certain that no illegal or unethical strings are attached.

If the decision is made to accept funding assistance from a non-governmental source, the Division must be diligent in keeping track of the funds or equipment provided. In addition, prosecutors must be vigilant to not allow the assistance to interfere with their independent exercise of prosecutorial discretion.

The Division of Criminal Justice has been fortunate in recent years to be granted charitable foundation funding that has permitted it to engage in innovative efforts that would not have been possible within the constraints of the Division's normal operating budget. With generous private financial and other support from the Herbert and Nell Singer Foundation, Inc., and its President, Jay H. Sandak, Esq., the Division partnered with the non-profit Center for Court Innovation (now Center for Justice Innovation) on two significant undertakings aimed at improving the criminal justice system: (1) The Early Screening and Intervention Program (ESI); and (2) the Moving Justice Forward project.

The Center for Justice Innovation is a New York based non-profit organization that promotes new thinking about how the criminal justice system can respond more effectively to issues like substance use, intimate partner violence, mental health, and juvenile delinquency. With a staff from diverse work backgrounds, including prosecutors, defense counsel, probation officials, senior administrators of major criminal justice system agencies, social workers, technology experts, researchers, victim advocates, and mediators, the Center performs original research, designs and implements operating programs, and provides agencies such as the Division of Criminal Justice with the tools needed to launch new strategies.<sup>4</sup>

Based upon a review of first-time court appearances for low-level offenders conducted in collaboration with the Center for Justice Innovation, with financial support from the Singer Foundation, the Division instituted a pilot program in GA courts in Bridgeport and Waterbury in mid-2017, known as the Early Screening and Intervention Program (ESI). This prosecutor driven program utilizes dedicated prosecutors and resource counselors to screen low-level offenses at the earliest stage in the proceedings to assess for underlying factors contributing to criminal behavior (e.g., substance abuse, mental health, homelessness, etc.).<sup>5</sup>

Cases accepted for ESI are referred to the resource counselor for assessment, mediation, and, as appropriate, linkage to or placement with community service providers. This evaluation provides a unique opportunity for individualized justice:

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<sup>4</sup> Center for Court Innovation, supra note 3, at 8.

<sup>5</sup> Division of Criminal Justice, *The Early Screening and Intervention Program (ESI) – Report to the Joint Standing Committee of the Judiciary on PA 17-205: An Act Establishing A Pilot Program To Provide Enhanced Community Services To Those In The Criminal Justice System*, February 1, 2019, at i.

the resource counselor assesses the needs of the individual and advises the ESI prosecutor as to how local services can be used to create a disposition that is tailored not only to the individual but to the needs and priorities of the community in which they reside. Resource counselors monitor all treatment and service referrals for compliance and efficacy, providing ESI prosecutors with invaluable information informing not only the success of a particular case's disposition but the handling of future cases as well.

In addition to funneling low-level offenders toward appropriate treatment and services to address the underlying factors that contributed to their criminal behavior, ESI has the added benefit of unburdening court dockets and conserving judicial resources for more serious cases. Given encouraging early results, the pilot program was expanded — again with financial assistance from the Singer Foundation — to Hartford, New Haven, New London and Norwich GA courts in mid-2018.<sup>6</sup> See C.G.S. § 51-286i. Because of the program's continued proven success, the Division is seeking to have the ESI program implemented statewide.

In 2022, an additional grant from the Herbert and Nell Singer Foundation allowed the Division to engage in a second collaboration with the Center for Justice Innovation, a strategic planning initiative — the Moving Justice Forward project. As part of the project, the Center conducted a needs assessment designed to assist the Division of Criminal Justice in enhancing efficiency and fairness within the offices of the State's Attorneys. The initial independent review was conducted in three parts: (1) In-person interviews were conducted with a range of stakeholders within the Division of Criminal Justice, including prosecutors and support staff (e.g., secretaries, investigators, and inspectors) across four jurisdictions. Interviews included questions about professional experience; office policies and culture; case processing; and community perceptions; (2) Both in-person and virtual interviews were held state-wide with stakeholders outside of the States Attorney's office, including defense counsel; community-based groups; sexual assault service providers; advocacy groups; victim advocates; the NAACP; and the Connecticut ACLU. These interviews were designed to glean community perceptions of the State's Attorney's office and focused on the role of the prosecutor, community involvement, and transparency; and (3) a series of in-person observations were conducted in four jurisdictions that included observations of practices across courts; specialized domestic violence and gun dockets; and pre-trial conferencing among defense counselors, prosecutors, and the judiciary. The goal of these observations was to better understand court processes and procedures, typical interactions between court actors and defendants, and overall decision-making.<sup>7</sup>

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<sup>6</sup> Division of Criminal Justice, *supra* note 5, at i-ii.

<sup>7</sup> Center for Court Innovation, *supra* note 3, at 9.

At the conclusion of its months-long series of interviews and observations, the Center produced a needs assessment report which focused on nine areas where it determined enhancement and improvement can occur: case processing; hiring practices; training; oversight and review; courtroom decorum; workload; data and technology; diversion and alternatives to incarceration; and community relations.<sup>8</sup> The needs assessment report was used as the foundation for a roundtable involving Division of Criminal Justice senior leadership and other stakeholders in the criminal justice system, facilitated by Center for Justice Innovation staff members. This process culminated in the Center's creation of an implementation blueprint that provides the Division of Criminal Justice with a strategic plan to implement practice change. The blueprint sets forth goals with actionable steps for achievement in the coming years.<sup>9</sup>

Feedback from this independent review is both useful and encouraging. Moreover, the Center lauded the Division's cooperation in the endeavor, particularly its willingness to open its operations to scrutiny, writing: "Connecticut can be proud of its prosecutorial system, which works to represent the people of the State of Connecticut and strives to provide fair and efficient justice. Prosecutors interviewed during the needs assessment were open, candid, and willing to implement changes that will improve the justice system."<sup>10</sup>

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<sup>8</sup> Center for Court Innovation, *supra* note 3, at 6-7.

<sup>9</sup> *See* Center for Justice Innovation, *Moving Justice Forward: Implementation Blueprint*, February 2023.

<sup>10</sup> *Id.* at 6.

## **PART III. INVESTIGATIONS**

- 1. Investigations Generally**
- 2. Warrant Review and Tracking**
- 3. Grand Jury Investigations**
- 4. Wiretap Applications**
- 5. Grants of Immunity**

### **1. Investigations Generally**

#### **3-1.1 Authority to Investigate**

As the chief law enforcement officer in the judicial district, the State's Attorney has the discretionary authority to initiate investigations of criminal activity in his or her 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, 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 or professional ambition or improper personal considerations.

#### **3-1.3 Prosecutor's Responsibility for Evidence**

A prosecutor is ultimately responsible for evidence that will be used in a criminal case. 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 take affirmative steps to investigate and remediate such problems.

#### **3-1.4 Illegally or Unethically Obtained Evidence**

A prosecutor should not knowingly obtain evidence or information through illegal or unethical means, nor should the prosecutor instruct nor encourage others to obtain evidence or information through illegal or unethical means. Prosecutors should research and know the law in this regard before acting, understanding that in some circumstances a prosecutor's ethical obligations may be different from those of other lawyers.



### **3-1.5 Privileged Materials Inadvertently Obtained or Viewed**

Prosecutors, and any investigators involved in a criminal investigation, who inadvertently come into possession of, or view, materials which contain privileged information protected by the attorney-client privilege that adheres to communications between the defendant and his or her counsel should take immediate action to remedy the situation consistent with prevailing law.

Upon discovering or determining that there has been an invasion into materials that contain privileged information relating to the case, a prosecutor should isolate and contain the materials in question, and notify the defendant and the court immediately of the intrusion. The prosecutor should further ensure that all government officials who possess knowledge of the information, himself or herself included, do not share such information with anyone else, and do not have any further involvement in the investigation or prosecution of the case.

### **3-1.6 Undercover Investigations Involving Deception**

Although prosecutors may not normally make false statements or engage in conduct involving deception, a prosecutor may, to the extent permitted by law, engage in or direct law enforcement investigations that involve such conduct (e.g., undercover operations which conceal the true identity of a law enforcement agent or others involved in the investigation from third parties for legitimate investigative purposes).

A prosecutor should take all reasonable steps to ensure that any such investigations do not create an unnecessary risk of harm to innocent parties, perpetuate a fraud on the court, or interfere with a defendant's constitutionally protected right to counsel or right to a fair trial. Nothing in this standard precludes a prosecutor from engaging in a duly authorized investigation of judicial or court officers, or members of the bar.

### **3-1.7 Prosecutorial Investigators**

The Division of Criminal Justice should employ properly trained inspectors and investigators to assist with case preparation, supplement law enforcement investigations, conduct original investigations, and carry out other duties as assigned by the prosecutor. The Chief State's Attorney should seek sufficient investigative resources from appropriate funding authorities for these purposes.

[NDAA Nat. Pros. Stds. Standards 3-1.1 through 3-1.6, inclusive; ABA Crim. Just. Stds. Standard 3-4.1(b); ABA Pros. Inv. Stds. Standard 2.3; Conn. Const. art. IV, § 27; C.G.S. §§ 51-277(a), 51-286, & 51-286a; R. Prof. Conduct Rules 5.3, 8.4(1) & (3)]

## Commentary

The primacy of the investigatory powers of the Division of Criminal Justice is set forth in the state constitution, which provides that “[t]here shall be established within the executive department a division of criminal justice which shall be *in charge of the investigation . . . of all criminal matters.*” (Emphasis added) Conn. Const. art. IV, § 27. The General Statutes further vest authority in each State’s Attorney, Assistant State’s Attorney, and Deputy Assistant State’s Attorney to “diligently *inquire after . . . all crimes and other criminal matters* within the jurisdiction of the court . . .” (Emphasis added) C.G.S. § 51-286a. Moreover, General Statutes § 51-277(a) directs that the Division of Criminal Justice “shall exercise all powers and duties with respect to *the investigation* and prosecution of criminal matters . . . required of state’s attorneys, assistant state’s attorneys and deputy assistant state’s attorneys . . . by the common and statutory law of this state . . .” (Emphasis added) C.G.S. § 51-277(a).

In support of this endeavor, the Chief State’s Attorney is authorized to appoint Chief Inspectors to assist, on a state-wide basis, all the State’s Attorneys. See C.G.S. § 51-286(a). Further, “[t]he Chief State’s Attorney shall appoint such inspectors as the criminal business of the office of the Chief State’s Attorney, in the opinion of the Chief State’s Attorney, may require, and each state’s attorney may appoint such inspectors as the criminal business of the judicial district, in the opinion of the Chief State’s Attorney, may require.” Id.

Any person appointed as an Inspector in the Division of Criminal Justice has “the same power of arrest within the state as has any officer of the state police.” C.G.S. § 51-286(b). By law, “[e]ach inspector shall make investigations concerning criminal offenses which the Chief State’s Attorney or the appropriate state’s attorney may have reason to believe have been committed or which may be committed and to assist in all investigations and other matters pertaining to the criminal business of the office or the judicial district and in procuring evidence for the state in any criminal matter . . .” C.G.S. § 51-286(a).

The Division of Criminal Justice possesses the authority to require the assistance of state and local police departments in the investigation of any matter with which the Division is concerned. C.G.S. § 51-286(d). If any such assistance is required, the Division of Criminal Justice shall have primacy concerning any such investigation, provided the state and local police shall maintain any investigatory authority provided by law. Id. Any conflict between the Division of Criminal Justice and the state and local police with respect to any such investigation shall be resolved by the Chief State’s Attorney. Id. The statute further provides that “[a]ll state and local police, law enforcement and criminal justice agencies *shall cooperate* with the [D]ivision [of Criminal Justice] in carrying out [its statutory

duties] and *shall provide* such information and assign such personnel as may be required.” (Emphasis added) C.G.S. § 51-286(e).

While the vast majority of criminal investigations are undertaken by state and local police departments, there are times when the prosecutor must use his or her authority to initiate or continue an investigation. Some instances where such action by the State’s Attorney’s Office would be appropriate are: where the law enforcement agency that would normally conduct the investigation has a conflict of interest; where the investigation has been handled improperly and is in need of re-investigation; where the investigation calls for expertise that is available in the State’s Attorney’s Office (e.g., cases requiring the pursuit of an investigatory grand jury; see Standard 3-3.1 et seq.) or the Office of the Chief State’s Attorney (e.g., cases requiring forensic accounting; Cold Case investigations; environmental crimes; Medicaid Fraud; Unemployment Compensation Fraud; or Worker’s Compensation Fraud); or, where the law enforcement agencies do not have sufficient resources to conduct the investigation.

Given the prosecutor’s responsibility to seek justice for all the people, there are axioms regarding investigations that follow. A prosecutor should not conduct an investigation motivated by any characteristics of the victim or perpetrator that are categories irrelevant to the elements of the crime or the motive therefore. The prosecutor should not conduct an investigation in an illegal or improper manner, nor should he or she allow his or her agents to do so. See R. Prof. Conduct Rules 5.3 (responsibilities regarding nonlawyer assistance — lawyer may not order or ratify conduct not compatible with professional obligations of lawyer) and 8.4 (misconduct for lawyer to violate the rules of professional conduct “through the acts of another”).

Standard 3-1.5 addresses the appropriate handling of those infrequent instances when, during the course of an investigation or prosecution, the prosecutor or a member of the investigation team inadvertently views materials which contain privileged information protected by the attorney-client privilege that adheres to communications between the defendant and his or her counsel. See E. Prescott, Tait’s Handbook of Connecticut Evidence (6th Ed. 2019) § 5.16 *Confidential Communications* (discussing attorney-client communications generally).

Generally, prejudice is presumed when the state has invaded the attorney-client privilege by reading privileged materials containing trial strategy regardless of whether the invasion was intentional. State v. Lenarz, 301 Conn. 417, 425 (2011), cert. denied, 565 U.S. 1156 (2012). The state may rebut the presumption by clear and convincing evidence. Id. When the state fails to do so, the trial court, *sua sponte*, must fashion a remedy to cure the existing prejudice and prevent future

prejudice. Id. at 443-44. Where doing so proves problematic, the remedy may be a dismissal of the charges as occurred in Lenarz. Id.

In Lenarz, the court “concluded as a matter of law that documents that are intended to be communicated to an attorney are subject to the attorney-client privilege regardless of their format or whether they have actually been provided to the attorney.” Lenarz, 301 Conn. at 441 n.18. Thus, regardless of whether a document is formatted or appears as a communication, i.e., in the form of an email or a letter to an attorney, if it is obvious or fairly inferable from the content of the document that it was intended to be communicated to the defendant's attorney, it is privileged material. Id.

Immediate action is essential under circumstances where investigators and/or prosecutors either determine that investigative materials contain privileged information relating to the case, or reasonably believe that they do. An investigator who comes to know or believe this should notify a prosecutor immediately without divulging any specific information regarding the materials to the prosecutor or anyone else. Further investigative examination of the materials should cease immediately, and the materials should be isolated and contained.

Upon notification by an investigator that investigative materials either do or may contain privileged information relating to the case, the prosecutor must ensure that the materials in question are reviewed for the purpose of determining whether, and to what extent, they contain such information. Because investigators and prosecutors who gain knowledge of privileged information relating to the case are barred from further involvement in the matter, careful consideration should be given to who reviews the material. This person or persons is often referred to as a “taint team.”

Upon discovering or determining that there has been an invasion into materials that contain privileged information relating to the case, a prosecutor should isolate and contain the materials in question, and notify the defendant and the court immediately of the intrusion. The prosecutor should further ensure that all government officials who possess knowledge of the information, himself or herself included, do not share such information with anyone else, and do not have any further involvement in the investigation or prosecution of the case. See, e.g., State v. Kosuda-Bigazzi, 335 Conn. 327 (2020) (setting forth successful efforts to identify, isolate, and contain privileged information); accord, State v. Goodchild, 2012 WL 3853840.

The prosecutor is a valuable resource to investigating officers, as he or she can advise on 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, the procedures for pursuing electronic surveillance, and similar matters relating to the proper investigation of criminal cases. In this

regard, the public benefits greatly from the prosecutor's early involvement in an investigation because it ensures lawful investigatory methods that protect citizens' rights and that will withstand later judicial scrutiny.

Undercover investigations are at times the only effective way of obtaining evidence by which to prosecute criminal conduct. Standard 3-1.6, concerning investigations involving deception, addresses two seemingly incongruous aspects of the Rules of Professional Conduct as applied to the role of the prosecutor in advising or supervising the investigative work of law enforcement agencies. The Rules provide that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." R. Prof. Conduct Rule 8.4(3). Under the Rules, it is also professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." R. Prof. Conduct 8.4(1). A strict interpretation of the Rules suggests that, if a prosecutor engages in or directs undercover law enforcement investigations that involve misrepresentation or deceit; e.g., undercover officers misrepresenting themselves by posing as drug buyers or sellers; the prosecutor is committing professional misconduct by doing so. Connecticut, unlike some jurisdictions, has not taken affirmative steps to adopt an "investigatory exception" to Rule 8.4(3) to address this apparent shortcoming in the application of the rule to prosecutors. See, e.g., FL. ST. Bar Rule 4-8.4(c) (exception for Florida criminal law enforcement agency lawyers advising or supervising others in otherwise lawful undercover investigation). Nonetheless, Standard 3-1.6 adopts the position of the vast majority of jurisdictions that have addressed the issue, by rule or otherwise, that the prohibition of dishonesty, misrepresentation, or deceit contained in Rule 8.4(3) does not apply to prosecuting attorneys who provide supervision and advice to undercover investigations. See Ann. Mod. Rules Prof. Cond. (9<sup>th</sup> ed. 2019) § 8.4, annotation (Misconduct - Covert Investigations) (collecting cases); see also United States v. Parker, 165 F. Supp. 2d 431 (W.D.N.Y. 2001) (federal prosecutor supervising and advising undercover sting operation did not violate ethics rule prohibiting "conduct involving dishonesty, fraud, deceit, or misrepresentation"). The prosecutor should be careful, however, to recognize the distinction between supervising and advising such investigations versus actively engaging in them; the latter of which is strongly discouraged.

## **2. Warrant Review and Tracking**

### **3-2.1 Availability for Warrant Review**

The State's Attorney's office should develop and maintain a system for providing law enforcement with the opportunity for a prompt legal review of all warrant applications for arrests, searches, and the installation and use of tracking devices. In accordance with prevailing law and practice, all such applications must be

reviewed and approved by a prosecutor before submission to a Judge of the Superior Court for his or her review and final approval or rejection.

### **3-2.2 Requisite Legal Knowledge**

Prosecutors must ensure that they have the requisite knowledge to review any warrants with which they may be presented. Because search and seizure law, in particular, is an ever-evolving area of the law, prosecutors should take appropriate steps to keep abreast of changes in the law that will impact upon their review of warrants and advising law enforcement in this regard.

### **3-2.3 Search and Tracking Device Warrants**

As used in these standards a “search warrant” is a written command issued by a Judge of the Superior Court that permits law enforcement agents to search specified persons, places, or things, and seize specified property, as defined by law, which is contraband, or otherwise connected with criminal activity, or will assist in an apprehension or conviction. “Tracking device” means an electronic or mechanical device that permits the tracking of the movement of a person or object.

Prosecutors should know and understand the statutory requirements for the issuance of:

- a. search warrants for persons, places, or things;
- b. warrants for the installation and use of a tracking device; and
- c. warrants which seek records or data from out of state corporations that transact business in the state, including, but not limited to, those providing electronic communication services or remote computing services to the public.

In reviewing a search warrant application, the prosecutor should seek to:

- a. ensure the warrant application, including the supporting affidavit, is complete, accurate, and legally sufficient, including confirming that the application describes with particularity what is to be searched and what is to be seized, and that the affidavit is sufficient to establish probable cause to believe that the items sought: (1) are contraband, or otherwise connected with criminal activity, or will assist in an apprehension or conviction; and (2) are presently located in the place(s) to be searched;
- b. determine, to the extent practicable, the veracity of the affiants and the accuracy of the information, especially when the application is based on information from a confidential informant; and

- c. ensure, to the extent practicable, that the affidavit is not misleading and does not omit material information which has a significant bearing on probable cause.

When the action is supported by the facts of a particular case, prosecutors should consider seeking an order from the issuing judge dispensing with the requirement that a copy of the affidavits upon which such warrants are based be provided to those persons statutorily identified as affected by the search or tracking within the time frames established by law. This action may be appropriate if:

- a. the personal safety of a confidential informant would be jeopardized by the giving of a copy of the affidavits at such time; or
- b. the search is part of a continuing investigation which would be adversely affected by the giving of a copy of the affidavits at such time; or
- c. the giving of a copy of the affidavits at such time would require disclosure of information or material prohibited from being disclosed by the statutes governing the use of a wiretap.

Prosecutors should pursue extensions of any such order where appropriate.

### **3-2.4 Arrest Warrants**

Prosecutors should be thoroughly familiar with the statutory and practice book requirements governing the submission of an application for an arrest warrant, including those addressing the proper form and contents of the warrant, and those provisions allowing for sealing or limiting the disclosure of the supporting affidavit.

In reviewing an arrest warrant application, the prosecutor should seek to:

- a. ensure the warrant application, including the supporting affidavit, is complete, accurate, and legally sufficient, including confirming that the crimes listed, the statute numbers identified, and the date(s) of the offense(s) are correct and supported by the facts contained in the affidavit, and that the affidavit shows that there is probable cause to believe that an offense has been committed and that the person complained against committed it;
- b. determine, to the extent practicable, the veracity of the affiants and the accuracy of the information, especially when the application is based on information from a confidential informant; and
- c. ensure, to the extent practicable, that the affidavit is not misleading and does not omit material information which has a significant bearing on probable cause.

A prosecutor should not sign a warrant application containing probable cause unless the prosecutor maintains a reasonable and good faith belief that, when viewed in a light most favorable to the State, there will be sufficient admissible evidence at trial to establish each element of the crime charged.

If good cause exists, a prosecutor should pursue a court order sealing or limiting the disclosure of a supporting affidavit. Prosecutors should pursue such appropriate action if:

- a. necessary to protect the identity of a sexual assault victim and/or complainant; or
- b. the arrest is part of a continuing investigation which could be adversely affected by disclosure of the affidavit at such time; or
- c. the personal safety of a confidential informant or witness could be jeopardized by disclosure of the affidavit at such time; or
- d. the disclosure of the affidavit at such time would be inconsistent with the provisions of the wiretap statutes; or
- e. the disclosure of the affidavit could reveal information which is exempted by the provisions of the Freedom of Information Act.

Prosecutors should pursue extensions of any such order where appropriate.

### **3-2.5 Warrant Tracking**

All warrant applications submitted to the State's Attorney's office should be entered and tracked in the Division of Criminal Justice's electronic case management system, also known as "eProsecutor," in accordance with Division policy. Prosecutors should utilize the case management system to document their review of submitted warrants, including any requests for additional action by the submitting agency, or any grounds cited for rejection of an application.

### **3-2.6 Law Enforcement Training**

Consistent with Standard 2-5.4, the Division of Criminal Justice should assist in training law enforcement personnel on the law applicable to the issuance and execution of search and arrest warrants.

[NDAA Nat. Pros. Stds. Standards 3-2.1 & 3-2.3; U.S. Const. Amend. 4; Conn. Const. art. I, § 7; C.G.S. §§ 54-2a; 54-33a, & 54-33c; P.B. §§ 36-1 through 36-3, 36-12, 36-13; R. Prof. Conduct Rule 1.1, 3.8(1); DCJ Policy No. 520]

### **Commentary**

Because Connecticut law requires application by the prosecutor, law enforcement agencies cannot pursue an arrest warrant from a judge without first obtaining the approval of the State's Attorney's office. See C.G.S. § 54-2a. Moreover, given the



number and nature of requirements for the issuance of arrest and search warrants that will withstand motions to suppress and other legal attacks, the role of the prosecutor in providing legal assistance to law enforcement agencies in this regard is essential.

As time is often of the essence with respect to the review and submission of both arrest and search warrant applications, the standard encourages the development and maintenance of a system which affords law enforcement agencies access to such timely review. It is an unfortunate truism of the prosecutorial profession that a majority of major crimes do not occur during normal business hours. As a result, the State's Attorney's office must make accommodations for the availability of prosecutors to review warrants in the overnight hours, on weekends, and on holidays whenever the situation dictates such. Due to the volatile nature of domestic incidents, and those involving child sexual assaults, priority should be given to the prompt review of any such warrants.

The Rules of Professional Conduct provide that "competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." R. Prof. Conduct Rule 1.1. Standard 3-2.2 recognizes that search and seizure law is one area, in particular, where the prosecutor must continuously strive to remain up to date on court decisions in order to properly review submitted warrant applications and provide accurate advice and guidance to inquiring police officers.

The following provides an overview and general guidance regarding the review of search and arrest warrants. It is not intended to serve as a comprehensive resource, as that is beyond the scope of this commentary. In order to properly familiarize themselves with the applicable statutes, practice rules, and caselaw in this area, prosecutors are encouraged to consult the many available training materials and other resources the Division of Criminal Justice provides for that purpose.

The Appellate Bureau in the Office of the Chief State's Attorney endeavors to keep prosecutors in the field apprised of recent Supreme and Appellate Court decisions, highlighting issues of which trial prosecutors should take particular notice, as well as assisting with statewide training in emerging areas of the criminal law. Prosecutors in the field should recognize that the appellate attorneys are a vital resource not only post-conviction, but also during the course of warrant review, or at any time throughout the life of a case, as they are available to assist prosecutors with spotting potential issues or answering legal questions that may arise. Such open communication between the trial prosecutor and appellate attorneys can serve to head off potential problems with a case, even as early as the warrant stage, or can ensure that a proper record is made that will survive later legal challenges.

The right to be protected from unlawful search and seizure is set forth in, and regulated by, the Fourth Amendment to the United States Constitution and Article I, Section 7, of the Connecticut Constitution. See U.S. Const. Amend. 4; Conn. Const. art. I, § 7. Connecticut General Statutes Section 54-33a(b) provides, in relevant part, that any judge of the Superior Court, or judge trial referee, may issue a search warrant

[u]pon complaint on oath by any state's attorney or assistant state's attorney or by any two credible persons . . . that such state's attorney or assistant state's attorney or such persons have probable cause to believe that any property (1) possessed, controlled, designed or intended for use or which is or has been used or which may be used as the means of committing any criminal offense; or (2) which was stolen or embezzled; or (3) which constitutes evidence of an offense, or which constitutes evidence that a particular person participated in the commission of an offense, is within or upon any place, thing or person.

C.G.S. § 54-33a(b). If, upon review of the warrant application, including the supporting affidavit, the issuing judge or judge trial referee finds such probable cause, he or she may issue the warrant “commanding a proper officer to enter into or upon such place or thing, search such place, thing or person and take into such officer's custody all such property named in the warrant.” Id.; see also C.G.S. §§ 54-33a(c) (warrant for installation of tracking device) & 54-33a(f) (warrant for records or data that are in the actual or constructive possession of a foreign corporation or business entity that transacts business in Connecticut).

Thus, in reviewing search warrant applications, the prosecutor should, in addition to reviewing for technical deficiencies, pay particular attention to ensure that the following key components to a search warrant are properly addressed: (1) there is sufficient particularity in the descriptions of what is to be searched and what is to be seized; (2) the affidavit adequately demonstrates probable cause to believe that the items sought are (a) connected with criminality, and (b) presently in the space to be searched. A deficiency in any area will render the warrant unconstitutional and invalid. Prosecutors should keep in mind that items seized are later subject to suppression if: the warrant is determined to be insufficient on its face; or the property seized is not that described in the warrant; or there was not probable cause for believing the existence of the grounds on which the warrant was issued; or the warrant was illegally executed. See C.G.S. § 54-33f.

A search warrant satisfies the fourth amendment's particularity requirement “if it identifies the place or thing for which there is probable cause to search with sufficient definiteness to preclude indiscriminate searches.” State v. Buddhu, 264 Conn. 449, 458-59 (2003), cert. denied, 541 U.S. 1030 (2004). Prosecutors should

be especially alert to particularity concerns surrounding the search of cellular phones and other personal electronic devices. See, e.g., State v. Smith, 344 Conn. 229, 249 (2022); see also United States v. Purcell, 967 F.3d 159, 178 (2d Cir. 2020), cert. denied, 142 S. Ct. 121 (2021).

With respect to probable cause, the Connecticut Supreme Court has explained:

Probable cause to search is established if there is probable cause to believe that (1) . . . the particular items sought to be seized are connected with criminal activity or will assist in a particular . . . conviction . . . and (2) . . . the items sought to be seized will be found in the place to be searched. . . . There is no uniform formula to determine probable cause—it is not readily, or even usefully, reduced to a neat set of legal rules—rather, it turns on the assessment of probabilities in particular factual contexts . . . . Probable cause requires less than proof by a preponderance of the evidence . . . . There need be only a probability or substantial chance of criminal activity, not an actual showing of such activity . . . . The task of the issuing [judge] is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.

(Citations omitted; internal quotation marks omitted; brackets in original.) State v. Sawyer, 335 Conn. 29, 37-38 (2020). As a general rule, in determining whether there exists probable cause for issuance of the warrant, the issuing judge may only consider the “four corners” of the affidavit itself and nothing extraneous thereto. State v. Colon, 230 Conn. 24, 34 (1994).

Although the probable cause determination may be made based upon hearsay evidence, the affidavit must provide sufficient information for the issuing judge to gauge its reliability or the credibility of its source. State v. Morrill, 205 Conn. 560, 568 (1987). Information gleaned from fellow police officers should be clearly identified as such, as they are presumed to be credible sources of information. State v. Smith, 38 Conn. App. 29, 39 (1995). The status of the source of the hearsay information as a crime victim, a witness to the criminal activity at issue, or an “average” citizen tipster lends credibility to the information provided, and the source should be identified as such in the affidavit. See, e.g., State v. Amarillo, 198 Conn. 285, 310 (1986); State v. Smith, 16 Conn. App. 223, 231 (1988).

“When an affidavit is based on hearsay information from an informant, rather than on the personal observations of the affiant, ‘the veracity or reliability and basis of knowledge of [the informant] are highly relevant’ in the issuing judge’s analysis of the totality of the circumstances.” (Internal quotation marks in original.) State v. Flores, 319 Conn. 218, 226 (2015), citing State v. Mordowanec, 259 Conn. 94,

110, cert. denied, 536 U.S. 910 (2002). Thus, information in the affidavit provided by a confidential informant must be accompanied by more than a mere conclusory statement that the informant is “known and reliable.” Rather, the informant’s track record for supplying accurate information should be fleshed out, at least briefly, with descriptors identifying previous interactions — e.g., “this person has provided accurate information on several prior occasions, which information has led to the seizure of illegal narcotics and the arrest and conviction of several persons.” See State v. DeFusco, 224 Conn. 627, 644 (1993). If the information provided is by a confidential source with no appreciable prior history of working with police, the reliability of the information stated in the affidavit should be bolstered, to the extent possible, in other ways. See, e.g., State v. Ferguson, 185 Conn. 104, 113 (1981) (“Three of the most common factors used to evaluate the reliability of an informant’s tip are (1) corroboration of the information by police, (2) declarations against penal interest by the informant-declarant, and (3) the reputation and past criminal behavior of the suspect.”); State v. Mordowanec, supra, at 111 (“A suspect’s prior criminal record [of similar conduct], even if inadmissible at trial, may be [a] basis for establishing probable cause.”); State v. DeFusco, 224 Conn. 627, 644 (1993) (affidavit should note if information is provided in sworn statement — considered reliable because C.G.S. § 53a-180 makes criminal giving police a false sworn statement).

In reviewing the search warrant application, the prosecutor must also ensure that the supporting affidavit establishes probable cause to believe that the items sought are presently in the place(s) to be searched. See State v. Couture, 194 Conn. 530, 536 (1984), cert. denied, 469 U.S. 1192 (1985). In other words, the information cannot be stale. The Connecticut Supreme Court has indicated that “[a]lthough it is reasonable to infer that probable cause dwindles as time passes, no single rule can be applied to determine when information has become too old to be reliable. . . . Consequently, whether a reasonable likelihood exists that evidence identified in the warrant affidavit will be found on the subject premises is a determination that must be made on a case-by-case basis.” (Citation omitted) State v. Buddhu, supra, 264 Conn. at 465. As such, the Court has “refused to adopt an arbitrary cutoff date, expressed either in days, weeks or months, beyond which probable cause ceases to exist,” indicating “[t]he likelihood that the evidence sought is still in place depends on a number of variables, such as the nature of the crime, of the criminal, of the thing to be seized, and of the place to be searched.” Id. Moreover, “when an activity is of a protracted and continuous nature the passage of time becomes less significant.” Id. at 466.

Prosecutors should also be cognizant of timeliness issues related to warrant applications seeking to search the contents of cellular phones or other personal electronic devices previously seized incident to arrest. See United States v. Smith, 967 F.3d 198, 206 (2d Cir. 2020) (one-month gap between seizure of electronic tablet and pursuit of warrant to search its contents deemed unreasonable following

application of four-factor test: (1) the length of the delay; (2) the importance of the seized property to the defendant; (3) whether the defendant had a reduced property interest in the seized item; and (4) the strength of the state's justification for the delay).

“In all criminal cases, the Superior Court, or any judge thereof, . . . may issue . . . bench warrants of arrest *upon application by a prosecutorial official* if the court or judge determines that the affidavit accompanying the application shows that there is probable cause to believe that an offense has been committed and that the person complained against committed it...” (Emphasis added) C.G.S. § 54-2a; see also P.B. § 36-1 (providing same). If a name is unknown, a “John Doe” warrant is acceptable on the basis of an adequate description. See Practice Book § 36-3 (requiring in arrest warrant any name or description by which subject can be identified with reasonable certainty).

In addition to reviewing the affidavit submitted in support of an arrest warrant application for the existence of probable cause, the prosecutor should carefully review the entirety of the submission for accuracy and any technical deficiencies. If a defendant is accused of committing, or attempting to commit, a sexual assault or risk of injury, prosecutors should pay particular attention to ensure that the name and address of the victim, or other identifying information, does not appear in the supporting affidavit. See C.G.S. § 54-86e.

Consistent with Standard 4-1.1, the prosecutor should remain mindful of the fact that arrest warrant review is a critical stage for the prosecutor in screening cases. Pursuant to both statute and practice book, probable cause is the bare minimum for the issuance of an arrest warrant. See C.G.S. § 54-2a; P.B. § 36-1. In reviewing the warrant application, the prosecutor should consider whether there is a reasonable and good faith belief that there will be sufficient admissible evidence at the time of trial to convict the suspect of the crimes alleged in the warrant beyond a reasonable doubt.

In conducting his or her review of the supporting affidavit, the prosecutor should note the extent to which the affidavit relies upon hearsay information or information supplied by a confidential informant to establish probable cause. Although hearsay information may be relied upon to establish probable cause to obtain the warrant, it will not be admissible at trial. See C.C.E. §§ 8.1 & 8.2. Similarly, although information attributed to a proven reliable confidential informant may be used to support the probable cause finding, unless that confidential informant becomes a cooperating witness by the time of trial, the information so relied upon in obtaining the warrant will not be before the jury at trial. Prosecutors should properly question whether a reasonable and good faith belief exists that these gaps in proof will be filled by other admissible evidence at the time of trial. Perceived deficiencies in

terms of the strength of the case, which may be eliminated by further investigation, should be discussed with the investigating officers.

In their discussions with law enforcement officers, prosecutors should emphasize that warrant affidavits submitted, in addition to identifying sufficient inculpatory evidence to satisfy the probable cause standard, must also identify any known exculpatory evidence which may call into question the truthfulness of assertions in the warrant, and thus might impact upon the reviewing judge's finding of probable cause. See Franks v. Delaware, 438 U.S. 154 (1978); State v. Grant, 286 Conn. 499, 519-20 (2008). In Franks, the United States Supreme Court held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." Id., at 155-56; see State v. Crespo, 190 Conn. App. 639, 651 (2019); see also State v. Ferguson, 260 Conn. 339, 363-64 (2002).

As the Connecticut Supreme Court has observed, "[t]he court in Franks mentioned only a false statement . . . *included* . . . in the warrant affidavit; subsequent cases, however, have extended Franks to include material *omissions* from such an affidavit." (Emphasis added, internal quotation marks omitted.) State v. Grant, supra, 286 Conn. at 519-20, citing State v. Weinberg, 215 Conn. 231, 237, cert. denied, 498 U.S. 967 (1990). When a defendant pursues a Franks hearing on the basis of an alleged omission from the warrant affidavit, "he [or she] must make a substantial preliminary showing that the [missing] information was [both] (1) omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge, and (2) material to the determination of probable cause." State v. Sayles, 202 Conn. App. 736, 767, cert. granted on other grounds, 336 Conn. 929 (2021), citing State v. Bergin, 214 Conn. 657, 666-67 (1990).

In the event that at that Franks hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side (or with the improperly omitted material now included), the affidavit's remaining content (including the previously omitted material) is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. See Franks, supra, 438 U.S. at 156.

Prosecutors should be aware that a Franks violation in an affidavit supporting an arrest warrant does not entitle a defendant to the dismissal of the charges for which he was arrested. State v. Patterson, 213 Conn. 708, 715 (1990). "Such a violation

may require the suppression of evidence or statements obtained as a result of the execution of the warrant but it does not deprive the court of jurisdiction nor does it bar a subsequent prosecution or void a resulting conviction.” (Citations omitted) Id. at 716.

Whenever a prosecutor reviews an arrest warrant involving an out-of-court identification procedure pursuant to General Statutes Section 54-1p (requiring sequential procedure for photo-arrays), and the probable cause determination is solely dependent upon the accuracy of the identification, consideration should be given to obtaining the following items for review *prior* to the signing of the arrest warrant, when practicable and taking into due account concerns for public safety: (1) A copy of the signed witness instruction form (*Ledbetter* instructions); and (2) A written report documenting the identification procedure, which must include, (a) all identification and non-identification results signed by the witness, including the witness’s own words reflecting how certain he/she is of the selection (confidence statement), (b) the name of all persons present at the identification procedure, (c) date and time of the identification procedure, (d) color copies of all photographs presented to the witness, (e) photo-array lineup key (identification information on all persons used as fillers). The purpose of the prosecutor obtaining these materials in advance of signing the warrant is to ensure that out-of-court identification procedures comply with applicable state and federal law and, in particular, to act as a further check to prevent the following scenarios: (1) Where there is a purported “positive” identification ascribed to a witness in an arrest warrant affidavit, yet such assertion is not supported by the actual language used by the witness in the confidence statement; and (2) Where there is a purported identification of the perpetrator by the witness in an arrest warrant affidavit, when in fact, the witness has actually selected a filler.

Whenever a prosecutor reviews an arrest warrant involving a video identification, and the probable cause determination is solely dependent upon the accuracy of the identification, consideration should be given to the prosecutor obtaining and reviewing a copy of the video *prior* to the signing of the arrest warrant, when practicable and taking into due account concerns for public safety. In reviewing these videos, particular attention should be paid to two questions which will affect the admissibility of any such identification: (1) Is the overall quality of the video footage such that a reliable identification can be made?; and (2) What is the witness’s basis of knowledge or recognition? (i.e., the relationship between the witness and the suspect). See State v. Gore, 342 Conn. 129, 150-51 (2022); State v. Bruny, 342 Conn. 169, 181-82 (2022).

Procedures governing seeking a dispensation order from the issuing judge, dispensing with the requirement that a copy of the affidavits upon which a search warrant is based be provided to those persons statutorily identified as affected by the search or tracking within the time frames established by law, are contained in

General Statutes Section 54-33c. The procedures for obtaining a sealing order related to affidavits in support of arrest warrant applications appear in Practice Book Section 36-2.

The State's Attorney's office should seek to ensure that all warrant applications submitted to the office for review are properly entered and tracked in the electronic case management system pursuant to Division of Criminal Justice policy. Notations made in "eProsecutor" should include, but are not limited to: all relevant dates related to the submission; if an arrest warrant – the name and date of birth of the accused, as well as the proposed charges; if a search warrant – the person, place, or thing proposed to be searched; the name of the affiants and submitting law enforcement agency; the agency case number; reviewing prosecutor; the date forwarded to reviewing prosecutor; the outcome of such review, including any requests for additional action by the submitting agency and the date such requests were communicated; the date that a prosecutor approved warrant application was submitted to a reviewing judge, and the outcome of such judicial review. If a submitted warrant is rejected by the State's Attorney's office, the basis for the rejection should be sufficiently documented. If a warrant is approved by the judicial authority, a signed copy of the warrant and affidavit should be scanned for inclusion in the case management system.

### **3. Grand Jury Investigations**

#### **3-3.1 Purpose and Scope of Grand Jury Investigation**

A grand jury is an investigative tool that is used to develop probable cause, not to indict. Unless authorized by law to do so, a prosecutor should not use a grand jury to (1) investigate solely a non-criminal matter, or (2) gather evidence for use at trial against a defendant who has already been charged by information with a criminal offense.

#### **3-3.2 Grand Jury Subpoenas**

A prosecutor should within the bounds of the law zealously pursue all relevant information that is within the scope of the investigation. A prosecutor may issue a subpoena *duces tecum* to compel the production of documents, and a subpoena for nontestimonial evidence to compel the production of evidence such as photographs, fingerprints, voice exemplars, handwriting samples, and DNA swabs, after the grand jury has been convened.

Where doing so does not compromise the investigation, a prosecutor should seek to minimize the investigatory burden placed on subpoenaed third parties and carefully consider good faith requests by such parties to limit or modify the scope of a subpoena that is credibly said to impose an undue hardship or burden on the recipient.



### **3-3.3 Subpoenaing a Target of the Investigation**

A target of the investigation is a person who is linked by substantive evidence to criminal conduct that is under investigation by the grand jury.

Although a prosecutor may subpoena a target of the investigation to testify before the grand jury, because such a person possesses a right against compelled self-incrimination, it is a better practice to seek to secure a target's grand jury appearance voluntarily. Prior to a target appearing before the grand juror, a prosecutor should, in writing, inform such person of his or her status as a target and advise such person to obtain legal advice regarding his or her rights.

A prosecutor should grant the unsolicited request of a target of the investigation to testify before the grand jury unless such request is made for an improper purpose or would unduly burden or delay the grand jury proceedings, clearly provide information that is irrelevant to the investigation, or be inconsistent with the need to preserve the secrecy of the investigation. Before granting such a request to testify, a prosecutor should require a target of the investigation to waive on the record his or her constitutional privilege against self-incrimination.

### **3-3.4 Counsel for Witnesses and Advisements**

A prosecutor should ensure that the grand juror informs each witness prior to questioning of his or her right to have counsel present and to consult with counsel. If the witness is a target of the investigation, who has not waived his or her constitutional right against compelled self-incrimination, a prosecutor should further ensure that the grand juror informs such target prior to questioning that he or she is a target of the investigation and has the right under the state and federal constitutions not to be compelled to be a witness, or to give evidence, against himself or herself. A prosecutor should not object to a witness's reasonable request to have counsel present in the grand jury room, and to confer with counsel during questioning.

### **3-3.5 Evidence Before the Grand Jury**

When beginning a grand jury, a prosecutor should describe the nature of the anticipated evidence and witnesses, and projected order in which the witnesses will appear. Prior to each witness's appearance, the prosecutor should inform the grand juror whether the witness is a potential target or merely a fact witness.

A prosecutor who knows or is convinced in advance of a grand jury that a witness will invoke his or her constitutional right against compelled self-incrimination, rather than provide relevant information, should not present the witness to the grand jury unless the prosecutor intends to challenge the witness's assertion of the privilege or convey a grant of immunity which is consistent with Connecticut Prosecution Standards 3-4.1 et seq.

A prosecutor should not seek information from a witness that the prosecutor knows or reasonably believes is protected by the attorney-client privilege, unless the witness has executed an appropriate waiver of the privilege.

A prosecutor shall provide the grand jury with any exculpatory information or material in his or her possession, custody, or control, concerning any person who is a target of the investigation. Such information or material includes that which may be used to impeach a state's witness, such as, but not limited to, the witness's criminal record, grants of immunity, plea agreements, cooperation agreements (written or oral), or any other agreement (written or oral) conveying a benefit upon the witness, such as an agreement relating to a sentence modification.

A prosecutor who, in the course of a grand jury, learns of evidence or information that tends to negate the guilt of any accused person, or mitigate an offense charged against such person, shall, as permitted by the law governing the disclosure of grand jury information, comply with the special responsibility of a prosecutor imposed pursuant to Rules of Professional Conduct Rule 3.8 (4), and make timely disclosure of such information to the defense in any such case.

A prosecutor shall not present evidence to the grand jury that the prosecutor knows to be false, nor shall a prosecutor knowingly make a false statement of law or fact to the grand jury.

Although the exclusionary rules of the Fourth Amendment to the federal constitution, and article first, § 7, of the state constitution, have not been extended to grand jury proceedings, a prosecutor should avoid presenting evidence to the grand jury that he or she knows has been obtained in violation of these constitutional provisions unless such evidence is necessary and reliable.

[NDAA Nat. Pros. Stds. Standards 3-3.1 through 3-3.7; ABA Crim. Just. Stds. Standard 3-4.6; C.G.S. §§ 54-47b through 54-47h, inclusive; P.B. § 44-31]

### **Commentary**

A Connecticut grand jury does not indict. It is an investigative body that is comprised of a judge, judge trial referee, or a three-judge panel. It is empaneled and conducted pursuant to General Statutes §§ 54-47b through 54-47h, inclusive. Prosecutors who seek and ultimately conduct a grand jury must review and be fully familiar with this comprehensive statutory framework, as well as the rule of practice governing motions to quash subpoenas issued to compel the attendance of a witness or the production of documents at such an inquiry. See P.B. § 44-31.

Above and beyond statutory compliance, the above standards relating to grand jury investigations are intended to encourage that such investigations be conducted with a spirit of fairness. The provisions set forth therein, such as

facilitating a witness's consultation with counsel, notification of target status, and witness advisements, allow prosecutors to defend the integrity of the grand jury system as a fair and effective tool in the pursuit of justice.

#### **4. Wiretap Applications**

##### **3-4.1 Interception of Wire Communications**

Prosecutors should be familiar with the statutory scheme which strictly governs the application for, and the execution of, an order authorizing the interception of a wire communication ("non-consensual electronic surveillance").

Prosecutors should have knowledge of which offenses may be investigated in this manner; should be aware of the significant statutory federal and state reporting requirements associated with the use of non-consensual electronic surveillance; and should understand the heightened obligations and accountability to the court in connection with an application for, and use of, such surveillance.

##### **3-4.2 Permission Required to Pursue Application**

By statute, only the Chief State's Attorney or the State's Attorney for the judicial district in which the interception is to be conducted may make application to a panel of judges for such an order. As such, and because of the special considerations and legal requirements involved in pursuing such an application, prosecutors should refer such inquiries by law enforcement to their supervisor, who shall present the matter for review and final approval or rejection to the State's Attorney or Chief State's Attorney.

##### **3-4.3 Balancing of Interests**

In determining whether to pursue a panel order for non-consensual electronic surveillance, the Chief State's Attorney or the appropriate State's Attorney should consider the potential benefit of obtaining direct, incriminating, and credible evidence that can be used alone or to corroborate other information. This potential benefit should be balanced against the potential costs and risks, including whether the suspected criminal activity being investigated is sufficiently serious and persistent to justify: (a) the significant intrusion on the privacy interests of targets and innocent third parties; (b) the need to obtain periodic reauthorization for electronic surveillance; and (c) the financial and resource costs associated with such surveillance.

[NDAA Nat. Pros. Stds. Standard 3-2.2; ABA Pros. Inv. Stds. Standard 2.12; C.G.S. § 54-41a, et seq.; P.B. § 41-14]

## Commentary

The court-ordered interception of telephonic communications by law enforcement officials, also known as “non-consensual electronic surveillance,” or “wiretapping,” is strictly governed by General Statutes § 54-41a, et seq. (the Wiretap Act). The Wiretap Act limits the use of non-consensual electronic surveillance to the investigation of those offenses specifically identified by statute. See C.G.S. § 54-41b. Among the offenses which can be investigated utilizing non-consensual electronic surveillance are: gambling; bribery; racketeering activity or the collection of illegal debts (violations of C.G.S. § 53-395); aggravated sexual assault of a minor (violations of C.G.S. § 53a-70c); enticing a minor (violations of C.G.S. § 53a-90a(a)); trafficking in persons (violations of C.G.S. § 53a-192a); obscenity as to minors (violations of C.G.S. § 53a-196); sale of narcotics and hallucinogens (other than marijuana), or any other illegal drug (violations of C.G.S. § 21a-277); and felonious crimes of violence or felonies involving the unlawful use or threatened use of physical force or violence committed with the intent to intimidate or coerce the civilian population or a unit of government. See C.G.S. § 54-41b.

Similar to participation in a grand jury investigation, any prosecutor supervising or advising an investigation utilizing non-consensual electronic surveillance must review and be fully familiar with the comprehensive statutory framework which strictly governs the use of this investigatory tool. Failure to strictly adhere to the parameters of the panel’s order of authorization or approval may result in the suppression of the contents of any intercepted wire communication or any evidence derived therefrom. See P.B. § 41-14 (Suppression of Intercepted Communications); see also C.G.S. § 54-41m (Authorizing “motion to suppress the contents of any intercepted wire communication, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted.”)

Prior to initiating any approved non-consensual electronic surveillance, the prosecutor should review the following with the law enforcement agents and contract personnel such as interpreters who will assist in the execution of the order:

- a) the scope of the order;
- b) obligations of the monitoring law enforcement agents and monitoring personnel to minimize the interception of privileged conversations and other conversations outside the scope of the order and to alert the prosecutor promptly when recording evidence of new crimes;
- c) the prohibition on listening without recording;
- d) rules related to protecting the integrity and chain of custody of recordings;
- e) instructions to contact the prosecutor whenever a noteworthy event occurs, or there is a question regarding the execution of the order; and
- f) the need to adhere to non-disclosure requirements.

Any prosecutor supervising or advising an investigation utilizing non-consensual electronic surveillance should stay informed of actions of law enforcement agents and contract personnel throughout the use of such surveillance and should take appropriate steps to determine whether the required procedures are being followed by those carrying out the surveillance. All involved should be aware that “[a]ny investigative officer who discloses the contents of any intercepted wire communication or evidence derived therefrom (1) to any person not authorized to receive such information or (2) in a manner otherwise than authorized by the provisions of [the Wiretap Act] shall be guilty of a class D felony.” C.G.S. § 54-41p.

## **5. Grants of Immunity**

### **3-5.1 Immunity Generally**

A prosecutor should not grant or request immunity for a witness without the prior approval of his or her State’s Attorney. Approval should be granted only after careful consideration of the public interest. A grant of immunity should be in writing and should 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, but are not limited to:

- 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 he or she testified 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 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 his or her criminal history;
- f. The possibility of successfully prosecuting the witness prior to compelling his or her testimony; and
- g. The likelihood of future physical harm to the witness if he or she testifies under a compulsion order.

### **3-5.3 Prosecution After Grants of Immunity**

Any prosecution of a witness who has previously been immunized should be approved by the State’s Attorney or his or her designee. The prosecutor’s office should 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.

[NDAA Nat. Pros. Stds. Standards 3-4.1 through 3-4.4; C.G.S. § 54-47a]

#### **Commentary**

There are some prosecutions, usually those in which more than one person carried out the criminal act or acts, where the cooperation and testimony of one or more of the wrong doers is required for the successful prosecution of the most culpable. In those situations in which the person whose testimony is needed cannot be persuaded to cooperate in any other way, a grant of immunity may be required.

In Connecticut, General Statutes § 54-47a authorizes the prosecution to grant immunity to state witnesses under certain circumstances. It confers no such authority upon the courts with regard to defense witnesses. State v. McIver, 201 Conn. 559, 567 (1986); State v. Simms, 170 Conn. 206, 210-11 (1976). Although § 54-47a refers specifically to the Chief State's Attorney, a State's Attorney or the Deputy Chief State's Attorney as the party making application for an order of the court to compel testimony, an assistant state's attorney has the authority to make such application. State v. Yates, 174 Conn. 6, 21-22 (1977) (§ 54-47a must be construed in conjunction with § 51-278). Keeping in mind the need to maintain public trust in the criminal justice system, prosecutors should carefully examine the factors set forth in the standards before exercising his or her discretion to grant immunity.

A grant of immunity under § 54-47a includes both use immunity and transactional immunity. State v. Williams, 206 Conn. 203, 212 (1988). Use immunity, also known as derivative use immunity, is immunity from the use of the compelled testimony or any information derived from that testimony in a future prosecution against the witness. Transactional immunity protects a witness from prosecution for the offense to which the compelled testimony relates. Furs v. Superior Court, 298 Conn. 404, 406-07 (2010). Transactional immunity is broader than use immunity. In sum, if a court grants a prosecutor's application for immunity pursuant to § 54-47a, no such witness may be prosecuted for any transaction, matter or thing concerning that which he or she is compelled to testify about or produce, and no testimony or evidence so compelled, may be used as evidence against him or her in any proceeding. There is one notable exception to the above, however,

which is that no witness is immune from prosecution for perjury or contempt committed while giving such testimony or producing such evidence.

Whether the state retains the inherent authority, pursuant to its “prosecutorial power,” as vested by article fourth of the Connecticut constitution, as amended by article twenty-three of the amendments, to afford a witness use immunity only is an open question. Id. at 411.

Absent special circumstances, once the state grants immunity under the statute, it lacks power to revoke that immunity. State v. Collymore, 168 Conn. App. 847, 866 (2016), affirmed, 334 Conn. 431 (2020). A witness’s refusal to testify following a grant of immunity may subject him or her to liability for criminal contempt. Cruz v. Superior Court, 163 Conn. App. 483, 488-93 (2016). A defendant has no standing to challenge the procedure by which a witness against him has been immunized under § 54-47a. State v. Williams, 206 Conn. 203, 209-12 (1988).

Standard 3-4.4 recognizes that, under Connecticut law, prosecutors have no obligation to seek or grant immunity to defense witnesses. Other jurisdictions, however, have held that, under certain compelling circumstances, the rights to due process and compulsory process under the federal constitution require the granting of immunity to defense witnesses. Those courts have developed two theories of immunity applicable to defense witnesses: the “effective defense” theory and the “prosecutorial misconduct” theory. State v. Holmes, 257 Conn. 248, 253-55 (2001).

Under the effective defense theory, the trial court has authority to grant immunity to a defense witness when it is found that a potential defense witness can offer testimony which is clearly exculpatory and essential to the defense case and when the government has no strong interest in withholding immunity. Immunity will be denied under this theory if the proffered testimony is found to be ambiguous or not clearly exculpatory. The prosecutorial misconduct theory, on the other hand, is based on the notion that the due process clause constrains the prosecutor to a certain extent in his or her decision to grant or not grant immunity. The constraint imposed by the due process clause is operative only when the prosecution engages in certain types of misconduct (i.e., forcing the witness to invoke the fifth amendment or engaging in discriminatory grants of immunity to gain tactical advantage), and the testimony must be material, exculpatory and not cumulative, and the defendant must have no other source to get the evidence. The Connecticut Supreme Court has discussed the effective defense and prosecutorial misconduct theories, but has not yet ruled on their validity or adopted them. State v. Collymore, 334 Conn. at 457-58; State v. Kirby, 280 Conn. 361, 404 (2006); State v. Holmes, 257 Conn. at 255; State v. Ayuso, 105 Conn. App. 305, 315-19 (2008).

## **PART IV. PRE-TRIAL CONSIDERATIONS**

- 1. Screening**
- 2. Charging**
- 3. Diversion**
- 4. Arraignment**
- 5. Pretrial Release**
- 6. Hearing in Probable Cause**
- 7. Forfeiture**
- 8. Discovery**
- 9. Case Scheduling**

### **1. Screening**

#### **4-1.1 Initiation of Criminal Cases**

Prosecutors should possess a fundamental understanding of the manner in which criminal cases are initiated under Connecticut law, including familiarity with rules of practice setting forth post-arrest procedures to be followed by law enforcement and the clerk of the court — all leading to the clerk's assignment of a docket number, the entry of the matter on the criminal docket, and the creation of a criminal case file.

Prosecutors should be aware that, apart from review of arrest warrant applications (see Standard 3-2.4), under Connecticut law and rules of practice there is no procedural mechanism for prosecutors to screen criminal cases before the clerk of the court assigns a docket number, a criminal file is created, and the matter is entered on the criminal docket.

#### **4-1.2 Prosecutorial Responsibility**

Prosecutors should recognize that the probable cause standard is the constitutional and ethical minimum for initiating criminal charges against an accused. A prosecutor shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.

The decision to initiate a criminal prosecution should be made by the State's Attorney's office. Although Connecticut law allows criminal charges to be lodged by law enforcement officers at the time of arrest without warrant, following the establishment of probable cause to believe that the accused was committing, or had just committed, the crime at issue, prosecutors should evaluate the matter at the earliest practical time to determine whether those charges initially lodged by law enforcement officers should be pursued.



When arrest is sought by warrant, prosecutors should appreciate that the review of an arrest warrant application is the first critical stage in the prosecutorial screening process. Consistent with Standard 3-2.4, a prosecutor should not sign a warrant application, even if it contains probable cause, unless the prosecutor maintains a reasonable and good faith belief that, when viewed in a light most favorable to the State, there will be sufficient admissible evidence at trial to establish each element of the crime charged. In determining whether formal criminal charges should be filed, prosecutors should consider whether further investigation should be undertaken.

#### **4-1.3 Prosecutorial Discretion**

The Chief State's Attorney and the State's Attorneys should recognize and emphasize the importance of the initial screening and charging decisions and should provide appropriate training and guidance to prosecutors regarding the exercise of their discretion.

#### **4-1.4 Factors to Consider**

Prosecutors should screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest.

The following factors may militate against pursuing criminal charges against an accused and should properly be considered as part of the deliberative process in this regard:

- a. Doubt about the accused's guilt;
- b. Insufficiency of admissible evidence to support a conviction;
- c. The negative impact of a prosecution on a victim;
- d. The availability of adequate civil remedies;
- e. The availability of suitable diversionary and rehabilitative programs;
- f. Provisions for restitution;
- g. Likelihood of prosecution by another criminal justice authority;
- h. Whether non-prosecution would assist in achieving other legitimate goals, such as the investigation or prosecution of more serious offenses;
- i. The charging decisions made for similarly-situated defendants;
- j. The attitude and mental status of the accused;
- k. Undue hardship that would be caused to the accused by the prosecution;
- l. A history of non-enforcement of the applicable law;
- m. Failure of law enforcement to perform necessary duties or investigations;
- n. Whether the alleged crime represents a substantial departure from the accused's history of living a law-abiding life;
- o. Whether the accused has already suffered substantial loss in connection with the alleged crime;

- 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.

#### **4-1.5 Factors Not to Consider**

While there are myriad factors that should be weighed by the prosecutor in exercising his or her discretion respecting the pursuit of criminal charges against an accused, the following factors should not be considered in the screening decision:

- a. The prosecutor's individual, or the State's Attorney's office's, conviction rates;
- b. Personal advantages or disadvantages that a prosecution might bring to the prosecutor or others in the State's Attorney's office;
- c. Political advantages or disadvantages that a prosecution might bring to the prosecutor;
- d. The individual's race, gender, religion, national origin, sexual orientation, or gender identity, insofar as those factors are not pertinent to the elements or motive of the crime;
- e. The impact of any potential asset forfeiture to the extent described in Standard 4-7.4.

#### **4-1.6 Information Sharing**

The prosecutor should attempt to gather all relevant information that would aid in rendering a sound screening decision. The States Attorney's office should take steps to ensure that other government and law enforcement agencies cooperate in providing the prosecutor with such information.

#### **4-1.7 Continuing Duty to Evaluate**

In the event that the prosecutor learns of previously unknown information that could affect a screening decision previously made, the prosecutor should reevaluate that earlier decision in light of the new information. In the event the new or additional information is discovered in a case that has previously been declined, the prosecutor should take all reasonable steps to ensure that the matter is properly reevaluated in a timely manner, with proper deference to any applicable limitations period.

#### **4-1.8 Record of Declinations**

Whether the election not to pursue charges is made at the time a warrant application is rejected, during an initial screening process, or at any time thereafter, consistent with Division policy the prosecutor should enter the reasons for

declining to pursue charges in the electronic case management system “eProsecutor.” The Division should retain a record of the reasons for declining a prosecution as permitted by law.

#### **4-1.9 Explanation of Declinations**

The prosecutor should, to the extent practicable, promptly respond to inquiries from those who are directly affected by a declination of charges.

[NDAA Nat. Pros. Stds. Standards 4-1.1 through 4-1.6, inclusive, & 4-1.8; ABA Crim. Just. Stds. Standards 3-4.2, 3-4.3, & 3-4.4; R. Prof. Conduct Rule 3.8(1); C.G.S. § 51-277d; P.B. §§ 36-1, 36-12; DCJ Policy No. 520]

#### **Commentary**

It could be argued that screening decisions are the most important made by prosecutors in the exercise of their discretion in the search for justice. The screening decision determines whether or not a matter will be absorbed into the criminal justice system. While the decision to initiate or maintain a prosecution may be very easy at times, at others it will require an examination and balancing of a broad assortment of factors. These standards set forth some of the considerations that may be relevant to an informed screening decision as well as some that should not be used in making the determination.

As the Connecticut Supreme Court has acknowledged: “Prosecutors . . . have a wide latitude and broad discretion in determining when, who, why and whether to prosecute for violations of the criminal law . . . This broad discretion, which necessarily includes deciding which citizens should be prosecuted and for what charges they are to be held accountable . . . rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.” (Citations omitted; internal quotation marks omitted.) State v. Kinchen, 243 Conn. 690, 699 (1998) (trial court’s dismissal of charge usurped essential prosecutorial function in violation of separation of powers doctrine where no constitutional infirmity or other fundamental defect in the state’s exercise of its prosecutorial authority warranted dismissal).

Most criminal cases begin when a law enforcement officer arrests a suspect, either under the authority of an arrest warrant or based on criminal conduct that the officer observes or learns of in the course of his or her duties. See C.G.S. §§ 42-2a (issuance of bench warrants of arrest); 54-1f (arrest without warrant); 54-1h (arrest by complaint and summons for commission of misdemeanor). In the vast majority of instances, the arrest will result in the issuance of a summons providing the accused with a first court appearance scheduled at a future date, generally within two weeks of the arrest.

In other instances, circumstances may require that the accused be taken into custody. See P.B. § 44-24 (listing offenses for which the defendant must be taken into custody). Following custodial arrest, the accused may be released on a promise to appear or after posting bail. If an accused held on a monetary bail is unable to post the appropriate bond, he or she will be held pending arraignment before a judge of the Superior Court on the next sitting day. See Standard 4-4 (Arraignment). Persons arrested for a family violence crime (as defined in General Statutes Section 46b-38a), a stalking crime, or violation of a protective order must be arraigned on the next sitting day, regardless of whether the person was able to be released on bail. See C.G.S. § 54-1g. If an individual arrested without a warrant has not been released from custody, a probable cause determination must be made by the judicial authority within forty-eight hours following arrest. See P.B. § 37-12 (“Such determination shall be made in a non-adversarial proceeding, which may be ex-parte based on affidavits.”)

Whether the accused is issued a summons or held in custody until he or she can be brought before the court for arraignment, once the arrest is effectuated, the matter, including copies of all required paperwork surrounding the arrest, is forwarded by law enforcement personnel to the clerk of the criminal division of the Superior Court for the jurisdiction in which the crime(s) occurred. But see C.G.S. §46b-142 (juvenile matters initiated in jurisdiction in which the juvenile resides, as opposed to where the alleged act occurred). The rules of practice provide that:

Upon the return of an indictment or of a summons, or of a warrant previously issued by the judicial authority, or upon receipt of notice of an arrest, the clerk of the court having jurisdiction of the case shall forthwith assign a number to the case, enter it on the criminal docket or on other appropriate documents, and make a file in connection therewith. Such clerk shall immediately notify the prosecuting authority of the number assigned to the case.

P.B. § 44-11. Thus, for initial screening purposes, under Connecticut law the defendant’s arrest generally does not come to the attention of the prosecutor until after the case has been assigned a docket number and docketed for a first court appearance.

At the earliest reasonable time, the prosecutor should review the police reports underlying the arrest to determine whether the charges lodged by the arresting officer are factually supported by the officer’s recitation of the events at issue. On scene, the involved law enforcement officers may have had a variety of reasons for arresting the defendant and lodging the charges they did. However, the prosecutor, upon review of the matter, maintains the discretion to keep those charges, increase the charges, decrease the charges, or even drop the charges entirely when appropriate.

In Connecticut, only the prosecutor has the statutory authority to file criminal charges in court. Unless the prosecutor signs an information or complaint charging specific offenses, an arrested person may not be held to answer to a criminal charge. See P.B. § 36-11; but see State v. Nelson, 144 Conn. App. 678, 686, cert. denied, 310 Conn. 935 (2013) (although information required to be signed by prosecuting authority, absence of required signature is waivable, non-jurisdictional defect). No one, not a police officer, elected official, or judge can override the prosecutor's decision to file – or not to file – a criminal charge. See, e.g., Massameno v. Statewide Grievance Committee, supra, 234 Conn. at 574 (“the doctrine of separation of powers requires judicial respect for the independence of the prosecutor”); Kelly v. Dearington, 23 Conn. App. 657, 659-60 (1990) (private citizen may not compel the state's attorney to take particular action).

In deciding whether to file a criminal charge, the prosecutor's first obligation is to ensure that probable cause exists to believe that the person committed the intended charge. No criminal charge may be filed absent probable cause. See R. Prof. Conduct Rule 3.8(1). In many instances, the prosecutor initially must rely on a police report to make that determination. Depending on the circumstances, it may be wise – even necessary – to file a criminal information on that basis alone, particularly when the investigation is ongoing and is likely to yield more evidence against the accused. But probable cause is the minimum evidentiary standard necessary to initiate a prosecution. To convict a defendant requires proof beyond a reasonable doubt. Thus, once the investigation is complete, the prosecutor must decide if the admissible evidence is sufficient, not merely to establish probable cause, but to convince a jury of the defendant's guilt beyond a reasonable doubt.

If, following careful consideration of the factors identified in these standards, the prosecutor declines to prosecute a particular case, the reasons surrounding the screening decision should be documented in the electronic case management system. Where the victim or law enforcement officers have requested to be kept informed about the case, the declination decision should be appropriately communicated in a timely fashion.

## **2. Charging**

### **4-2.1 Prosecutorial Responsibility**

It is the ultimate responsibility of the State's Attorney's office to determine which criminal charges should be prosecuted and against whom.

As with the initial screening of cases, the decision as to what charge to pursue or not to pursue against an individual, as well as other decisions made throughout the case, shall not be influenced by the race, gender, religion, national origin, or sexual orientation of the individual unless relevant to an element of the offense.

After criminal charges are filed the State's Attorney's office should oversee any further law enforcement investigative activity related to the case.

#### **4-2.2 Propriety of Charges**

In fulfilling his or her role in the criminal justice system the prosecutor must enforce the law while exercising sound discretion. In doing so, the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support.

A prosecutor should only file those charges that are consistent with the interests of justice, that he or she believes adequately encompass the accused's criminal activity, and which he or she reasonably and in good faith believes can be substantiated by admissible evidence at trial.

Factors that may be relevant to this decision include:

- 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 accused that are relevant to his or her 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 value to society of incapacitating the accused in the event of a conviction;
- f. the willingness of the offender to cooperate with law enforcement;
- g. the defendant's relative level of culpability in the criminal activity;
- h. the status of the victim, including the victim's age or special vulnerability;
- i. whether the accused held a position of trust at the time of the offense;
- j. excessive costs of prosecution in relation to the seriousness of the offense;
- k. recommendation of the involved law enforcement personnel;
- l. the impact of the crime on the community;
- m. any other aggravating or mitigating circumstances.

#### **4-2.3 Improper Leveraging**

The prosecutor should not file charges where the sole purpose is to obtain from the accused a release of potential civil claims, nor should the prosecutor attempt to use the charging decision as a leverage device to obtain a guilty plea to a lesser charge (i.e., by "overcharging").

#### 4-2.4 Maintaining Criminal Charges

After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.

If a prosecutor has significant doubt about the guilt of the accused or the quality, truthfulness, or sufficiency of the evidence in any criminal case assigned to the prosecutor, the prosecutor should disclose those doubts to his or her supervisor. If a prosecutor has made such a disclosure, the supervisor, and/or the State's Attorney for the jurisdiction, should undertake an independent review of the case in light of the prosecutor's expressed concerns, including meeting with the involved law enforcement agency if necessary. Following such review, the State's Attorney's office should determine whether it is appropriate to proceed with the case. The State's Attorney's office should not continue to maintain charges if it believes the defendant is innocent, no matter what the state of the evidence.

[NDAA Nat. Pros. Stds. Standards 1-1.3, 4-2.1 through 4-2.4, inclusive; ABA Crim. Just. Stds. Standards 3-4.2, 3-4.3, & 3-4.4; C.G.S. §§ 54-57, 54-60, 54-61, 54-62; P.B. §§ 36-11 et seq.]

#### Commentary

The means by which a prosecutor elects to implement charging decisions is closely related to the mechanism utilized in reaching screening decisions. As with the initial screening decision that a prosecution should be initiated, the charging decision is the prerogative and responsibility of the prosecutor. "It has long been recognized by both the United States Supreme Court and the Connecticut Supreme Court that it is the prosecutor's duty to determine whether reasonable grounds exist to proceed with a criminal charge and that the prosecutor has broad discretion in determining what crime or crimes to charge in any particular situation." State v. Menzies, 26 Conn. App. 674, 680-81 (1992), citing Wayte v. United States, 470 U.S. 598, 607-608 (1985) and State v. O'Neill, 200 Conn. 268, 279-80 (1986).

The Connecticut Supreme Court has acknowledged that "the basis of prosecutorial charging decisions is one area not generally well suited for broad judicial oversight because it involve[s] exercises of judgment and discretion that are often difficult to articulate in a manner suitable for judicial evaluation . . . . The judicial branch . . . [is] not in the best position to consider the various factors that prosecutors weigh, such as the strength of the evidence, the visibility of the crime, the availability of resources and possible deterrent effects. Nor is the judicial branch anxious to consider the validity of various rationales advanced for particular charging

decisions.” (Citation omitted; internal quotation marks omitted.) Massameno v. Statewide Grievance Committee, 234 Conn. 539, 575 (1995).

At its base, the charging decision entails determination of the following issues:

- What possible charges are appropriate to the offense or offenses?
- What charge or charges would best serve the interests of justice?

The guidelines provide a non-exhaustive list of appropriate factors which the prosecutor should consider in exercising his or her charging decision on a case-by-case basis. No two defendants, and no two cases, are ever exactly the same. “Serving the interests of justice” requires the prosecutor to engage in a delicate balance. In making a charging decision, the prosecutor should keep in mind the power he or she is exercising at that point in time. The prosecutor is making a decision that will have a profound effect on the lives of the person being charged, the person’s family, the victim, the victim’s family, and the community as a whole. The magnitude of the charging decision does not dictate that it be made timidly, but it does dictate that it should be made wisely with the exercise of sound professional judgment.

These standards afford the prosecutor discretion in the charging decision to pursue only those charges that he or she believes adequately encompass the accused’s criminal activity, rather than requiring the prosecutor to pursue the most serious charges available; a policy which undoubtedly benefits the accused — particularly when exposed to potential mandatory minimum sentencing. By contrast, under federal charging policies, federal prosecutors are not afforded this same discretion in charging. Federal policy provides that, “[o]nce the decision to prosecute has been made, the attorney for the government should charge and pursue the most serious, readily provable offenses. By definition, the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences.” Justice Department Manual, § 9-27.300 (*Selecting Charges — Charging Most Serious Offenses*). Any variation from the federal policy must be approved by the United States Attorney or Assistant Attorney General, or their designee. Id.

There will be times when information not known at the time of charging will influence future actions in a case. While it is advisable to gather all information possible prior to charging, at times that is simply an unrealistic expectation. The prosecutor must balance the importance of gathering information and the importance of public safety interests when determining when he or she has sufficient information to make a charging decision.

While commencing a prosecution is permitted by most ethical standards upon a determination that probable cause exists to believe that a crime has been



committed and that the defendant has committed it, the standard prescribes a higher standard for filing a criminal charge. To suggest that the charging standard should be the prosecutor's reasonable belief that the charges can be substantiated by admissible evidence at trial is recognition of the powerful effects of the initiation of criminal charges. Pursuant to the prosecution's duty to seek justice, the protection of the rights of all (even the prospective defendant) is required.

Prosecutor led diversion decisions, as discussed in Standard 4-3.1, and the commentary thereto, should only be done at the prosecutor's discretion, and the prosecutor should not yield to external pressures in either selecting a charge or deciding if diversion alternatives are a proper course of action. Such diversion may be done at any stage of the proceeding, but with the option of continued prosecution.

### **3. Diversion**

#### **4-3.1 Diversion Alternatives**

In Connecticut, cases may be diverted as a result of: 1) prosecutorial led diversion decisions; or 2) court sanctioned alternative diversion programs. In either case, the prosecutor should keep in mind that the interests of justice are best served by a diversion that benefits both the community and the individual.

As used in these standards "prosecutorial led diversion decisions" are diversions of a criminal case based upon an exercise of the prosecutor's discretion. That diversion may be through a formally established screening program such as the Early Screening and Intervention Program (ESI) (see Standard 2-16.1 et seq., commentary, supra), or it may be accomplished by the granting of a continuance to allow the defendant to take administrative action (e.g., remedy issues related to the Motor Vehicle Department), perform community service, make restitution to a victim, obtain supporting documentation, attend counseling sessions or substance abuse treatment, connect with community service providers, or satisfy similar requirements germane to the offense — any of which will, upon adequate proof of performance, result in the prosecutor entering a nolle prosequi of the charges.

"Court sanctioned alternative diversion programs" are programs which have been developed by the legislature, and implemented by the Judicial Department, to address certain identified persons or offenses. The parameters for eligibility and participation in such diversionary programs are governed by statute. The prosecutor exercises no discretion with relation to the offender's eligibility for participation in any such court sanctioned alternative diversion program. An offender's successful completion of such programs results in a dismissal of the charges against him or her.

A prosecutor should be aware and informed of the scope and availability of all prosecutorial led and court sanctioned alternative diversion programs.

#### **4-3.2 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.

#### **4-3.3 Diversion Procedures**

In judicial districts that have implemented the Early Screening and Intervention Program (ESI), prosecutors should be familiar with the procedures utilized for screening cases for acceptance and understand the role of the resource counselor in providing an assessment of the offender for treatment and service referrals. Those prosecutors assigned to ESI should work with the resource counselor to create a disposition tailored for the individual defendant that, to the extent practicable, addresses the needs and priorities of the community.

In addition to being aware of the statutory criteria governing a defendant's eligibility for participation in court sanctioned alternative diversion programs, the prosecutor should be familiar with the procedures by which defendants may make application for court ordered acceptance into such programs.

#### **4-3.4 The Prosecutor's Role in Diversion**

A prosecutorial led diversion decision represents an informed exercise of the prosecutor's discretion. The prosecutor should, within the sound exercise of that discretion, determine whether diversion of an offender best serves the interests of justice by taking into account the needs of both the individual offender and the community. The prosecutor should seek to corroborate that the accused has fulfilled any conditions appropriately attached to the diversion of the case prior to entering a nolle prosequi of any charges on the record.

The prosecutor should, in the interest of fairness, make pro se defendants aware of their eligibility for any court sanctioned alternative diversion programs which a review of the case reveals, and provide instruction to the defendant on how to make application for any such program should the defendant so choose. Upon the defendant's successful completion of any such program ordered, the prosecutor should so advise the court. Conversely, the prosecutor should alert the court to the defendant's failure to abide by the terms and conditions of any diversion program ordered and, if warranted, should seek to have the defendant's participation in the program terminated and the case restored to the regular docket.

#### **4-3.5 Factors to Consider**

The prosecutor may divert individuals from the criminal justice system when he or she considers it to be in the interest of justice and beneficial both to the community and to the individual. Factors which 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 recidivate;
- i. the extent to which diversion will enable the defendant to maintain employment or remain in school;
- j. victim input / impact of the crime on the victim;
- k. provisions for restitution; and
- l. diversion decisions with respect to similarly situated defendants.

#### **4-3.6 Record of Diversion**

Consistent with Division policy the prosecutor should enter a record of the defendant's participation in a court sanctioned alternative diversion program, or, if the defendant's case is the subject of a prosecutorial led diversion, the reasons for the diversion, in the electronic case management system "eProsecutor." The Division should retain a record of such diversionary program participation as permitted by law.

#### **4-3.7 Explanation of Diversion Decision**

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

#### **4-3.8 Establishment and Expansion of Programs**

The Chief State's Attorney and the various State's Attorneys should urge the establishment, statewide expansion, maintenance, and enhancement of effective diversionary programs for low-level offenders that address the root causes of their criminal behavior (e.g., mental health, drug dependence, and/or homelessness). In addition to directing offenders to service providers in the community, the overarching objectives of such programs should be reducing recidivism,

unburdening court dockets, and conserving judicial resources for more serious cases.

[NDAA Nat. Pros. Stds. Standards 4-3.1 through 4-3.8, inclusive; ABA Crim. Just. Stds. Standard; C.G.S. §§ 46b-38c(h)(2), 54-56g, 54-56l, 54-56m; P.B. § 39-33; DCJ Policy No. 520]

### **Commentary**

An alternative available to prosecutors in the processing of a criminal complaint is that of diversion — the channeling of criminal defendants, into programs that may not result in a criminal conviction. The purposes of diversion programs include:

- Unburdening court dockets and conserving judicial resources for more serious cases;
- Reducing the incidence of offender recidivism by providing community-based rehabilitation that would be more effective and less costly than the alternatives available in continued criminal prosecution.

How prosecutors elect to use their charging authority on “low-level” offenders — panhandlers, shoplifters, vagrants, minor drug offenders, many of whom may have substance abuse, mental health or housing issues — has a significant impact on their likelihood of future offense, their interaction and participation with the community — their very lives. Prosecutors, when provided the resources necessary to look at the person behind the offense, can use their authority to charge or not charge — to push a case along or seek to address the underlying causes of criminal behavior — to effect long-term changes in offenders’ lives, make people feel safer, and regenerate communities. Division of Criminal Justice, supra note 5, at 24.

Determination of the appropriateness of diversion in a specified case will involve a subjective determination that, after consideration of all circumstances, the offender, the victim, and the community will all benefit more by diversion than by prosecution. Equally important as protecting the rights of the individual is the necessity to protect the interests of society. It must be remembered that the individual involved in the diversion process is accused of having committed a criminal act and is avoiding prosecution only because an alternative procedure is thought to be more appropriate and more beneficial.

Prosecutors, even those in jurisdictions in which the Early Screening and Intervention Program (ESI) is not presently operating, should be familiar with its objectives and operating procedures, as described in the commentary to Standard

2-16, supra. The documented success of the program in diverting low-level offenders away from the criminal court system and toward appropriate treatment and service providers justifies its proposed future expansion on a statewide basis.

The standards stress that prosecutors, more particularly those line prosecutors who work in Part B geographic area courts, should know the court sanctioned alternative diversion programs available to defendants and be familiar with the statutory requirements regarding eligibility for participation. Among those diversionary programs are: Accelerated Pretrial Rehabilitation (AR), C.G.S. § 54-56e; Supervised Diversionary Program for Veterans and Persons with Psychiatric Disabilities, C.G.S. § 54-56l; Family Violence Education Diversionary Program, C.G.S. § 46b-38c(h)(2); Alcohol Education Program (AEP), C.G.S. § 54-56g; Pretrial School Violence Prevention Program, C.G.S. § 54-56j; and Court ordered referral for mediation pursuant to C.G.S. § 54-56m.

As noted in Standard 2-7.4, and the commentary thereto, the standards distinguish between the forbidden act of giving legal advice to an unrepresented person and the acceptable action of apprising an unrepresented defendant of diversionary programs legally available to the defendant. Faced with the realities encountered by prosecutors on a daily basis vis-à-vis unrepresented low-level offenders (described in footnote 3, supra), prosecutors are encouraged to explain the parameters of available diversionary alternatives to eligible defendants and provide information relating to how to make application to such programs where appropriate.

As noted in the commentary to Standard 2-7.2 (Communication with Unrepresented Defendants), any concerns that the defendant speaking with prosecutors regarding alternatives to prosecution may result in admissions against interest, that will later be used against him or her should diversion prove unsuccessful, are obviated by the rules of evidence. Connecticut Code of Evidence Section 4-8A(a)(3), expressly prohibits the admission of statements made by a pro se defendant during unsuccessful plea negotiations at any subsequent trial in the case. See C.C.E. § 4-8A(a)(3) & 4-8A(b) (providing limited exceptions).

## **4. Arraignment**

### **4-4.1 Prosecutorial Responsibility**

The prosecutor should work with law enforcement and the court to ensure that an accused who is in custody is brought before a Judge of the Superior Court for purposes of arraignment in a timely fashion in accordance with governing law.

#### **4-4.2 Prosecutor's Role**

Consistent with rules of practice, prior to arraignment the prosecutor shall provide to the judicial authority and the defendant, or counsel for defendant, a copy of any affidavit or report submitted to the court for the purpose of determining the existence of probable cause to believe such person committed the offense charged. Redactions to any such documents should be made as authorized by statute.

At or prior to the arraignment, the prosecutor handling the arraignment should ensure that the charges contained on the charging document are consistent with the conduct described in the available law enforcement reports and any other information the prosecutor possesses.

At or before the arraignment, the prosecutor should consider:

- a. whether the accused has counsel, and if not, whether and when counsel will be made available or waived;
- b. whether the accused appears to be mentally competent, and if not, whether to seek an evaluation;
- c. whether the accused should be released or detained pending further proceedings and, if released, whether supervisory conditions should be imposed; and
- d. what further proceedings should be scheduled to move the matter toward timely resolution.

At the arraignment, the prosecutor should, to the extent practicable, ensure that:

- a. bond is set commensurate with the offense charged;
- b. any reasonable concerns about the accused's mental competence, are brought to the attention of defense counsel and, if necessary, the judicial officer;
- c. the charges to which the defendant is put to plea are correct and appropriate;
- d. any schedule of future proceedings set by the court avoids unnecessary delay.

The prosecutor shall not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.

[NDAA Nat. Pros. Stds. Standards 4-5.1 & 4-5.2; ABA Crim. Just. Stds. Standard 3-5.1; R. Prof. Conduct Rule 3.8(3); C.G.S. §§ 54-1d, 54-1g(a); P.B. §§ 37-1, 37-2]

## Commentary

The General Statutes provide that any arrested person who is not released sooner shall be promptly presented before the superior court sitting next regularly for the geographical area where the offense is alleged to have been committed. C.G.S. § 54-1g(a). If an arrested person is hospitalized, or has escaped or is otherwise incapacitated, the person shall be presented, if practicable, to the first regular sitting after return to police custody. Id.

In addition to those persons in custody described above, the statutes provide for the next sitting day arraignment of persons arrested for a family violence crime (as defined in General Statutes Section 46b-38a), a stalking crime, or violation of a protective order, regardless of whether the person was able to be released on bail. C.G.S. § 54-1g(a) & (b).

Practice Book Section 37-1 states:

[A] defendant who is not released from custody sooner shall be brought before a judicial authority for arraignment no later than the first court day following arrest. A defendant not in custody shall appear for arraignment in person at the time and place specified in the summons or the terms of release, or at such other date or place fixed by the judicial authority.

P.B. § 37-1. Prior to arraignment, the prosecutor is responsible for providing the court and the defendant, or his or her counsel, with sufficient documentation to support a finding of probable cause for the crime(s) with which the defendant is charged. See P.B. § 37-2. Prosecutors must bear in mind that, pursuant to statute, if a defendant is accused of committing, or attempting to commit, a sexual assault or risk of injury, the name and address of the victim shall be confidential and shall be disclosed only upon order of the court. See C.G.S. § 54-86e. Therefore, the name and address of such a victim, as well as any other potential identifying information, should be redacted from any documents relied upon for the probable cause determination *before* the documents are provided to the court, as those document will become part of the criminal file subject to public inspection.

The standard incorporates Rule 3.8(3), prohibiting a prosecutor from seeking to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing. See R. Prof. Conduct Rule 3.8(3). The rule does not apply, however, when the prosecutor is dealing with a defendant who has elected to proceed without counsel with the approval of the judicial authority. See R. Prof. Conduct Rule 3.8, commentary; see also Standard 2-7.2 (Communications With Unrepresented Defendants).

## **5. Pretrial Release**

### **4-5.1 Prosecutorial Responsibility**

Article first, § 8, of the constitution of Connecticut guarantees a person accused in a criminal prosecution the right “to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great....”

This provision provides a fundamental right in all cases, including capital cases not falling within the exception, to bail in a reasonable amount. A reasonable amount of bail is not necessarily an amount within the power of the accused person to raise but, rather, an amount that is reasonable under all of the relevant circumstances.

The primary purpose of bail is to secure an accused person’s presence at trial, but bail also may serve the purpose of ensuring good behavior and public safety during the pretrial period.

### **4-5.2 Bail Amount Request**

A prosecutor’s decision to recommend pretrial release or seek detention should be based on the facts and circumstances of the accused person and the offense, rather than made categorically. As such, a prosecutor should obtain information about the accused person and his or her circumstances and history upon which to adequately base a request for bail in a reasonable amount. Among the factors a prosecutor should consider in determining a reasonable amount of bail are:

- a. the person’s employment status and history;
- b. the person’s financial condition and resources, ability to raise funds, and the source of such funds;
- c. the length and character of the person’s residence in, or ties to, the community, and the nature and extent of the person’s family ties in or to the community;
- d. the nature and severity of the crime, including the level of violence, the strength of the evidence, and the severity of the sentence that could be imposed on conviction;
- e. the person’s criminal record, especially prior convictions for a crime of violence or non-appearance, or for offense committed while on release;
- f. the likelihood, based upon reliable information, including statements of the accused person, that such person will seek to intimidate or tamper with a witness or victim, tamper with evidence, or otherwise engage in criminal activity while on release.



### **4-5.3 Alternatives to Pretrial Incarceration**

A prosecutor should recommend bail decisions that facilitate pretrial release rather than detention to the extent that such release is consistent with the prosecutor's responsibilities set forth in Section 4-5.1.

### **4-5.4 Continuing Obligation**

A prosecutor has a continuing obligation to take appropriate steps to modify the accused person's bail or conditions of release if, after the initial bail and release determinations are made, the prosecutor learns of new information that makes such original decisions inappropriate.

[NDAA Nat. Pros. Stds. Standards 4-1.1 through 4-4.4; ABA Crim. Just. Stds. Standard 3-5.2; C.G.S. § 54-64a; P.B. § 38-4]

### **Commentary**

Determinations regarding bail and release ultimately are made by the court pursuant to Connecticut General Statutes § 54-64a and corresponding Practice Book § 38-4, which set forth the same essential factors that are set forth in Section 4-5.2. The statutory and ruled-based standards demand respect for the presumption of innocence, which is not overcome lightly or indiscriminately, and express a clear preference for release of an accused person pending trial. Prosecutors should keep in mind, as the Connecticut Supreme Court has recently observed, "pretrial detention may carry very serious consequences in addition to, and as a result of, the defendant's loss of liberty. Pretrial detention can affect employment situations, housing arrangements and family relationships, and also increases the likelihood of a criminal conviction, either by interfering with the defendant's ability to assist in his own defense or by increasing the possibility of a guilty plea." (Citation omitted) State v. Pan, 345 Conn. 922, 952-53 (2022), 2022 WL 17170883 at \*10.

Consistent with the prosecutor's responsibilities set forth in Section 4-5.1, such standards also recognize that in circumstances in which the accused person poses a significant risk of non-appearance, danger to the community, likely harm to witnesses or victims, or likely threat to the integrity of evidence, the setting of bail in an amount that the accused person likely cannot raise may be constitutionally reasonable under all of the relevant circumstances. See id. 345 Conn. at 941-42, 2022 WL 17170883 at \*6-7; see also State v. Anderson, 319 Conn. 288, 308, 127 A.3d 100 (2015).

Upon a judicial order of pretrial release of an accused person, any other person or agency responsible for monitoring the accused person's compliance with any conditions of release should keep the prosecutor apprised of the accused person's

performance. Based on material changes in circumstances, the prosecutor should remain open to considering, and make reasoned, up-to-date decisions regarding, modifications of the conditions of release in order to maintain the closest possible continuing fit between such and the present circumstances relating to the accused person.

Prosecutors should be familiar with the implications of the Connecticut Supreme Court's recent decision in State v. Pan, *supra*, wherein the court had occasion to consider whether the procedures surrounding initial bail determinations at arraignment, and the post-arraignment bail review process when modification is sought, adequately protect the right to bail guaranteed by article first, § 8, of our state constitution. The court's review resulted in an affirmation of existing procedures utilized to establish bail at arraignment, advising – “the trial court should exercise its discretion to impose an initial bond in accordance with relevant statutory and Practice Book factors, as it always has, guided by any available evidence and representations from counsel. In short, we have no reason at this time to believe that the existing procedures in place for initial bond determination at arraignment require alteration.” State v. Pan, 345 Conn. at 952, 2022 WL 17170883 at \*10. However, the court's review resulted in the establishment of new, post-arraignment, procedural rules governing motions to modify bond, designed to provide a more extensive hearing process regarding a defendant's financial resources than initially provided at arraignment. Those new rules provide that:

Either party may move for modification of a bond if it has a good faith basis to believe that a modification of that initial bond determination is warranted. If the defendant files the motion based on a claim that the existing bond is unaffordable, the defendant bears the initial burden of presenting information, either through evidence or reliable hearsay, that would allow the trial court to make a threshold determination that the defendant does not have access to financial resources to afford the bond set at arraignment. Upon such a showing, the state then bears the burden of demonstrating, by a preponderance of the evidence, that the bond is in fact reasonable in light of the factors set forth in § 54-64a (b) (2) and Practice Book § 38-4 (d). Thereafter, the trial court must make a de novo determination regarding whether the bail initially set is reasonable, and, if it not reasonable, the trial court must set a new bail amount. In connection with its determination, the trial court must articulate findings and reasoning sufficient to ensure that an appellate court has adequate information to assess the trial court's exercise of discretion in setting the bond in an amount that is permitted by law.

State v. Pan, 345 Conn. at 958-59, 2022 WL 17170883 at \*12. The post-arraignment hearing “is not intended to be a mini-trial, and the rules of evidence do not apply. A full-blown evidentiary hearing that includes the right to present and

cross-examine witnesses is not needed or required. However, such a hearing, or some variation, may be held in the discretion of the judge when the circumstances of a particular case warrant.” (Internal quotation marks omitted.) State v. Pan, 345 Conn. at 954, 2022 WL 17170883 at \*11. Despite the rules of evidence not applying, neither the defendant nor the state “may rely solely on simple representations of counsel to meet their respective burdens. Rather, the parties may proceed by proffer, supported by reliable hearsay evidence, relevant documents, and other documentary or testimonial evidence. The court may also consider any additional information on recommendations from the bail commissioner and the victim’s advocate.”(Citation and footnote omitted). Id. 345 Conn. at 954-55, 2022 WL 17170883 at \*11.

Prosecutors should be familiar with the statute and Superior Court rule which provide that “[u]pon application by the prosecuting authority alleging that a defendant has violated the conditions of the defendant's release, the court may, if probable cause is found, order that the defendant appear in court for an evidentiary hearing upon such allegations.” C.G.S. § 54-64f(a); see also P.B. § 38-19. If the court, after an evidentiary hearing at which hearsay or secondary evidence shall be admissible, finds by clear and convincing evidence that the defendant has violated reasonable conditions imposed on the defendant's release it may impose different or additional conditions upon the defendant's release. C.G.S. § 54-64f(b); see also P.B. § 38-20. If the court makes such a finding in a case in which the defendant is on release with respect to an offense for which a term of imprisonment of ten or more years may be imposed, and the court makes the additional finding that the safety of any other person is endangered while the defendant is on release, it may revoke such release. Id.

## **6. Hearing in Probable Cause**

### **4-6.1 Entitlement to Hearing**

The prosecutor should be cognizant of the state constitutional right of a defendant charged with a crime punishable by life in prison to have a hearing at which the state bears the burden of establishing probable cause that the defendant committed the charged offense.

The prosecutor should be familiar with the statute giving effect to this right, the time limits and procedures established therein for conducting such a hearing, as well as the evidentiary rules governing the admissibility of evidence at such hearing.

### **4-6.2 Prosecutor’s Role**

In preparing for the hearing in probable cause, the prosecutor should be mindful of his or her duty to disclose exculpatory and impeachment evidence in advance of the hearing, consistent with Standard 4-8.1.

At the hearing in probable cause, the prosecutor should present such reliable evidence as is required for a Judge of the Superior Court to make the determination that probable cause exists that the defendant committed the crime(s) with which he or she is charged.

#### **4-6.3 Waiver**

If the defendant expresses a desire to waive the probable cause determination, the prosecutor should, to the extent practicable, listen intently to the court's canvass of the defendant and seek to ensure that the record adequately reflects that the defendant's decision to waive the hearing is both knowing and voluntary. As with any waiver of a defendant's rights, the prosecutor should not hesitate to alert the court to any perceived deficiencies in the court's canvass of the defendant in order to ensure an effective waiver.

[NDAA Nat. Pros. Stds. Standard 4-6.1 & 4-6.2; Conn. Const. art. I, § 8; C.G.S. § 54-46a]

#### **Commentary**

Article first, § 8, of the Connecticut constitution provides in relevant part:

No person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law . . .

Conn. Const. art. I, § 8. The procedures governing probable cause hearings are set forth in General Statutes Section 54-46a, which also provides that a defendant "may knowingly and voluntarily waive" his or her right to a probable cause hearing. C.G.S. § 54-46a(a); see State v. Ouellette, 271 Conn. 740, 760-61 (2004). The Connecticut Supreme Court has never imposed a particular script that must be followed by the trial courts in canvassing a defendant to ensure an effective waiver of the right. See State v. Wilkins, 159 Conn. App. 443, 446-57 (2015) (Justice Borden providing in-depth analysis of Connecticut Supreme Court precedent in determining trial court's canvass sufficed to ensure defendant waived his right knowingly and voluntarily).

Nevertheless, guidance can be found in the Connecticut Supreme Court's decision in Ouellette, wherein the Court determined that the trial court's canvass adequately demonstrated that the defendant knowingly and voluntarily waived his right to a probable cause hearing where the court: (1) informed the defendant that he had a right to a probable cause hearing; (2) advised the defendant that the state would bear the burden at such a hearing to establish probable cause that defendant

committed the charged offense; (3) inquired whether the defendant discussed the waiver with defense counsel; and (4) received the defendant's own affirmation that he understood what he was waiving. Id. at 761.

In Wilkins, the Appellate Court had occasion to discuss why a defendant, from a tactical standpoint, may choose to waive the right to a probable cause hearing, explaining:

. . . such a decision will usually be strategic and will usually reflect factors such as the defendant's decision, on the one hand, to waive the opportunity to view some of the state's evidence, and, perhaps, to cross-examine its witnesses, balanced against, on the other hand, giving the state an opportunity to rehearse its witnesses in giving their testimony prior to trial, and permitting the state to preserve the witness' testimony for trial in the event of the subsequent unavailability of the witness. See, e.g., State v. Estrella, 277 Conn. 458, 474-77, 893 A.2d 348 (2006) (holding that witness' testimony at probable cause hearing was admissible at trial because witness no longer available to testify and because defendant had adequate opportunity to cross-examine him at probable cause hearing).

Wilkins, supra, 159 Conn. App. at 456-57.

Prosecutors should note that the statute governing probable cause hearings provides that the rules of evidence apply in such hearings, "except that written reports of expert witnesses shall be admissible in evidence and matters involving chain of custody shall be exempt from such rules." C.G.S. §54-46a(b). Further, "[n]o motion to suppress or for discovery shall be allowed in connection with such hearing." Id. Although discovery motions are not allowed, Standard 4-6.2 alerts prosecutors to be mindful of their legal duty to disclose exculpatory and impeachment evidence in advance of any such hearing.

## **7. Forfeiture**

### **4-7.1 Forfeiture Laws**

The prosecutor should make appropriate use of statutes that permit the forfeiture of money and property used in or obtained as a result of criminal activity.

### **4-7.2 Due Process**

Consistent with Connecticut forfeiture laws, the prosecutor should ensure that the due process rights of any known person with an ownership claim to the property subject to forfeiture are protected, whether that person is the one who committed

the crime, or is an individual who is not a party to the criminal proceedings. In accordance with statute, the State should provide notice to property owners of any seizure and provide an opportunity to be heard before a Judge of the Superior Court. Prosecutors should be mindful of the fact that, in any forfeiture proceeding under Connecticut law, the State bears the burden of proving that the money or property are either the proceeds of criminal activity or used in connection with criminal activity.

#### **4-7.3 Impact on Private Counsel**

The ability of defendants to secure private legal counsel of their choice should not be a consideration in the prosecutor's enforcement of forfeiture statutes, except as provided by law.

#### **4-7.4 Factors in Mitigation**

A prosecutor may, in the exercise of his or her sound professional judgment, decide to remit, mitigate, or forgo the forfeiture of property to an owner or interest holder other than the wrongdoer. Factors a prosecutor may consider in making such a decision include whether an owner or interest holder has, to the prosecutor's satisfaction, established that:

- a. the interest was acquired and maintained in good faith without knowledge or substantial reason to know of the conduct that gave rise to the forfeiture;
- b. that the forfeiture would work a severe hardship on an otherwise innocent owner or interest holder; and
- c. that the property will not be used in furtherance of future criminal activity or benefit the one whose conduct subjected the property to forfeiture.

#### **4-7.5 Impermissible Considerations**

The fact that forfeited assets might be available to fund law enforcement efforts should not unduly influence the proper exercise of the prosecutor's discretion in the enforcement of forfeiture statutes or the criminal law, nor should forfeiture be improperly used as a substitute for criminal prosecution.

[NDAA Nat. Pros. Stds. Standards 4-7.1 through 4-7.4, inclusive; ABA Crim. Just. Stds. Standard 3-7.2(b); C.G.S. §§ 54-33g; 54-36a(e), 54-36h, 54-36o, & 54-36p]

### **Commentary**

The concept that a person should not be allowed to profit from his or her wrongdoing is the underlying principle of forfeiture. Seizing profits from illegal activity and property used to facilitate a crime or criminal enterprise is an important tool to combat illegal activity by eliminating the financial gain associated with

criminal conduct. It serves to deter individuals from committing crimes for fear of losing the proceeds and cash flow earned from illegal activity or losing property used in the commission of the crime, to include houses and cars. Criminal enterprises, such as street gangs engaged in the illegal drug trade, stand to gain tremendous profits by selling illegal narcotics, and they are better crippled by the loss of profits and property than prosecution of an individual drug runner or seller. Furthermore, the seized assets can be used by law enforcement agencies to battle illegal activity by using the money or property to enhance investigations and prosecutions.

Forfeiture of seized property may occur when the wrongdoer does not own the property but hides it under subterfuge in another's name. The prosecutor should take care, however, to ensure that the named owner is knowledgeable that the money or property is being used in furtherance of criminal activity as opposed to an unknowing innocent owner.

Asset forfeiture laws were called into question over the *federal* laws that permitted seizure of assets without a judicial proceeding requiring the Government to prove that the assets were connected to criminal activity. Public concern was also voiced over the practice under *federal* laws to shift the burden to the property owner to prove that the assets were not connected to illegal activity and that the Government improperly took the assets.

Connecticut's prosecutors adhere to the principle codified in our laws that the individual property owners' rights must be protected, and that due process should be afforded to all property owners. See C.G.S. §§ 54-33g; 54-36a(e), 54-36h, 54-36o, & 54-36p. Prosecutors should be familiar with these statutes and, in particular, the procedures and strict time frames associated with the initiation of such civil forfeiture actions.

Prosecutors should be aware that, even without the filing of a separate civil proceeding, property may be ordered forfeited as part of the disposition of the criminal proceeding, either through stipulation as part of a plea agreement, or by order of the court. In State v. Garcia, 108 Conn. App. 533 (2008), the court held that the seized property statute (C.G.S. § 54-36a) and the forfeiture of drug monies and property statute (C.G.S. § 54-36h) can be read together and further allow for a trial court to dispose of contraband (including money linked to drug dealing) without the need for an "in rem" forfeiture proceeding, provided that a nexus exists between the contraband and the crime charged (i.e., cash located in close proximity to illegal drugs).

The guiding principle for bringing a forfeiture action should be whether the property was used in or obtained as a result of criminal activity as opposed to whether the wrongdoer will have difficulty hiring defense counsel if the money or property is seized.

Frequently, ownership interests in property are mixed and forfeiture would have adverse results for others. The prosecutor, in his or her discretion, may determine when extenuating circumstances exist such that foregoing, remitting, or mitigating forfeiture is appropriate. These standards provide guidance in exercising that discretion, remaining mindful that the purpose of forfeiture is to deter conduct giving rise to forfeiture and to remove the instrumentalities and proceeds of such conduct.

## **8. Discovery**

### **4-8.1 Prosecutorial Responsibility – The Duty to Disclose Exculpatory and Impeachment Evidence**

A prosecutor should, at all times, carry out his or her discovery obligations in good faith and in a manner that furthers the goals of discovery, namely, to minimize surprise, afford the opportunity for effective cross-examination, expedite trials, and meet the requirements of due process. In furtherance of those obligations:

- a. After charges are filed if not before, the prosecutor should diligently seek to identify all information in the possession of the prosecution or its agents that tends to negate the guilt of the accused, mitigate the offense charged, impeach the government's witnesses or evidence, or reduce the likely punishment of the accused if convicted.
- b. Before trial of a criminal case, a prosecutor should make timely disclosure to the defense of information described above that is known to the prosecutor, regardless of whether the prosecutor believes it is likely to change the result of the proceeding, unless relieved of this responsibility by a court's protective order.
- c. A prosecutor should not deliberately attempt to obscure information disclosed pursuant to this standard by including it within a larger volume of materials in order to prevent the discovery of favorable information, nor should a prosecutor intentionally mislead anyone about the contents of any disclosed materials.
- d. The prosecutor should make prompt efforts to identify and disclose to the defense any physical evidence that has been gathered in the investigation, and provide the defense a reasonable opportunity to examine it.
- e. A prosecutor should not avoid pursuit of information or evidence because the prosecutor believes it will damage the prosecution's case or aid the accused.
- f. A prosecutor should determine whether additional statutes, rules or caselaw may govern or restrict the disclosure of information, and comply with these authorities absent court order.



#### **4-8.2 Continuing Duty**

The obligations to identify and disclose such information continue throughout the prosecution of a criminal case. If at any point in the pretrial or trial proceedings the prosecutor discovers additional witnesses, information, or other material previously requested or ordered which is subject to disclosure or inspection, the prosecutor should promptly notify defense counsel and provide the required information. The prosecutor should diligently advise other governmental agencies involved in the case of their continuing duty to identify, preserve, and disclose to the prosecutor information described above.

#### **4-8.3 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. A prosecutor should timely respond to legally proper discovery requests, and make a diligent effort to comply with legally proper disclosure obligations, unless otherwise authorized by a court. When the defense makes requests for specific information, the prosecutor should provide specific responses rather than merely a general acknowledgement of discovery obligations. Requests and responses should be tailored to the case and "boilerplate" requests and responses should be disfavored.

#### **4-8.4 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.

#### **4-8.5 Reciprocal Discovery**

A prosecutor should take steps to ensure that the defense complies with any obligation to provide discovery to the prosecution.

#### **4-8.6 Protection of Personal Identifying Information**

The Court may, upon a sufficient showing, issue a protective order that denies, restricts, or defers discovery or inspection. When appropriate, the court may place a defendant and his or her counsel under a protective order against unwarranted disclosure of the materials that they may be entitled to inspect when disclosure might harm third parties. The Court may also issue a protective order to restrict or limit dissemination of discovery materials to ensure a fair and impartial trial or protect the integrity of legitimate law enforcement tactics or procedures. The prosecutor should pursue such orders when warranted by the facts of a particular case.

#### 4-8.7 Work Product

The work product of the prosecutor is exempt from discovery disclosures. The prosecutor should take appropriate measures to avoid inadvertent disclosure of his or her work product and should exert the privilege which attaches to such materials if compelled disclosure is sought.

[NDAA Nat. Pros. Stds. Standards 4-9.1 through 4-9.6; ABA Crim. Just. Stds. Standards 3-5.4 and 3-5.6(f); C.G.S. §§ 54-86a, 54-86b, 54-86c, 54-86d, 54-86e, 54-86m, and 54-142k; R. Prof. Conduct 3.4(4) and 3.8(4); P.B. § 40-1 et seq.; DCJ Policy Nos. 512 and 512a]

#### Commentary

Discovery in criminal cases in Connecticut is governed by the federal and state constitutions, statute, rules of practice, and rules of professional conduct. See DCJ Policy No. 512 (discovery). It bears noting that the criminal rules of discovery have no application to state habeas corpus cases, which are governed by their own discovery rules. See Standard 9-1.6, commentary (Duty to Conduct and Cooperate in Post-Conviction Discovery), infra.

Criminal discovery contemplated by our statutes and rules mostly concerns “inculpatory” evidence; that is, evidence that the prosecutor intends to use to link the defendant to the crime. This includes, but is not limited to: (1) any written or recorded statements, admissions or confessions made by the defendant, codefendant or coconspirator; (2) books, papers, documents or tangible objects obtained from or belonging to the defendant or obtained from others by seizure or process; (3) copies of records of any physical or mental examinations of the defendant; (4) records of prior convictions of the defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known to the attorney for the state or to the defendant; (5) any warrant executed for the arrest of the defendant for the offense charged, and any search and seizure warrants issued in connection with the investigation of the offense charged; and (6) statements, law enforcement reports and affidavits within the possession of the prosecuting authority. C.G.S. §§ 54-86a and 54-142k; P.B. §§ 40-11 and 40-12 (permitting disclosure of relevant material and information not covered by § 40-11). Prosecutors are also required to disclose to the defense the names and addresses of all witnesses that the prosecuting authority intends to call in his or her case-in-chief. P.B. § 40-13; but see P.B. §§ 40-10(b) (disclosure of witness names and addresses not required to unrepresented defendant unless court orders disclosure upon finding of need); 40-13(f) (personal residence address of police officer or correction officer shall not be disclosed except pursuant to court order); 40-13(g) (witness address may not be disclosed upon written request of a party and for good

cause shown). In addition, once a state's witness testifies on direct examination, the defendant, on motion, is entitled to examine any statement oral or written of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified. C.G.S. §§ 54-86b(a) and (b) (permitting court to strike testimony or declare mistrial if state fails to produce statement). The rules of practice do not require the prosecutor to disclose: (1) reports, memoranda or other internal documents made by a prosecuting authority or by law enforcement officers in connection with the investigation or prosecution of the case; (2) legal research; or (3) records, correspondences, reports or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting authority. P.B. § 40-14(3).

It is incumbent upon each prosecutor to familiarize himself or herself with the pertinent statutes and practice rules in order to understand the type and scope of materials required to be disclosed and the timeline for disclosure. Generally speaking, the defense must file a written request for discovery and the prosecuting authority has forty-five days to respond to the written request. See, e.g., P.B. §§ 40-7, 40-11, 40-13, 40-13A and 41-5. Objections to disclosure requests are permitted. P.B. § 40-8. Written responses to defense requests for discovery are strongly encouraged. Prosecutors should be vigilant to ensure that the disclosure is permitted under our law and that appropriate limitations are in place to prevent further dissemination of confidential and/or protected information. See, e.g., C.G.S. §§ 54-86d, 54-56e & 54-86m; P.B. §§ 40-10, 40-13 (f), 40-13 (g), 40-40, 40-41, 40-42 and 40-43.

For good cause shown, supplemental discovery requests or motions may be permitted. C.G.S. § 54-86a(c); P.B. § 40-4. Remedies for failing to comply with disclosure requests include, but are not limited to, a court order requiring the noncomplying party to comply, the granting of additional time or a continuance, declaration of a mistrial or dismissal of the charges. See P.B. § 40-5. Both parties are under a continuing obligation to disclose. P.B. § 40-3. Thus, consistent with the duty to disclose imposed by the constitution, other laws, and rules of ethical conduct, if information becomes known to the prosecutor after initial disclosures have been made, that information should be turned over promptly.

In addition to disclosing inculpatory evidence, prosecutors also have a legal and ethical duty to disclose to the defense any "exculpatory" evidence; that is, evidence that is helpful to the defendant because it could be used to prove that the defendant did not commit the alleged offense. See DCJ Policy No. 512a (policy regarding disclosure of exculpatory and impeachment evidence); Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972). In this regard, the prosecutor's duty of disclosure is much broader than defense counsel's because

a lawyer for the accused has no general obligation to reveal to the prosecutor evidence in his possession which may help prove his client's guilt.

In contrast to the disclosure of inculpatory evidence, the prosecutor must disclose all exculpatory information in its possession to the defense regardless of whether the defendant makes a request therefor. See C.G.S. § 54-86c(a); P.B. § 40-11(b). The disclosure of exculpatory information or material which the prosecutor may have with respect to the defendant should occur not later than thirty days after any defendant enters a not guilty plea in a criminal case. C.G.S. § 54-86c(a). After the initial disclosure, if the prosecutor discovers additional exculpatory information prior to or during trial, he or she must promptly disclose it. C.G.S. § 54-86c(a). This duty to disclose exculpatory evidence continues post disposition.

Subsection c. of Standard 4-8.1 provides a clear statement that the prosecutor may not deliberately conceal known Brady material within voluminous disclosed materials. To the extent the prosecutor knows of any documents or statements that constitute Brady material, he or she must identify that material to the defendant. See United States v. Skilling, 554 F.3d 529, 576-77 (5th Cir. 2009) (government is under no duty to direct defendant to exculpatory evidence of which it is unaware within larger mass of disclosed evidence; "And it should go without saying that the government may not hide Brady material of which it is actually aware in a huge open file in the hope that the defendant will never find it."), vacated in part on other grounds, 561 U.S. 358 (2010); see also United States v. Warshak, 631 F.3d 266, 297-98 (6th Cir. 2010) (rejecting claim that government abdicated Brady duties when it turned over millions of pages of evidence to defense without identifying exculpatory evidence contained therein where, inter alia, there was no indication that government deliberately concealed exculpatory evidence in voluminous materials); see also United States v. Thomas, 981 F. Supp. 2d 229, 239 (S.D.N.Y. 2013) ("Government cannot hide Brady material as an exculpatory needle in a haystack of discovery materials.").

As discussed previously, exculpatory evidence is anything that could be used to prove that the defendant did not commit the charged offense. Exculpatory evidence includes, but is not limited to, statements by a witness giving a description of the perpetrator that does not match the defendant, prior inconsistent statements made by the witness, whether or not the inconsistent statement was made to law enforcement, inconsistent statements or recantations, inability of an eyewitness to identify the accused from a photo array or lineup, scientific test results that are inconclusive or negative, and an admission of responsibility by another person. Impeachment evidence, broadly defined, is evidence "having the potential to alter the jury's assessment of the credibility of a significant prosecution witness." Adams v. Commissioner of Correction, 309 Conn. 359, 369-70 (2013).

Examples of inculpatory evidence include, but are not limited to, inducements provided to witnesses in exchange for their cooperation, other known conditions that could affect the witness's bias such as animosity toward the defendant or relationship with the victim, known physical, mental health, or substance abuse issues that reasonably could impact the witness's ability to recall or perceive the events about which they will be testifying, prior criminal convictions for felonies or crimes of moral turpitude, and where self-defense reasonably could be raised by the accused, convictions of the victim for crimes of violence and any other information that is material to the victim's reputation for violence. As with inculpatory evidence, if a question arises as to whether information is exculpatory or constitutes impeachment evidence subject to disclosure, a prosecutor should consult his or her supervisor and/or seek in camera review. See DCJ Policy No. 512a; C.G.S. 54-86a (b).

The state's duty to disclose exculpatory evidence applies not only to evidence known to the prosecutor trying the case, but also extends to evidence known to any member of the "prosecution team," which includes both prosecutorial and investigative personnel. See State v. Guerrero, 331 Conn. 628, 647 (2019) (prosecutor has duty to learn of exculpatory evidence in possession of any entity acting as agent or arm of state in connection with investigation at issue). The prosecutor is deemed to possess all favorable evidence, and is deemed to know if any member of the prosecution team possesses favorable evidence, even if the prosecutor does not have actual possession or knowledge of that favorable evidence.

Promises, offers, and inducements to a prosecution witness to secure the witness's testimony – no matter their form – constitute evidence favorable to the accused that must be disclosed. United States v. Bagley, 473 U.S. 667, 676-78 (1985); see State v. Grasso, 172 Conn. 298, 302 (1977) ("Information that a witness has been arrested, is being prosecuted, or has confessed to a crime, tends to show that the state has power over a witness which may induce him to give testimony which will win favor with the state . . . and must be disclosed."). Under Giglio, prosecutors have an affirmative duty to learn of any such promises, offers, and inducements made to a witness by anyone "acting on the government's behalf in the case," including investigating agents. Kyles v. Whitley, 514 U.S. 419, 437 (1995). In this regard, the collective knowledge of all Division of Criminal Justice prosecutors is imputed to the individual prosecutor trying the case, and vice versa. In other words, a promise made to a witness by one prosecutor binds all other prosecutors in the Division. See Giglio, 405 U.S. at 154. Before trying a case, therefore, the prosecutor must ascertain whether his or her witnesses have pending cases and/or recent convictions in other judicial districts; inquire whether any offers have been made (by the state or the court) in connection with those

cases; and, if so, disclose any inducement to the defense. To assist in this endeavor, prosecutors are required to consult and provide timely updates to the jailhouse witness tracking database. See DCJ Policy No. 512a.

Pursuant to Napue v. Illinois, 360 U.S. 264, 269 (1959), and Giglio, 405 U.S. at 153, when a prosecutor knows that a witness has falsely denied striking a plea deal with the state, or knows that the witness has substantially mischaracterized the nature of an inducement, the prosecutor has an obligation to correct any misconception. See Gomez v. Commissioner of Correction, 336 Conn. 168, 185-86 (2020) (prosecutor has duty to correct material, false or misleading testimony regarding cooperation agreement even if agreement at issue has been disclosed to defense counsel). It does not matter whether the cooperating witness actually intended to lie. Napue and Giglio require that the prosecutor apprise the court whenever the prosecutor knows the witness is giving testimony that is “substantially misleading.” State v. Ouellette, 295 Conn. 173, 186 (2010).

To avoid the potential pitfalls associated with presenting the testimony of cooperating witnesses at trial, prosecutors are required to put all cooperation agreements in writing signed by the parties in accordance with Division of Criminal Justice Policy 515 “Cooperating Witnesses.” See Standard 2-10.9 & commentary. A prosecutor’s duty to disclose exculpatory evidence has both constitutional and ethical dimensions. That is, a failure to turn over exculpatory evidence may violate the due process requirements of the Fifth and Fourteenth Amendments owed to a defendant, and it may violate a prosecutor’s responsibilities under pertinent state attorney ethics rules. A due process violation may result in a mistrial of the case or reversal of conviction on appeal. Sanctions for a violation of an ethics rule or rules imposed against the individual prosecutor may include internal agency counseling or discipline and/or referral to the statewide grievance committee.

Caution in discovery is required in a few areas. First, the prosecutor should educate and inform law enforcement agencies in his or her jurisdiction that the prosecutor, not the law enforcement officer or agency, is the arbiter of what information is disclosed to the defense. The law enforcement community should be encouraged to provide all information in its possession to the prosecutor so that he or she can make a disclosure decision.

Second, the prosecutor’s relationship with defense counsel or his or her opinion regarding the defendant is not a factor in the discovery process.

Third, while work product of a prosecutor is typically exempt from disclosure, care must be taken in assigning the “work product” label.

Fourth, when a question arises as to whether to disclose a piece of evidence or information or when the necessity for disclosure cannot be resolved amicably among the parties, the prosecutor should seek advice from his or her supervisor and/or consider obtaining guidance from the court by way of, inter alia, in camera review and/or the issuance of protective order. See P.B. 40-40 through 40-43. If in camera review occurs, request that material be “lodged” with the court pursuant to Practice Book § 7-4C (providing that “lodged” record is a record that is temporarily placed or deposited with the court but not filed” and that such records may be lodged with court “under seal”). If a prosecutor requests that material be “filed” under seal, or if the trial court treats the material as having been “filed” under seal, it will trigger the requirements for denying public access to “documents filed with the court,” pursuant to Practice Book § 42-49A.

## **9. Case Scheduling**

### **4-9.1 Control of Scheduling**

In Connecticut, the judge, acting through the clerk of the court, controls the time and the manner of scheduling all proceedings in criminal cases. In accordance with rules of practice, the prosecutor and defense counsel shall cooperate with the clerk in matters of scheduling.

Because the scheduling of criminal matters ultimately rests in the discretion of the court, to aid in prioritizing workloads prosecutors should endeavor to maintain open communication with the clerk of the court regarding the order in which matters are likely to be called for argument, contested hearings, jury selection, or trial.

### **4-9.2 Prosecutorial Responsibility**

A prosecutor should not seek or cause delays during the course of a criminal case because of a lack of diligent preparation, nor should the prosecutor seek or cause delays for the purpose of disadvantaging the defendant or his or her counsel. In the interests of justice, a prosecutor may reasonably request a continuance for matters outside the control of the State’s Attorney’s office, such as an illness, the unavailability of a witness, or the need for and availability of scientific testing of evidence.

### **4-9.3 Speedy Trial Issues**

The prosecutor should be familiar with statutes and rules of practice governing the defendant’s exercise of his or her right to a speedy trial. The prosecutor should be alert to the time constraints triggered by the filing of any such motion, should know what periods of time are excludable from any such calculations, and should work

with the court to ensure that prosecutions are not jeopardized by any failure to adhere to the time limitations imposed by the exercise of such right.

#### **4-9.4 Trial Readiness**

A prosecutor shall exercise due diligence in preparing for trial and not cause or accede to any unreasonable delay.

[NDAA Nat. Pros. Stds. Standard 4-9.1, 4-9.3; ABA Crim. Just. Stds. Standard 3-6.1; R. Prof. Conduct 1.3; C.G.S. § 54-82c, 54-82d, 54-82m; P.B. §§ 43-39 through 43-43, inclusive, 44-11 through 44-18, inclusive]

#### **Commentary**

In the pursuit of his or her duty to seek justice, the prosecutor needs to be mindful of the expression, “justice delayed is justice denied.” From the view of society, delays in disposition of violation of criminal laws create uncertainty regarding the reliability and efficiency of the criminal justice system. Victims and families of victims are left without a necessary ingredient for closure. Defendants are kept in a state of limbo about their future. In short, delay does not serve anyone’s best interests.

With that being said, the reality is that due to caseloads and the necessity for complete investigations by both the prosecution and defense, case disposition often takes longer than those involved would like. These standards set forth guidelines for keeping delay as short as reasonably possible.

In Connecticut it is the court, acting through the clerk of the court, which ultimately controls the docket, the scheduling of argument on pre-trial motions, and the calling of cases for hearings or trial. See P.B. §§ 44-12 through 44-18, inclusive. To the extent practicable, prosecutors should seek to avoid being the source of unnecessary delay and should seek a continuance from the court only when good cause exists. See R. Prof. Conduct 1.3 (“A lawyer shall act with reasonable diligence and promptness . . .”); see also P.B. § 44-18 (“[C]ontinuances may be granted only by the judicial authority or with the judicial authority’s explicit approval.”); P.B. § 5-10 (“Counsel who fails to appear on a scheduled date for any hearing or trial or who requests a continuance without cause or in any other way delays a case unnecessarily will be subject to sanctions pursuant to General Statutes § 51-84.”). Toward that end, the standards encourage communication between prosecutors and the clerk’s office so that prosecutors can remain informed as to the likelihood of when a matter will be called before the court. Such communication affords an opportunity to prioritize case preparation, and allows for sufficient advance contact with witnesses to assure availability and provide for their attendance.



A criminal defendant is guaranteed the right to a speedy trial by both the United States constitution and the constitution of Connecticut. See U.S. Const., amend. VI & Conn. Const., art. I, § 8. The defendant's right to a speedy trial is also codified in the General Statutes. See C.G.S. § 54-82m. The rules of practice provide the procedures by which the defendant may exercise his or her statutory right to a speedy trial. See P.B. §§ 43-39 through 43-41, inclusive. The defendant's exercise of that right by filing a motion for speedy trial pursuant to Practice Book Section 43-41, necessarily impacts upon the court's assignment of cases for trial. See P.B. §44-16(a)(2) (priority in assignment or trial may be given cases in which judicial authority has granted motion for speedy trial). Prosecutors should be familiar with the time limitations imposed by the rules of practice for commencing the trial of a defendant charged by information with a criminal offense, as well as those time periods that are excluded and included by rule in computing the time within which the trial must commence. See P.B. §§ 43-39, 43-40, & 43-40A. Careful attention to the time computations is vital, as a failure to commence trial within the time frame established by the rules of practice may result, upon motion of the defendant, in the information being dismissed with prejudice, provided the defendant filed the prerequisite motion for speedy trial in a timely fashion. See P.B. § 43-41; see also State v. McCahill, 265 Conn. 437, 444, 453 (2003) (dismissal granted due to institutional negligence and "administrative incompetence" when motion for speedy trial was brought by incarcerated defendant but not timely acted upon by the scheduling authority); State v. Friend, 159 Conn. App. 285, 336-42, cert. denied, 319 Conn. 954 (2015) (Defendant waived his right to protection of speedy trial statute, where he withdrew his speedy trial motion and did not file a timely motion to dismiss.).

## **V. JUVENILE JUSTICE**

### **1. Overview of Juvenile Proceedings**

#### **5-1.1 Primary Responsibility of Prosecutors in Juvenile Court**

The primary duty of prosecutors handling juvenile matters is to seek justice while fully and faithfully representing the interests of the state. While the safety and welfare of the community, including the victim, is their primary concern, prosecutors in juvenile court should consider the special circumstances and rehabilitative potential of the juvenile to the extent they can do so without unduly compromising their primary concern.

#### **5-1.2 Qualifications and Training of Prosecutors in Juvenile Court**

Like many states, Connecticut employs prosecutors whose full-time duties are devoted to the handling of juvenile matters. Consistent with Standard 1-4.7, prosecutors hired by the Division of Criminal Justice to handle juvenile matters in the family division of the Superior Court must possess the same qualifications and participate in the same interview and appointment process applicable to Deputy Assistant State's Attorneys assigned to the criminal division of the Superior Court. State's Attorneys should select transfer candidates, or submit new applicants for any vacancy in the position of juvenile court prosecutor to the Criminal Justice Commission, on the basis of their skill and competence, including knowledge of juvenile law, interest in working with children and youth, interest in community engagement, education, and experience.

Prosecutors handling juvenile matters are subject to the same training requirements applicable to other prosecutors in the Division of Criminal Justice. See Standard 1-5.1 et seq. and commentary. Additionally, given the specialized nature of the work, prosecutors assigned to juvenile delinquency cases should be provided opportunities to receive targeted ongoing training regarding juvenile matters, including adolescent development.

#### **5-1.3 Screening Juvenile Cases**

In Connecticut, referrals from the police regarding alleged delinquent acts are screened by the juvenile probation department to determine if the matter is eligible for non-judicial (out-of-court) handling. If the prosecutor objects to non-judicial handling, the judicial authority shall determine if non-judicial handling is appropriate. See P.B. § 27-1A.

#### **5-1.4 Transfer to Adult Criminal Docket**

The transfer of cases to the adult criminal docket are dictated by statute and should only occur after consultation with the supervisor of the adult criminal court the case is proposed to be transferred to. See C.G.S. § 46b-127(a)(1).

Prosecutors should make discretionary transfer decisions on a case-by-case basis and take into account the individual factors and statutory requirements the court that hears the matter will consider, including, that (A) such offense was committed after such child attained the age of fifteen years, (B) there is probable cause to believe the child has committed the act for which the child is charged, and (C) the best interests of the child and the public will not be served by maintaining the case in the superior court for juvenile matters. In making such findings, the court shall consider (i) any prior criminal or juvenile offenses committed by the child, (ii) the seriousness of such offenses, (iii) any evidence that the child has intellectual disability or mental illness, and (iv) the availability of services in the docket for juvenile matters that can serve the child's needs. See C.G.S. § 46b-127(3).

#### **5-1.5 Plea Agreements**

The decision to enter into a plea agreement should be governed by both the interests of the state and those of the juvenile. Although the primary concern of the prosecutor should be protection of the community, as determined in the exercise of traditional prosecutorial discretion, the prosecutor should also consider the special circumstances of the juvenile, and his or her potential for rehabilitation, in seeking to determine an appropriate plea which addresses the juvenile's needs without unduly compromising the primary concern.

#### **5-1.6 Prosecutor's Role in the Delinquency Hearing (Trial)**

At the adjudicatory hearing, the prosecutor should assume the traditional adversarial role of a prosecutor, acting in the best interests of justice and community safety.

#### **5-1.7 Dispositions**

The prosecutor should take an active role in the dispositional hearing and make a recommendation consistent with community safety to the court after reviewing predispositional reports prepared by the probation department and others. In making a recommendation, the prosecutor should seek the input of the victim and consider the rehabilitative needs of the juvenile offender, provided that they are consistent with community safety and welfare.

### **5-1.8 Victim Impact**

Consistent with Standard 2-9.1 et seq., victims of crimes should be informed of all important stages of the juvenile court proceedings to the extent feasible, upon request or as required by law. The prosecutor should be aware of obligations imposed by the victims' rights amendment and, in particular, statutes governing victims' rights in juvenile court proceedings. The prosecutor should take care to balance the extent of information provided to the victim with the need to protect the integrity of the case and process.

[NDAA Nat. Pros. Stds. Standards 5-1.1 through 5-1.12, inclusive; C.G.S. §§ 46b-120 through 46b-159, inclusive; P.B. §§ 26-1 through 31a-18, inclusive.]

#### **Commentary**

In Connecticut, juvenile delinquency matters are handled in the family division of the Superior Court. Such matters are governed by General Statutes Sections 46b-120 through 46b-159, inclusive, and Practice Book Sections 26-1 through 31a-18, inclusive. A significant venue distinction between juvenile and adult criminal court bears mention at the outset — unlike crimes committed by adults, juvenile matters are handled in the jurisdiction in which the juvenile resides, as opposed to where the alleged act occurred. See C.G.S. §46b-142.

The prosecutor in juvenile court is charged to seek justice just as the prosecutor does in criminal prosecutions in adult court. The prosecutor in the juvenile system, however, is further charged to give special attention to the circumstances and needs of the accused juvenile to the extent that it does not conflict with the duty to fully and faithfully represent the interests of the state. This balanced approach reflects the philosophy that the safety and welfare of the community is enhanced when juveniles, through counseling, restitution, or more extensive rehabilitative efforts and sanctions, are dissuaded from further criminal activity.

Diversion of cases in juvenile court from the formal charging, adjudication, and disposition procedure has become common for less serious offenses. The impetus for such a procedure is that because juveniles are in the process of cognitive, moral, and social development, there is a unique opportunity presented at the juvenile court level to dissuade them from criminal activity. Advances in neuroscience confirm that the adolescent brain is undergoing significant development, and the neuroplasticity creates tremendous opportunity to influence youth in a positive way. However, science also confirms the tremendous vulnerability of the adolescent brain to drugs and alcohol. This is a concern for prosecutors. Many first-time or minor offenders will never enter the justice system again if their cases are handled properly through a robust diversion program. Treatment, restitution, or service programs often are viable alternatives to court

processing. These standards describe the opportunity for referral to probation or community service agencies.

In Connecticut, transfer of juveniles to the adult criminal docket is done by motion in accordance with statute and rules of practice. See C.G.S. § 46b-127 & P.B. § 31a-12. This standard simply provides guidance for prosecutors in using discretion to the extent that they participate in this process, and includes consideration of the rehabilitative potential of a juvenile offender. Given the general decline in the number of cases being transferred, this option should be reserved for serious, violent, or chronic offenders. As noted above, if the prosecutor seeks to have the matter transferred to the adult docket, any transfer will be made to the adult court for the jurisdiction in which the crime occurred. See C.G.S. § 46b-127.

These standards reflect the consensus that plea agreements are appropriate for juvenile court. See P.B. § 30a-2. A plea agreement should only be entered into when there is sufficient admissible evidence to demonstrate a prima facie case that the juvenile has committed the acts alleged in the petition to which he or she is pleading guilty. The prosecutor should always take steps to ensure that the resulting disposition is in the interest of the community with due regard being given to the rehabilitative needs of the juvenile.

In those matters that are not diverted or disposed of without trial the prosecutor should assume the traditional prosecution role in the adversarial process with respect to determination of guilt or innocence. This standard, therefore, suggests that the rules of evidence apply. Prosecutors should strive in the juvenile court setting to maintain a distinction between a factual determination of innocence or guilt and a determination of disposition. This approach promotes fairness to both the victim and the community and enhances the integrity of juvenile court findings.

Prosecutors should offer dispositional alternatives to the court that reduce risk and increase the protective factors that will make a juvenile successful in the future. When a juvenile presents a danger to the safety and welfare of the community, the prosecutor should voice this concern. On the other hand, when appropriate, the prosecutor may offer a dispositional recommendation that is less restrictive than what the juvenile court judge may contemplate imposing.

Given the unique role that prosecutors play across the justice continuum, they have a responsibility to ensure that all decisions are fair and just. They must base decisions on factors such as community safety, offender accountability, and rehabilitation. Race, ethnicity, and/or gender are never appropriate factors in decision-making. In order to ensure that decisions and policies are fair and equal, it is important to track case processing and outcomes. Data-driven practices are an important component of the fair administration of justice. Prosecutors should

examine strategies and alternatives that decrease racial, ethnic, and gender disparities while maintaining community safety.

This standard also suggests that, to the extent possible, the prosecutor should take a leadership role in the community in assuring that a wide range of appropriate dispositional alternatives are available for youth who are adjudicated delinquents. In addition, the prosecutor is encouraged to follow up on cases to ensure that dispositions are upheld, court ordered sanctions are administered, and treatment is provided. Similarly, prosecutors, to the extent possible, should take an active role in prevention and early intervention efforts. Some examples of programs offered through CSSD (Court Support Services Division) are: Alcohol and Drug Dependency Program (C.G.S. § 46b-133b); School Violence Education Program (C.G.S. § 46b-133e); Fire-starting Behavior Treatment Program (C.G.S. § 46b-133i); and Motor Vehicle Theft and Misuse Program (C.G.S. § 46b-133j).

## **PART VI. PROPRIETY OF PLEA NEGOTIATION AND PLEA AGREEMENTS**

### **1. General**

### **2. Availability for Plea Negotiation**

### **3. Factors for Determining Availability and Acceptance of Guilty Plea**

### **4. Fulfillment of Plea Agreements**

### **5. Record of Plea Agreement**

#### **1. General**

##### **6-1.1 Propriety**

While the defendant always has the right to enter a plea of guilty, which the court may accept regardless of the State's position, the prosecutor is under no obligation to offer to enter into a plea agreement that has the effect of disposing of criminal charges in lieu of trial. However, where it appears that it is in the public interest, the prosecution may engage in negotiations for the purpose of reaching an appropriate plea agreement.

When the prosecutor does engage in plea discussions, similarly situated defendants should be afforded substantially equal plea agreement opportunities. 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.

##### **6-1.2 Types of Pleas**

The prosecution and defense, in reaching a plea agreement, may agree to a disposition of the case that includes one of the following commitments from the prosecution in exchange for a plea of guilty:

- a. That the prosecuting authority will amend the information to charge a particular offense;
- b. That the prosecuting authority will nolle, recommend dismissal of, or not bring certain other charges against the defendant; or
- c. That the sentence or other disposition will not exceed specified terms or that the prosecuting authority will recommend a specific sentence, not oppose a particular sentence, or make no specific recommendation.

## **2. Availability for Plea Negotiation**

### **6-2.1 Willingness to Negotiate**

The prosecutor should make known a policy of willingness to consult with the defense concerning disposition of charges by plea and should set aside times and places for plea negotiations, in addition to pre-trial hearings.

### **6-2.2 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 either present or has given his or her express permission for the prosecutor to negotiate directly with the defendant.

### **6-2.3 Subject Matter of Discussions**

The prosecutor's plea discussions with defense counsel, or a pro se defendant, need not be limited to the entry of a plea of guilty or nolo contendere, and may include any disposition without trial permitted under the Superior Court Rules or the General Statutes. The prosecutor should also discuss pretrial motions filed or yet to be filed which would lead to a disposition of the case without trial. The prosecutor may also discuss permissible diversions of the case where appropriate.

## **3. Factors for Determining Availability and Acceptance of Guilty Plea**

### **6-3.1 Factors to Consider**

Prior to negotiating a plea agreement, the prosecutor should consider the following factors:

- a. the nature of the offense(s);
- b. the degree of the offense(s) charged;
- c. any possible mitigating circumstances;
- d. the age, background, and criminal history of the defendant;
- e. the expressed remorse or contrition of the defendant, and his or her willingness to accept responsibility for the crime;
- f. sufficiency of admissible evidence to support a verdict;
- g. undue hardship caused to the defendant;
- h. possible deterrent value of trial;
- i. aid to other prosecution goals through non-prosecution;
- j. a history of non-enforcement of the statute violated;
- k. the potential effect of legal rulings to be made in the case;



- l. the probable sentence if the defendant is convicted;
- m. society's interest in having the case tried in a public forum;
- n. the defendant's willingness to cooperate in the investigation and prosecution of others;
- o. the likelihood of prosecution in another jurisdiction;
- p. the availability of civil avenues of relief for the victim, or restitution through criminal proceedings;
- q. with respect to witnesses, the prosecutor should consider the following:
  - 1. the availability and willingness of witnesses to testify;
  - 2. any physical or mental impairment of witnesses;
  - 3. the certainty of their identification of the defendant;
  - 4. the credibility of the witness;
  - 5. the witness's relationship with the defendant;
  - 6. any possible improper motive of the witness;
  - 7. the age of the witness;
  - 8. any undue hardship to the witness caused by testifying.
- r. with respect to victims, the prosecution should consider those factors identified above and the following:
  - 1. the existence and extent of physical injury and emotional trauma suffered by the victim;
  - 2. economic loss suffered by the victim;
  - 3. any undue hardship to the victim caused by testifying.

### **6-3.2 Innocent Defendants**

The prosecutor should not enter into a disposition agreement before having information sufficient to assess the defendant's actual culpability. The prosecutor should always be vigilant for the case where the accused may be innocent of the offense charged. The prosecutor must satisfy himself or herself that there is a sound factual basis for all crimes to which the defendant will plead guilty under any proposed plea agreement.

### **6-3.3 Candor**

The prosecutor should not knowingly make any false or misleading statements of law or fact to the defense during plea negotiations. Toward that end, prior to engaging in plea negotiations the prosecutor should make available to the defense any and all information currently known to the prosecutor that tends to negate guilt, mitigates the offense, or is likely to reduce punishment.

### **6-3.4 Imposition of Reasonable Conditions**

The prosecutor should not demand conditions for a disposition that are so coercive that the voluntariness of a plea or the effectiveness of defense counsel is put into question. A prosecutor may set a reasonable deadline for acceptance of a disposition offer.

## **4. Fulfillment of Plea Agreements**

### **6-4.1 Limits of Authority**

The prosecutor should not make any guarantee concerning the sentence that will be imposed by the court or concerning a suspension of sentence. The prosecutor may advise the defense of the position the prosecutor will take concerning disposition of the case, including a sentence that the prosecutor is prepared to recommend to the court based upon present knowledge of the facts of the case and the offender, including his or her criminal history.

### **6-4.2 Implication 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.

### **6-4.3 Inability to Fulfill Agreement**

The prosecutor should not fail to comply with a plea agreement that has been accepted and acted upon by the defendant to his or her detriment, unless the defendant fails to comply with any of his or her obligations under the same agreement or unless the prosecutor is authorized to do so by law. If the prosecutor is unable to fulfill an understanding previously agreed upon in plea negotiations, the prosecutor should give prompt notice to the defendant and cooperate in securing leave of court for the defendant to withdraw any plea and take such other steps as would be appropriate to restore the defendant and the prosecution to the position they were in before the understanding was reached or plea made.

### **6-4.4 Rights of Others to Address the Court**

The prosecutor should scrupulously honor the legal rights of victims and other persons authorized by law to address the court. The prosecutor 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.

### **6-4.5 Notification of Media**

Prior to the entry of a plea of guilty by the defendant in open court, the prosecutor should not make any extrajudicial comments to the media about either the possibility or existence of a plea agreement with the defendant, or of the nature or contents of any such agreement.

## **5. Record of Plea Agreement**

### **6-5.1 Record of Agreement**

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

The terms of all offers, as well as any final plea agreement, should be entered in the Division of Criminal Justice's electronic case management system, also known as "eProsecutor," in accordance with Division policy.

### **6-5.2 Reasons for Nolle Prosequi**

Whenever criminal charges are dismissed by way of a nolle prosequi or its equivalent, the prosecutor should make a record of the reasons for his or her action.

As with the terms of any plea agreement, the basis for the entry of any nolle prosequi should be entered in the Division of Criminal Justice's electronic case management system.

[NDAA Nat. Pros. Stds. Standards 6-5.1 & 6-5.2; ABA Crim. Just. Stds. Standard 3-5.9; R. Prof. Conduct Rule 4.1(1); C.G.S. §§ 54-56b, 54-56h, 54-91c, 54-94a; P.B. §§ 39-1, 39-2, 39-4, through 39-6, inclusive, 39-11 through 39-17, inclusive, & 39-29 through 39-31, inclusive]

### **Commentary**

In the prosecutor's quest for justice, it may become necessary and desirable to dispose of criminal cases without going to trial. As a practical matter, the Division of Criminal Justice and the Judicial Department do not have the resources that would be required to try every case on the criminal court docket in a timely fashion. Given that reality, prosecutors actively engage in negotiations to reach appropriate dispositions in most cases. As the Connecticut Supreme Court has noted, "[f]or better or for worse, plea bargaining involving the court, the state, and the defendant has become an important tool for the efficient and orderly disposition of our criminal

court dockets.” State v. Damato-Kushel, *supra*, 327 Conn. at 195, citing State v. Elson, 311 Conn. 726, 776 (2014) (documenting “our state’s extremely heavy reliance on plea bargaining in resolving criminal cases”); State v. Revelo, 256 Conn. 494, 505 (“[w]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of [the] criminal justice system” [internal quotation marks omitted] ), *cert. denied*, 534 U.S. 1052 (2001).

The Connecticut Supreme Court has recognized “that more than 90 percent of criminal cases in this state are resolved through plea bargains in any given year.” State v. Damato-Kushel, *supra*, 327 Conn. at 187. This number is in line with recent national figures provided by the American Bar Association (ABA) Criminal Justice Section *2023 Plea Bargain Task Force Report*.

Like other agreements between parties, most plea negotiations require some action by both the prosecutor and the defendant. Also, like most other agreements, plea negotiations should be conducted in an honest and forthright manner in which the prosecution is guided by representing the best interest of society while being mindful of duties of candor and to avoid overreaching in dealing with the defendant. See R. Prof. Conduct Rule 4.1(1) (“ . . . a lawyer shall not knowingly . . . [m]ake a false statement of material fact or law to a third person.”) The prosecutor should be careful not to agree to an action that he or she cannot perform. Likewise, the defendant should be aware that his or her failure to perform his or her part of the agreement might well result in the prosecutor’s withdrawal from the agreement.

The manner in which supervised pre-trial discussions occur in Connecticut alleviates many of the plea bargaining issues experienced in other states:

. . . although many jurisdictions forbid or strictly limit judicial participation in plea conferences, practice and policy in Connecticut recognize that judges may play a valuable role in facilitating plea negotiations. See State v. Revelo, *supra*, at 508 n.25, 775 A.2d 260 (“[i]t is a common practice in this state for the presiding criminal judge to conduct plea negotiations with the parties”); J. Turner, “Judicial Participation in Plea Negotiations: A Comparative View,” 54 Am. J. Comp. L. 199, 201, 214 (2006) (explaining that, unlike judges in many states, Connecticut judges “are actively involved in the negotiations as moderators and comment not only on the ultimate sentence acceptable to the court, but also on the merits of the case,” and arguing that such “[a]ctive judicial participation” in plea negotiations may be “a better way to promote accuracy and fairness in plea bargaining”).

State v. Damato-Kushel, *supra*, 327 Conn. at 195-96.

“When a guilty plea is induced by promises arising out of a plea bargaining agreement, fairness requires that such promises be fulfilled by the state.” State v. Littlejohn, 199 Conn. 631, 644 (1986). In the event that the prosecutor is for some reason unable to fulfill a portion of the agreement, he or she should do everything possible to help restore the defendant and the prosecution to their respective positions prior to the agreement.

A concern that is not common to other agreements is the possibility that an innocent defendant would be interested in a negotiated guilty plea in order to avoid exposure to a greater sentence. A prosecutor who considers all of the factors in these standards is in the best position to avoid such a miscarriage of justice.

“Nolle prosequi” is a Latin term which translates loosely into English as “unwilling to prosecute.” In practice, a nolle prosequi, or simply “nolle,” is a formal entry by the prosecutor which declares an unwillingness to prosecute a case, or an intention not to prosecute a case further. The rules of practice provide that “[a] prosecuting authority shall have the power to enter a nolle prosequi in a case[.]” which “shall be entered upon the record after a brief statement by the prosecuting authority in open court of the reasons therefor.” P.B. § 39-29. The entry of a nolle prosequi terminates the prosecution and the defendant is released from custody. See P.B. § 39-31.

In addition to the rule of practice requiring that the reasons for the nolle be placed upon the record, the standards indicate that a prosecutor should maintain a record of the basis for the entry of a nolle in the Division’s electronic case management system. The underlying purpose for these requirements is that there is legal significance to the reason why the State is entering the nolle. As the Connecticut Supreme Court noted in State v. Kallberg, 326 Conn. 1 (2017), there is a distinction between a prosecutor’s unilateral entry of a nolle and a nolle that has been bargained for as part of a plea agreement. Id. at 13-14. Where the defendant has performed some act in exchange for the nolle, it operates as the functional equivalent of a dismissal.

In contrast, when a nolle has entered for other than a bargained for reason, the defendant is still subject to prosecution. If the prosecutor subsequently decides to proceed against the defendant, a new prosecution must be initiated. Id.; see State v. Winer, 286 Conn. 666, 684-85 (2008) (“In Connecticut, after a nolle prosequi has been entered, the statute of limitations continues to run and a prosecution may be resumed only on a new information and a new arrest.”).

In entering a nolle prosequi, the prosecutor in charge of the case may consider the fact that the defendant has made a monetary contribution to the Criminal Injuries Compensation Fund or a contribution of community service work hours to a private nonprofit charity or other nonprofit organization. See C.G.S. § 54-56h(b). A

monetary contribution made by a defendant to the Criminal Injuries Compensation Fund as provided by statute may be paid to either the clerk of the court or the Office of Victim Services. See C.G.S. § 54-56h(c). Where a prosecution is initiated by complaint or information, the defendant may object to the entering of a nolle prosequi at the time it is offered by the prosecuting authority and may demand either a trial or a dismissal, except when a nolle prosequi is entered upon a representation to the judicial authority by the prosecuting authority that a material witness has died, disappeared or become disabled or that material evidence has disappeared or has been destroyed and that a further investigation is therefore necessary. P.B. § 39-30; C.G.S. § 54-56b.

## **PART VII: TRIAL**

- 1. Candor with the Court**
- 2. Selection of Jurors**
- 3. Relationships with Jury**
- 4. Opening Statements**
- 5. Presentation of Evidence**
- 6. Examination of Witnesses**
- 7. Objections and Motions**
- 8. Arguments to the Jury**

### **1. Candor With The Court**

#### **7-1.1 Veracity**

A prosecutor shall not knowingly make a false statement of fact or law to a court. If a prosecutor learns that a previous statement of material fact or law made to the court by the prosecutor is incorrect, the prosecutor shall correct such misstatement in a timely manner.

#### **7-1.2 Legal Authority**

A prosecutor shall inform the court of legal authority in Connecticut known to the prosecutor to be directly adverse to his or her position and not disclosed by others.

#### **7-1.3 Truthful and Accurate Evidence**

A prosecutor shall offer evidence that is believed to be truthful and accurate. If a prosecutor learns that material evidence previously presented by the prosecutor is not truthful or accurate, the prosecutor shall take reasonable remedial measures to prevent prejudice caused by such untruthful or inaccurate evidence.

#### **7-1.4 Ex Parte Proceeding**

A prosecutor, in an ex parte proceeding authorized by law, shall inform the court of all material facts known to the prosecutor which he or she reasonably believes are necessary to an informed decision by the court, whether or not the facts are adverse.

[NDAA Nat. Pros. Stds. Standard 7-1.1 through 7-1.4, inclusive; ABA Crim. Just. Stds. Standard 3-3.3(b) & 3-6.6; R. Prof. Conduct Rule 3.3]

## Commentary

Standards 7-1.1 through 7-1.4, inclusive, embody the duty of candor toward the tribunal set forth in Rule 3.3 of the Rules of Professional Conduct. In order to make just, informed decisions, the court must have the most accurate information available regarding the facts and the law. A prosecutor, in his or her role as a minister of justice, must provide information to the court in an honest and forthright manner.

Remember, under Napue v. Illinois, 360 U.S. 264, 269 (1959), and Giglio v. United States, 405 U.S. 150, 153 (1972), when a prosecutor knows that a witness has falsely denied striking a plea deal with the state, or knows that the witness has substantially mischaracterized the nature of an inducement, the prosecutor has an obligation to correct any misconception. See Gomez v. Commissioner of Correction, 336 Conn. 168, 185-86 (2020) (prosecutor has duty to correct material, false or misleading testimony regarding cooperation agreement even if agreement at issue has been disclosed to defense counsel). It does not matter whether the cooperating witness actually intended to lie. Napue and Giglio require that the prosecutor apprise the court whenever the prosecutor knows the witness is giving testimony that is “substantially misleading.” State v. Ouellette, 295 Conn. 173, 186 (2010). The prosecutor may correct such testimony through leading questions, if necessary.

## 2. Selection of Jurors

### 7-2.1 Requisite Legal Knowledge

The Division of Criminal Justice should provide appropriate training to prosecutors on the legal standards that govern the selection of jurors in Connecticut in order to assure that the criminal defendant’s Sixth Amendment right to an impartial jury will be honored.

Before engaging in voir dire examination of prospective jurors, the prosecutor should be familiar with Connecticut statutes, rules of practice, and caselaw governing the jury selection process. The prosecutor should prepare to effectively discharge the prosecution function in the selection of the jury, including exercising challenges “for cause” and peremptory challenges. In preparing for voir dire, prosecutors should pay particular attention to rules and cases providing guidance in the proper exercise of peremptory challenges.

### 7-2.2 Voir dire Examination

The opportunity to question jurors personally should be used to obtain information relevant to the well-informed exercise of challenges. The prosecutor should not seek to commit jurors on factual issues likely to arise in the case, and should not



intentionally use the voir dire process to present arguments, facts, or evidence which he or she reasonably should know will not be admissible at trial.

In conducting voir dire examination, the prosecutor should seek to minimize any undue embarrassment or invasion of privacy of potential jurors while still enabling fair and efficient juror selection.

### **7-2.3 Peremptory and “For Cause” Challenges**

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

The prosecutor should consider contesting a defense counsel’s peremptory challenges that appear to be based upon such criteria.

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

### **7-2.4 Duration**

A prosecutor should conduct selection of the jury without unnecessary delay.

[NDAA Nat. Pros. Stds. Standards 7-2.2 through 7-2.4, inclusive; ABA Crim. Just. Stds. Standard 3-6.3; C.G.S. §§ 54-82, 54-82b, 54-82f, 54-82g, & 54-82h; P.B. §§ 5-12, 42-11 through 42-13, inclusive]

### **Commentary**

The Connecticut Constitution states:

The right of trial by jury shall remain inviolate, the number of such jurors, which shall not be less than six, to be established by law; but no person shall, for a capital offense, be tried by a jury of less than twelve jurors without his consent. In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law. The right to question each juror individually by counsel shall be inviolate.

Conn. Const. art. I, § 19.

The General Statutes further provide that “[t]he party accused in a criminal action in the Superior Court may demand a trial by jury of issues which are triable of right by a jury.” C.G.S. § 54-82b(a); see P.B. § 42-1. The legislature has established that “[t]here is no right to trial by jury in criminal actions where the maximum penalty is a fine of one hundred ninety-nine dollars or in any matter involving violations payable through the Centralized Infractions Bureau where the maximum penalty is a fine of five hundred dollars or less.” C.G.S. § 54-82b(a); see also State v. Wheeler, 37 Conn. Supp. 693, 694-97 (1981) (legislature’s limitation of jury trial constitutional under both federal and state constitutions); State v. LoSacco, 12 Conn. App. 481, 494, cert. denied, 205 Conn. 814 (1987) (“defendant has no right to a jury trial when he is charged with the infraction of creating a public disturbance”).

If an accused is entitled, and elects, to be tried by jury, the number of jurors who shall comprise the jury is set forth by statute. See C.G.S. § 54-82; see also C.G.S. § 54-82h (selection of “alternate jurors” in the discretion of the court). The primary purpose of the jury selection process is to empanel a jury that is representative of the community and does not have personal interests or prejudices for or against a party to the extent that they cannot render a verdict based upon the law and the facts. See State v. Edwards, 314 Conn. 465, 483-84 (2014); see also P.B. §§ 42-4 (Challenge to Array) & 42-5 (Disqualification of Jurors and Selection of Panel).

The number of peremptory challenges permitted to the prosecution and defense during the jury selection process is governed by the severity of the possible punishment attributable to the charged offense as established by statute. See C.G.S. § 54-82g & P.B. § 42-13. The standards set forth principles to be followed by prosecutors in conducting their part of the selection process.

As indicated above, the right to an individual voir dire examination of each prospective juror in a criminal action is expressly set forth in the state constitution. See Conn. Const. art. I, § 19. The right is also provided for by the General Statutes and the Superior Court Rules. See C.G.S. § 54-82f & P.B. § 42-12. As the Connecticut Supreme Court has observed, however, “[t]his right . . . is not unlimited.” State v. Marsh, 168 Conn. 520, 522-23 (1975). “In conducting the examination of jurors during voir dire, the trial court is vested with wide discretion; and when questioning by counsel transcends the proper limits of the voir dire and represents an abuse of the right of examination, the court is under a duty to restrict such examination.” (Citations omitted.) Id. at 521-22.

Examination of jurors on voir dire has a two-fold purpose; first, it permits the trial court to determine whether the prospective juror is qualified to serve and second, it aids counsel in exercising their rights to peremptory challenges. State v. Haskins, 188 Conn. 432, 446 (1982). “While challenges for cause permit rejection of prospective jurors on the ground of provable and legally cognizable evidence of

partiality, peremptories permit further rejections for a real or imagined partiality that is less easily designated and proved.... [T]he effectiveness of the peremptories [in securing an impartial jury panel] must depend in part on intuition.... [Citation omitted.]" Rozbicki v. Huybrechts, 218 Conn. 386, 396 n.4 (1991); see State v. Hodge, 248 Conn. 207, 217, cert. denied, 528 U.S. 969 (1999) (peremptory challenges may be based on subjective and intuitive criteria); accord State v. Peeler, 267 Conn. 611, 624 (2004). Ideally, a peremptory challenge should be made with "regard to the particular circumstances of the trial or the individual responses of the juror[ ]...." Hernandez v. New York, 500 U.S. 352, 371-72 (1991); State v. Hodge, supra, 248 Conn. at 257. A party may, however,

legitimately [base his or her decision to exercise a peremptory challenge] not only on answers given by the prospective juror to questions posed on voir dire, but also on the prosecutor's observations of the prospective juror. An impression of the conduct and demeanor of a prospective juror during the voir dire may provide a legitimate basis for the exercise of a peremptory challenge . . . . Thus, a prosecutor's explanation that a venireperson was excluded because he or she seemed, for example, inattentive or hostile to the government, if credible, is sufficient.

(Internal quotation marks omitted.) State v. King, 249 Conn. 645, 666-67 n.26 (1999); accord State v. Robinson, 237 Conn. 238, 254-55 n.15 (1996); but see P.B. § 5-12(h) (providing strict procedures to be followed when exercise of peremptory challenge relies upon venireperson's conduct). "[O]ften the reasons behind that decision cannot be easily articulated." Thomas v. Moore, 866 F.2d 803, 805 (5th Cir.), cert. denied, 493 U.S. 840 (1989). In exercising a challenge, a prosecutor is not bound by a venireperson's assurances of ability to be fair and impartial and may justifiably rely upon his or her own perceptions and assessments. State v. Peeler, supra, 267 Conn. at 624; State v. Hodge, 248 Conn. at 231.

In exercising peremptory challenges, the prosecutor should be mindful that as a representative of all of the people of his or her jurisdiction, it is important that none of those people be obstructed from serving on a jury because of their status as a member of a particular group. See, e.g., Batson v. Kentucky, 476 U.S. 79 (1986) (federal constitutional right to equal protection applies to government's use of peremptory challenges and forbids peremptory removal of venireperson on account of **race**); Hernandez v. New York, 500 U.S. 352, 355 (1991) (Equal Protection Clause prohibits discrimination in jury selection on basis of Latino **ethnicity**). Accord State v. Gonzalez, 206 Conn. 391, 396-97 (1988); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) (Supreme Court extended holding in Batson to forbid peremptory challenges based solely on **gender**); State v. Hodge, 248 Conn. 207, 240, cert. denied, 528 U.S. 969 (1999) (Connecticut Supreme

Court holding peremptory challenge based strictly on **religious affiliation**, as distinguishable from *beliefs* likely to adversely affect person's ability to serve as juror and follow the law, is unconstitutional under the federal constitution); State v. Rigual, 256 Conn. 1, 11 (2001) (Connecticut Supreme Court holding Batson applies to peremptory challenges based on **national or ethnic origin and ancestry**); see also Powers v. Ohio, 499 U.S. 113 (1991) (criminal defendant has standing to raise third-party equal protection claims of venireperson excluded by prosecution because of race regardless of defendant's race). Accord State v. King, 249 Conn. 645 (1999); Georgia v. McCollum, 505 U.S. 42 (1992) (Supreme Court extended Batson to enable prosecutors to object to defendant's improper use of peremptory challenges).

Until supplanted by Superior Court Rule 5-12, which became effective January 1, 2023, challenges to the use of peremptory challenges in Connecticut on the basis of racial or ethnic discrimination were governed as a matter of state and federal constitutional law in accordance with the procedure set forth in Batson v. Kentucky, *supra*. See State v. Jose A.B., 342 Conn. 489 (2022); see also P.B. § 5-12. In Connecticut, the Batson procedure has three steps: (1) the opponent of the challenge must make a Batson objection; (2) the proponent of the challenge must offer a race-neutral reason or reasons for it; and (3) the opponent must demonstrate, and the trial court must find, that the proffered reason or reasons is pretextual and that the proponent is acting with purposeful discrimination. See State v. Edwards, *supra*, 310 Conn. at 483-86.

The procedures set forth in Batson have garnered significant criticism as being ineffectual for three principal reasons: (1) race-neutral reasons for a peremptory always abound; (2) proving purposeful discrimination is effectively impossible because such behavior rarely occurs openly and trial courts are reluctant to make such a finding in the absence of compelling proof, which rarely exists; and (3) the focus on purposeful discrimination fails to combat the influence of negative racially and ethnically based assumptions and stereotypes that often operate subconsciously to lead people to discriminate without purposeful or nefarious intentions. See State v. Holmes, 334 Conn. 202, 234-41 (2019).

In Holmes, *id.*, the court rejected the defendant's Batson claim, but the Chief Justice commissioned a jury selection task force to study, among other matters, the problem of implicit and unconscious bias in the exercise of peremptory challenges and offer solutions to it. See also State v. Holmes, 176 Conn. App. 156, 192 (Lavine, J., *concurring*). On July 12, 2022, the judges of the Superior Court adopted the Jury Selection Task Force's proposed Superior Court Rule aimed at addressing the problem of implicit and unconscious bias in jury selection, replacing the Batson procedure with a rule-based procedure that governs objections to the use of peremptory challenges allegedly on the basis of race or ethnicity. Practice

Book Section 5-12, which is modeled after the State of Washington's General Rule 37, became effective January 1, 2023, and provides:

- (a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based upon race or ethnicity.
- (b) Objection. A party may object to the use of a peremptory challenge to raise a claim of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the prospective juror.
- (c) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reason that the peremptory challenge has been exercised.
- (d) Determination. The court shall then evaluate from the perspective of an objective observer, as defined in subsection (e) herein, the reason given to justify the peremptory challenge in light of the totality of the circumstances. If the court determines that the use of the challenge against the prospective juror, as reasonably viewed by an objective observer, legitimately raises the appearance that the prospective juror's race or ethnicity was a factor in the challenge, then the challenge shall be disallowed and the prospective juror shall be seated. If the court determines that the use of the challenge does not raise such an appearance, then the challenge shall be permitted and the prospective juror shall be excused. The court need not find purposeful discrimination to disallow the peremptory challenge. The court must explain its ruling on the record. A party whose peremptory challenge has been disallowed pursuant to this rule shall not be prohibited from attempting to challenge peremptorily the prospective juror for any other reason or from conducting further voir dire of the prospective juror.
- (e) Nature of Observer. For the purpose of this rule, an objective observer: (1) is aware that purposeful discrimination, and implicit, institutional, and unconscious biases, have historically resulted in the unfair exclusion of potential jurors on the basis of their race, or ethnicity; and (2) is deemed to be aware of and to have given due consideration to the circumstances set forth in subsection (f) herein.

(f) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

- (1) the number and types of questions posed to the prospective juror including consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the questions asked about it;
- (2) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the prospective juror, unrelated to his testimony, than were asked of other prospective jurors;
- (3) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;
- (4) whether a reason might be disproportionately associated with a race or ethnicity;
- (5) if the party has used peremptory challenges disproportionately against a given race or ethnicity in the present case, or has been found by a court to have done so in a previous case;
- (6) whether issues concerning race or ethnicity play a part in the facts of the case to be tried;
- (7) whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.

(g) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Connecticut or may be influenced by implicit or explicit bias, the following are presumptively invalid reasons for a peremptory challenge:

- (1) having prior contact with law enforcement officers;
- (2) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
- (3) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
- (4) living in a high crime neighborhood;
- (5) having a child outside of marriage;
- (6) receiving state benefits;
- (7) not being a native English speaker; and
- (8) having been a victim of a crime.

The presumptive invalidity of any such reason may be overcome as to the use of a peremptory challenge on a

prospective juror if the party exercising the challenge demonstrates to the court's satisfaction that the reason, viewed reasonably and objectively, is unrelated to the prospective juror's race or ethnicity and, while not seen by the court as sufficient to warrant excusal for cause, legitimately bears on the prospective juror's ability to be fair and impartial in light of particular facts and circumstances at issue in the case.

- (h) **Reliance on Conduct.** The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection: allegations that the prospective juror was inattentive, failing to make eye contact or exhibited a problematic attitude, body language, or demeanor. If any party intends to offer one of these reasons or a similar reason as a justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A party who intends to exercise a peremptory challenge for reasons relating to those listed above in subsection (g) shall, as soon as practicable, notify the court and the other party in order to determine whether such conduct was observed by the court or that party. If the alleged conduct is not corroborated by observations of the court or the objecting party, then a presumption of invalidity shall apply but may be overcome as set forth in subsection (g).
- (i) **Review Process.** The chief justice shall appoint an individual or individuals to monitor issues relating to this rule.

P.B. § 5-12. Because Practice Book Section 5-12(a) expressly states that its purpose “is to eliminate the unfair exclusion of potential jurors based upon race or ethnicity,” it would appear that it has no application to instances where a party asserts an objection that a peremptory challenge was improperly exercised on the basis of gender, religious affiliation, or other status. See P.B. § 5-12(a). This would seem to suggest that the three-step Batson procedure outlined in Edwards still applies under such circumstances. See State v. Edwards, supra, 310 Conn. at 483-86.

### **3. Relationships with Jury**

#### **7-3.1 Direct Communication**

The prosecutor should not communicate with persons the prosecutor knows to be summoned for jury duty or impaneled as jurors, before or during trial, other than in the lawful conduct of courtroom proceedings. The prosecutor should avoid even the appearance of improper communications with jurors, and minimize any out-of-court proximity to or contact with jurors. Where out-of-court contact cannot be avoided, the prosecutor should not communicate about or refer to the specific case.

The prosecutor should treat jurors with courtesy and respect, while avoiding a show of undue solicitude for their comfort or convenience.

#### **7-3.2 After Discharge**

After the jury is discharged, the prosecutor may, with the consent of the juror[s], communicate with the jury as a whole, or with any members of the jury, to discuss the verdict and the evidence in order to investigate whether the verdict may be subject to legal challenge, or to evaluate the prosecution's performance for improvement in the future. 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, however, jurors have no obligation to speak to any person about any case and may refuse all interviews or requests to discuss the case.

No prosecutor, or representative or agent of the prosecutor, shall contact, communicate with, or interview any juror or alternate juror concerning the deliberations or verdict of the jury, or of any individual juror, or alternate juror in any action in any manner after trial which subjects the juror to harassment, misrepresentation, duress, or coercion. The prosecutor should not criticize the verdict or intentionally seek to influence future jury service during such communication. A prosecutor should cease communication upon a juror's request.

[NDAA Nat. Pros. Stds. Standards 7-3.1, 7-3.2; ABA Crim. Just. Stds. Standard 3-6.4; R. Prof. Conduct Rule 3.5; P.B. § 42-8]

#### **Commentary**

Practice Book Section 42-8 governs communications between parties and jurors, providing in relevant part:

- (a) No party, and no attorney, employee, representative or agent of any party or attorney, shall contact, communicate with or interview



any juror or alternate juror, or any relative, friend or associate of any juror or alternate juror concerning the deliberations or verdict of the jury or of any individual juror or alternate juror in any action:

(1) during trial until the jury has returned a verdict and/or the jury has been dismissed by the judicial authority, except upon leave of the judicial authority, which shall be granted only upon a showing of good cause; or

(2) in any manner after trial which subjects the juror to harassment, misrepresentation, duress or coercion.

P.B. § 42-8(a). Subsection (c) of this Practice Book Section provides that “[a] violation of subsection (a) may, where appropriate, be treated as a contempt of court, and may be punished accordingly.” P.B. § 42-8(c). Moreover, “[t]he judicial authority shall have continuing supervision over communications with jurors, even after a trial has been completed.” Id.

The prosecutor has a large responsibility in seeing that the criminal justice system is respected and improved. In that regard, he or she must be careful to avoid any appearance of taking unfair advantage of a juror or jury. In post-trial contact, the prosecutor should not criticize the verdict or jurors’ actions, as such might be seen as an attempt to influence the behavior of a juror or a person with whom the juror confides in any future instance of jury service.

## **4. Opening Statements**

### **7-4.1 Purpose**

When permitted by the trial court, a prosecutor may give an opening statement for the purpose of explaining the legal and factual issues, the evidence, and the procedures of the particular trial.

### **7-4.2 Limits**

The prosecutor’s opening statement at trial should be confined to a fair statement of the case from the prosecutor’s perspective, and discussion of evidence that the prosecutor reasonably believes, in good faith, will be available, offered, and admitted into evidence at the trial to support the prosecution case.

The prosecutor’s opening statement should be made without expressions of personal opinion, vouching for witnesses, inappropriate appeals to emotion, or personal attacks on opposing counsel. The prosecutor should scrupulously avoid any comment on a defendant’s right to remain silent.

[NDAA Nat. Pros. Stds. Standards 7-4.1, 7-4.2; ABA Crim. Just. Stds. Standard 3-6.5(a) & (c)]

## Commentary

Although common in other states, the practice of permitting the parties to deliver an opening statement to the jury is not standard in criminal cases in Connecticut. Such a procedure is not expressly established by statute or the rules of practice; nor, however, is it explicitly prohibited. As the Appellate Court has observed, “[i]n Connecticut, ‘the right to make an opening statement to the jury by a defendant in a criminal case is not guaranteed by law or rule. Whether to allow an opening statement is a decision to be left to the sound discretion of the trial court, taking into consideration the number and nature of the charges, the complexity of the issues, the number of defendants and their interrelationship, and similar factors which, when put into proper perspective by an opening statement, would serve to clarify the issues and focus the attention of the jury upon the matters it must decide.’” State v. Gerald A., 183 Conn. App. 82, 127 (2018), quoting State v. Ridley, 7 Conn. App. 503, 506, cert. denied, 201 Conn. 803 (1986).

If the trial court exercises its discretion to permit the parties to provide opening statements to the jury, the prosecutor should be guided by the principle that the opening statement should be confined to assertions of fact that he or she intends or, in good faith, expects to prove. Although it may be acceptable for the prosecuting attorney to state facts that are expected to be proved, such assertions should be founded upon the prosecutor’s good faith and reasonable basis for believing that such evidence will be tendered and admitted into evidence. The prosecutor should be zealous in maintaining the propriety and fairness which should characterize his or her conduct as an officer of the court whose duty it is to competently represent the citizenry of the state in seeking justice. So long as the prosecutor’s remarks are guided by good faith and a reasonable belief that such assertions will ultimately be supported by the admissible evidence, the prosecution will have fulfilled the basic requirements of an opening statement.

### 5. Presentation of Evidence

#### 7-5.1 Admissibility

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

#### 7-5.2 Questionable Admissibility

When admissibility of evidence is reasonably questionable, a prosecutor should not publish or display the evidence to the jury prior to obtaining a ruling on its admissibility from the court.

[NDAA Nat. Pros. Stds. Standards 7-5.1 & 7-5.2; ABA Crim. Just. Stds. Standard 3-6.9; R. Prof. Conduct Rule 3.4(5); P.B. § 42-15]

### **Commentary**

Consistent with the concepts of fairness that should be embraced by the prosecutor, he or she should not expose the jury to evidence of questionable admissibility without first seeking a ruling from the court.

The Rules of Professional Conduct explicitly provide that a lawyer shall not “[i]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.” R. Prof. Conduct Rule 3.4(5).

The Superior Court rules provide that: “The judicial authority to whom a matter has been referred for trial may in its discretion entertain a motion in limine made by either party regarding the admission or exclusion of anticipated evidence.” P.B. § 42-15.

## **6. Examination of Witnesses**

### **7-6.1 Fair Examination**

A prosecutor should conduct the examination of all witnesses fairly and with due regard for dignity and their legitimate reasonable privacy concerns, and without seeking to intimidate or humiliate a witness unnecessarily.

### **7-6.2 Sequestration of Witnesses**

To ensure a fair trial, and to assure that witnesses will testify solely on the basis of their own personal knowledge and not shape their testimony to that of earlier witnesses, prosecutors should seek a trial court order providing for the sequestration of witnesses when appropriate.

### **7-6.3 Valid Claims of Privilege**

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 is unsure whether a particular witness will claim a privilege to not testify, the prosecutor should alert the court and defense counsel in advance and outside the presence of the jury.

#### **7-6.4 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.

#### **7-6.5 Purpose of Cross-Examination**

A prosecutor should use cross-examination as a good faith quest for the ascertainment of the truth.

#### **7-6.6 Impeachment and Credibility**

A prosecutor may and should use cross-examination to test the credibility of a witness within the bounds of the rules of evidence. However, the prosecutor should not abuse this power in an attempt to ridicule, discredit or hold a fact witness up to contempt, if the prosecutor knows the witness is testifying truthfully.

[NDAA Nat. Pros. Stds. Standards 7-6.1 through 7-6.4; ABA Crim. Just. Stds. Standard 3-6.7; R. Prof. Conduct 3.4(5); 4.4(a); C.G.S § 54-85a; P.B. § 42-36]

#### **Commentary**

If the criminal justice system is to retain credibility with the public, it must furnish a tribunal into which people can come to give information without the fear of being harassed or having their privacy unduly invaded. Our system requires that all witnesses, those brought in by both the prosecution and defense, be treated fairly. In this regard, Standard 7-6.1 incorporates the spirit of the Rules of Professional Conduct, which provide in relevant part that “a lawyer shall not use means that have no substantial purpose other than to embarrass . . . or burden a third person.” R. Prof. Conduct 4.4(a).

A “sequestration order” is a court order which prevents an anticipated witness from being in the courtroom during the testimony of other witnesses. General Statutes § 54-85a provides that “[i]n any criminal prosecution, the court, upon motion of [either party] shall cause any witness to be sequestered during the hearing on any issue or motion or any part of the trial of such prosecution in which he [or she] is not testifying.” See P.B. § 42-36 (same); see also State v. Morgan, 70 Conn. App. 255, cert. denied, 261 Conn. 919 (2002) (either party may invoke court's authority to issue sequestration order during any portion of trial; court lacks discretion to deny such request). Standard 7-6.2 provides that prosecutors should not hesitate to seek the sequestration of witnesses where appropriate. Sequestration of witnesses is a procedural device that serves to prevent witnesses from tailoring their testimony to that of earlier witnesses, aids in detecting testimony that is less

than candid and assures that witnesses testify on the basis of their own knowledge; in essence, it helps to ensure that the trial is fair. Moye v. Commissioner of Correction, 168 Conn. App. 207, cert. denied 324 Conn. 905 (2016); see State v. Delgado, 50 Conn. App. 159 (1998) (expert witnesses are not excepted from sequestration under either rule of practice or statute and may be sequestered).

To ask a question that implies the existence of a factual predicate that is not true or for which the prosecutor has no reasonable objective basis for believing, is not fair and therefore not proper. See R. Prof. Conduct 3.4(5). Without such limitations, the overzealous prosecutor could use the examination of a witness to imply the existence of whatever evidence might be needed in the hope that the jury would not consider too closely the fact that it was never really introduced.

Because cross-examination is to be used as a good faith quest for the truth, a prosecutor who knows the witness is testifying truthfully should not attempt to ridicule, discredit, or undermine said witness. That does not mean that the prosecutor cannot vigorously cross-examine a witness. The use of proactive techniques can elicit other information that is useful in establishing the prosecution's theory of the case.

In the end, if a prosecutor keeps in mind that his or her responsibility is to seek justice for all of the people of the community, then following the directives of these standards is simply a matter of common sense.

## **7. Objections and Motions**

### **7-7.1 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.

### **7-7.2 Motions in Limine**

A prosecutor should attempt to resolve by motion in limine, prior to commencement of trial, any evidentiary matters when the prosecutor believes there may be an issue of admissibility before a judge or jury, to avoid unnecessary delays in the trial or to prevent the risk of prejudicial information before the trier of fact. Likewise, a prosecutor should also request the court to similarly resolve questions on the admissibility of defense evidence.

[NDAA Nat. Pros. Stds. Standards 7-7.1 and 7-7.2; ABA Crim. Just. Stds. Standard 3-3.6; P.B. §§ 5-5, 41-2, 42-15]

## Commentary

The admissibility of evidence, exhibits, demonstrations, or argument is left to the court for determination. Prosecutors should be sufficiently acquainted with the rules of evidence so they are able to predict the admissibility of evidence to a high degree of probability.

When the prosecutor has a good faith belief that the evidence, exhibit, demonstration, or argument being offered by opposing counsel is not admissible, he or she should object and give a short statement of the basis for the objection. See P.B. § 5-5; see also E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 1.25.1 *Objections Form and Burden*. Argument upon such objection or upon any interlocutory question arising during the trial of a case shall not be made by either party unless the judicial authority requests it and, if made, must be brief and to the point. P.B. § 5-5. Since most, if not all, objections involve questions of law to be ruled upon by the trial court, the legal arguments are of little or no concern to the jury. Such argument may also refer to factual matters that have not, up to that point in the proceedings, been brought out by sworn testimony and which, additionally, may not be brought out and/or may be inadmissible. This should not, however, preclude the trial court from giving the jury an explanation of the basis for the objection and/or its ruling sufficient to dispel the questions that could normally arise in the minds of the jurors, so that no unfavorable inferences will be drawn by them reflecting upon a party.

In order to conserve the time of the jury, witnesses, and other interested parties, the prosecutor should attempt to have questions regarding the admissibility of evidence resolved prior to trial. This may be done through the filing of one or more motions in limine pursuant to Practice Book § 42-15. See E. Prescott, supra, § 1.29.1. A motion in limine should be made in the same way as any other pretrial motion and should (1) be in writing; (2) describe the anticipated evidence; and (3) explain the reason why it should be excluded or admitted. Id. § 1.29.2. The rules of practice specifically provide the court the option to grant the motion, deny it with or without prejudice, or reserve decision until a later time. Id. In addition to the savings of court time, the pre-trial rulings will also allow for more efficient pre-trial preparation and, as permitted, the appeal of adverse rulings.

## 8. Arguments to the Jury

### 7-8.1 Preparation for Closing

Prosecutors conducting jury trials should be well-versed in the caselaw governing the parameters of proper closing arguments. In preparing for closing argument, prosecutors should take time to refresh themselves on improper practices and comments which should be scrupulously avoided in delivering the State's closing.

## **7-8.2 Characterizations**

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

## **7-8.3 Sandbagging Discouraged**

In conducting closing argument, prosecutors should take appropriate measures to avoid the practice of “sandbagging,” wherein the prosecutor reserves the bulk of his or her discussion of the evidence for rebuttal after the defendant makes his or her single closing argument.

## **7-8.4 Personal Opinion**

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

## **7-8.5 Decision Not to Testify**

During closing argument, a prosecutor shall not comment upon the defendant’s decision not to testify.

[NDAA Nat. Pros. Stds. Standards 7-8.1 & 7-8.2; ABA Crim. Just. Stds. Standard; R. Prof. Conduct 3.4(5); C.G.S. § 54-84, 54-85e; P.B. §§ 42-35, 42-37]

## **Commentary**

Faced with closing argument, the final opportunity to espouse the state’s theory of the case, prosecutors need to be keenly aware of the limitations on the methods available to them for that use. Closing arguments have been the ticket back to the trial court from many appellate courts that have uttered the words “prosecutorial misconduct” or “prosecutorial impropriety” in relation to words uttered by the prosecutor.

A complete review of the law governing proper closing arguments is beyond the scope of this commentary. These standards set forth the basic rules for guidance in constructing and delivering a closing argument. Prosecutors should become intimately familiar with Connecticut’s ethical rules and appellate opinions on proper closings.

“[A]s the state's advocate, a prosecutor may argue the state's case forcefully, [to the extent such argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom.” (Internal quotation marks omitted.) State v. Otto, 305 Conn. 51, 76 (2012). Our State Supreme Court has long recognized that “[w]hile the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider.” (Internal quotation marks omitted.) Id. at 76-77; see also State v. Williams, 204 Conn. 523, 544 (1987) (“[s]tatements as to facts which have not been proven amount to unsworn testimony that is not the subject of proper closing argument”).

With respect to closing arguments, Practice Book § 42-35 provides in relevant part: “Unless the judicial authority for cause permits otherwise, the parties shall proceed with the trial in the following order . . . (4) The prosecuting authority shall be entitled to make the opening and final closing arguments. (5) The defendant may make a single closing argument following the opening argument of the prosecuting authority.” P.B. § 42-35. Standard 7-8.3 discourages the prosecutor from engaging in what the Connecticut Supreme Court has labeled “sandbagging” — the act of reserving the bulk of the prosecutor’s discussion of the evidence until after the defendant makes his or her single closing argument. Although the Court found no impropriety in the case under review, in State v. Gonzalez, 338 Conn. 108 (2021), the Court nonetheless warned: “Prosecutors should avoid structuring their closing arguments in a manner that reserves the entirety of their summation for rebuttal, which could implicate a defendant's constitutional rights.” Id. at 141, n.20.

The Rules of Professional Conduct provide that a lawyer shall not “[i]n trial, allude to any matter . . . not . . . supported by admissible evidence, assert personal knowledge of facts in issue . . ., or state a personal opinion as to the justness of a cause, the credibility of a witness, . . . or the guilt or innocence of an accused.” R. Prof. Conduct 3.4(5).

Standard 7-8.4 recognizes that it is firmly established that a prosecutor may not express his own opinion, directly or indirectly, as to the credibility of the witnesses. See State v. Bermudez, 274 Conn. 581, 590 (2005). As the Connecticut Supreme Court has explained, “expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position. . . . [B]ecause the jury is aware that the prosecutor has prepared and presented the case and consequently, may have access to matters not in evidence . . . it is likely to infer that such matters precipitated the personal opinions.” (Internal quotation marks omitted.) Id.



Standard 7-8.5 incorporates the longstanding constitutional and statutory prohibition on commenting upon the defendant's election not to testify at trial. The Fifth Amendment prohibits the state from forcing the defendant to be a witness against himself, and the United States Supreme Court has concluded that this protection also prohibits prosecutors from commenting at trial on the defendant's decision not to testify. Griffin v. California, 380 U.S. 609, 615 (1965); see also State v. Parrott, 262 Conn. 276, 292 (2003) (“[i]t is well settled that comment by the prosecuting attorney . . . on the defendant's failure to testify is prohibited by the fifth amendment to the United States constitution” [internal quotation marks omitted] ). In Griffin, the court reasoned that allowing a prosecutor to comment on the defendant's refusal to testify would be equivalent to imposing a penalty for exercising his constitutional right to remain silent. Griffin v. California, supra, at 614.

Additionally, General Statutes Section 54-84 explicitly provides that any person on trial for a crime may refuse to testify upon such trial. Further, “the neglect or refusal of an accused party to testify shall not be commented upon by the court or prosecuting official, except that the court shall instruct the jury that they may draw no unfavorable inferences from the accused's failure to testify. In cases tried to the court, no unfavorable inferences shall be drawn by the court from the accused's silence.” C.G.S. § 54-84.

Of note, the statutes provide that a photograph, not to exceed 8” X 10”, solely of a deceased victim prior to the date of the offense for which the defendant is being tried, that is a fair and accurate representation of the victim and is not of itself inflammatory in nature, may be shown to the jury during the opening and closing arguments by the prosecutor. C.G.S. § 54-85e.

## **PART VIII: SENTENCING**

### **1.Sentencing**

### **2.Probation**

#### **1. Sentencing**

##### **8-1.1 Fair Sentencing**

When participating in the sentencing process, the prosecutor should seek to assure that a fully informed, fair, just, and equitable judgment is made and that unfair sentences and unfair sentence disparities are avoided.

##### **8-1.2 The Role of the Prosecutor**

At sentencing, the prosecutor shall:

- a. inform the sentencing judge of the offenses for which the defendant is to be sentenced;
- b. give a brief summation of the facts relevant to each offense;
- c. disclose to the sentencing judge any information in the State's files that is favorable to the defendant and relevant to sentencing; and
- d. state the basis for any recommendation which he or she chooses to make as to the appropriate sentence.

Consistent with Standard 2-9.2, the state constitution, and applicable statutes, the prosecutor should take steps to see that the victim is not denied his or her rights to address the sentencing court.

##### **8-1.3 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.

##### **8-1.4 Pre-Sentence Reports**

In cases where no pre-sentence report is required by law, or in those cases where the defendant has properly waived a pre-sentence report, the prosecutor should disclose to the court any information in the State's files relevant to the sentencing process.

Consistent with Standard 8-2.2, the State's Attorney's office should be available as a source of information for the probation officer concerning a defendant's background when developing pre-sentence reports, and the prosecutor should provide the probation officer any information in the State's files relevant to the sentencing process.

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. Upon noticing any material information within a pre-sentence report which conflicts with information known to the prosecutor, it is the duty of the prosecutor to notify the appropriate parties of such conflicting information.

[NDAA Nat. Pros. Stds. Standards 8-1.1 through 8-1.4, inclusive; ABA Crim. Just. Stds. Standards 3-7.2, 3-7.3; C.G.S. §§ 53a-28, 54-91a, 54-91c, 54-91g, 54-91h, 54-92; P.B. §§ 39-7, 43-3, 43-4, 43-7, 43-9 through 43-12]

### **Commentary**

The Connecticut Legislature has recognized that: (1) The primary purpose of sentencing in the state is to enhance public safety while holding the offender accountable to the community, (2) sentencing should reflect the seriousness of the offense and be proportional to the harm to victims and the community, using the most appropriate sanctions available, including incarceration, community punishment, and supervision, (3) sentencing should have as an overriding goal the reduction of criminal activity, the imposition of just punishment, and the provision of meaningful and effective rehabilitation and reintegration of the offender, and (4) sentences should be fair, just, and equitable while promoting respect for the law. See C.G.S. § 54-300(c). General Statutes Section 53a-28 sets forth the authorized sentences that the court may impose. See C.G.S. § 53a-28.

The procedures to be followed by the court in imposing sentence upon a defendant after the acceptance of a plea of guilty or nolo contendere or upon a verdict or finding of guilty, as well as the prosecutor's role in the proceeding, are set forth in the rules of practice. See P.B. §§ 43-10 through 43-12, inclusive. Before imposing sentence or making any other disposition on the date previously imposed for sentencing, the court shall:

- 1) afford the parties an opportunity to be heard and, in its discretion, to present evidence on any matter relevant to the disposition, and to explain or controvert the presentence investigation report, the alternate incarceration assessment report or any other document relied upon in imposing sentence;

- 2) allow the victim and any other person directly harmed by the commission of the crime a reasonable opportunity to make, orally or in writing, a statement with regard to the sentence to be imposed (the “victim impact statement”);
- 3) allow the defendant a reasonable opportunity to make a personal statement in his or her own behalf and to present any information in mitigation of the sentence (the “right of allocution”);
- 4) in cases where guilt was determined by a plea, be informed by the parties whether there is a plea agreement, and if so, the substance thereof (see P.B. § 39);
- 5) impose the sentence in the presence and hearing of the defendant, unless the defendant has waived his or her right to be present (see C.G.S. § 54-92);
- 6) in cases where sentence review is available (see C.G.S. § 51-195) state on the record, in the presence of the defendant, the reasons for the sentence imposed.

P.B. § 43-10. Participation in the sentencing process provides the prosecutor the opportunity to continue his or her quest for justice. The prosecutor should be the person most familiar with the defendant, the facts surrounding the commission of the crime, and the procedures that brought the defendant to the sentencing stage. It is also the prosecutor who, from prior experience, will be aware of the sentences received by persons in similar situations so as to steer the court away from unfair sentences and unfair sentence disparities.

Sentencing participation also provides the prosecutor with an opportunity to assure that the victims of crimes are allowed to voice their thoughts and opinions regarding the sentence to be imposed. Sentencing also presents the opportunity for the prosecutor to seek a sentence that will adequately protect the community, deter persons from committing crimes and appropriately punish the offender. Sentencing further provides the means for the prosecutor to make sure the defendant is treated fairly by making mitigating evidence in his or her possession available to the defense and to ensure that the information provided to the court in the form of a pre-sentence investigation report is accurate.

## **2. Probation**

### **8-2.1 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 State’s Attorney’s office should be available as a source of information for the probation officer concerning a defendant’s background when developing pre-sentence reports;

- b. The State's Attorney's office should review pre-sentence reports prior to or upon submission of such reports to the court; and
- c. Upon noticing any material information within a pre-sentence report which conflicts with information known to the prosecutor, it is the duty of the prosecutor to notify the appropriate parties of such conflicting information.

### **8-2.2 Prosecutor as a Resource**

The State's Attorney's office should be available as a source of information for the Court Support Services Division regarding offenders under supervision.

Prosecutors should make themselves available to respond to questions probation officers may pose regarding modifying or enlarging the conditions of probation, revoking probation, or pursuing warrants for violations of conditions of probation.

### **8-2.3 Motions to Modify or Enlarge Conditions of Probation or Terminate Sentence of Probation**

The prosecutor should pursue or support motions to modify or enlarge conditions of probation, or terminate a sentence of probation, when authorized by rule or statute and warranted by the facts of the particular case. The prosecutor should oppose any such motion that is not supported by the facts or is not in the interests of justice or public safety.

### **8-2.4 Violations of Probation**

The State's Attorney's office should develop and maintain a system for providing probation officers with the opportunity for a prompt legal review of warrant applications alleging violations of conditions of probation before the applications are submitted to a Judge of the Superior Court.

Prosecutors should vigorously pursue a charge of violation of conditions of probation where the defendant has demonstrated an unwillingness or inability to abide by the terms of probation imposed by the sentencing court and where the beneficial aspects of probation are no longer being served.

[NDAA Nat. Pros. Stds. Standards 8-2.1 & 8-2.2; ABA Crim. Just. Stds. Standard 3-7.3; C.G.S. §§ 53a-29, 53a-30, 53a-31, 53a-32, 53a-32a, 53a-33, 54-108, & 54-108d; P.B. §§ 43-3, 43-4, 43-7, 43-29, 43-29A]

## Commentary

The Connecticut Supreme Court has recognized that the legislative policies underlying conditional probation are “to foster the offender's reformation and to preserve the public's safety.” (Citation and internal quotation marks omitted.) State v. Hill, 256 Conn. 412, 420 (2001).

The prosecutor's relationship with the Court Support Services Division must continue beyond the preparation of the pre-sentence report. The State's Attorney's office should maintain an open line of communication with probation officers, sharing information where necessary. If a defendant is placed under the supervision of the Court Support Services Division or another community based program, the State's Attorney's office, as a guardian of the public interest in seeing that the court's directives to the defendant are followed, should, if the defendant's conditions of probation require modification, or the defendant fails to comply with the conditions of his or her probation, assist the Court Support Services Division in bringing the defendant back before the court. Prosecutors should be aware of the time sensitive nature of violation of probation warrants, and should work to ensure such warrant applications are reviewed and presented to a judge in a timely fashion. See C.G.S. § 53a-32 (warrant for violation must be issued “during the period of probation”).

The General Statutes provide that “at any time during the period of probation . . . after hearing and for good cause shown, the court may modify or enlarge the conditions [of probation] . . . and may extend the period [of probation], provided the original period with any extensions shall not exceed [that period permitted by law].” C.G.S. § 53a-30(c). The procedures governing motions to modify or enlarge the conditions of probation appear in Practice Book Section 43-29A. A motion to modify the conditions of a defendant's probation has been found to satisfy the statute when the modification “reasonably relate[d] to [the probationer's] rehabilitation and the preservation of the safety of the general public.” State v. Crouch, 105 Conn. App. 693, 699 (2008).

Where the offender's noncompliance with the conditions of his or her probation demonstrate that the beneficial aspects of probation are no longer being served, prosecutors should pursue a charge of violation of conditions of probation. In Hill, the Court held that “the language of [C.G.S. § 53a-32] demonstrates that the legislature did not intend to make wilfulness an element of a probation violation.” State v. Hill, supra, 256 Conn. at 420. “[T]o establish a violation, the state needs only to establish that the probationer knew of the condition and engaged in conduct that violated the condition.” Id. at 424. At any probation revocation proceeding, the State must prove the violation of probation by a “preponderance of the evidence.” State v. Davis, 229 Conn. 285, 302 (1994). In

other words, “the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation.” Id.

## **PART IX: POST-SENTENCING**

### **1. Appeals and Post-Conviction Proceedings**

#### **9-1.1 Cooperation of Trial and Post-Conviction Counsel**

A prosecutor handling a post-conviction proceeding who was not counsel in the trial court should, when possible, consult with the trial prosecutor as needed to ensure an adequate flow of information, but ultimately must exercise independent judgment in reviewing all of the information of record and assessing the issues raised in the proceeding. Prior to conceding error, a prosecutor handling a post-conviction proceeding should inform the trial prosecutor and the State's Attorney for the jurisdiction that a concession is or may be in order, and consider the collective input of the State's Attorney and the trial prosecutor regarding the matter.

#### **9-1.2 Duty of Prosecutor to Defend Conviction**

Unless otherwise compelled by the interests of justice, a post-conviction prosecutor should defend a legally obtained conviction and/or punishment, and hold the convicted person to the applicable burden of proof required to obtain relief on appeal of, or collateral challenge to, the conviction.

#### **9-1.3 Prosecution Appeals**

As provided by law, a prosecutor may appeal pretrial and trial rulings, but only upon a reasonable, good faith basis in law and fact, and a determination that doing so is in the interest of justice, viewed from the perspective of the prosecution, the judicial system, victims, witnesses, the public, and the defendant. A prosecutor handling a pretrial appeal who was not counsel in the trial court should, when possible, consult with the trial prosecutor as needed to ensure an adequate flow of information, but ultimately must exercise independent judgment in reviewing all of the information of record and assessing the viability of the appeal.

#### **9-1.4 Issues Raised in Post-Conviction Proceedings**

A prosecutor should not assert or contest an issue in a post-conviction proceeding unless there is a reasonable, good faith basis in law or fact for doing so. The prosecutor may offer reasonable, good faith arguments in support of extending, limiting, modifying, or reversing existing law.



### **9-1.5 Appeal Bonds**

A prosecutor should defend against the efforts of convicted defendants to be released on appeal bond unless there is reason to believe that the conviction is no longer supported by law or evidence or opposition to bond would create a manifest injustice.

### **9-1.6 Duty to Conduct and Cooperate in Post-Conviction Discovery**

A prosecutor shall provide discovery to the convicted person or such person's counsel as required by law. In post-conviction proceedings in which a conviction is being collaterally attacked, a prosecutor is encouraged to cooperatively engage in informal discovery with the convicted person or such person's counsel. A prosecutor shall provide the convicted person or such person's counsel with any information or evidence that relates to a claim of actual innocence that is supported by specific factual allegations which, if true, would entitle the convicted person to relief under the governing legal standard. A prosecutor may require a specific offer of proof in support of a claim of actual innocence prior to agreeing to take any affirmative action in response to a post-conviction request for information.

### **9-1.7 Duty of Prosecutor in Case of Actual Innocence**

A prosecutor who is satisfied that a convicted person is actually innocent shall promptly notify his or her supervisor and the State's Attorney of the jurisdiction and inform them of the basis for such belief. If, following review, the State's Attorney agrees with the assessment that a convicted person is actually innocent, he or she shall promptly notify the appropriate court and, unless the court orders or authorizes a delay, notify the convicted person or such person's counsel, and seek the release of the convicted person if he or she is incarcerated or in the custody of correctional officials.

### **9-1.8 Duty of Prosecutor Regarding Evidence Which May Undermine Confidence in a Previously Obtained Conviction**

If the prosecutor becomes aware of new, material, and credible evidence which may create a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall promptly report such evidence to his or her supervisor and the State's Attorney of the jurisdiction. If, following review, the State's Attorney agrees with that assessment of the evidence, he or she shall disclose such evidence to the appropriate court and, unless the court orders or authorizes a delay, to the convicted person or such person's counsel. The decision by a State's Attorney to disclose information to a defendant or an appropriate authority shall not be deemed a concession that, and

shall not ethically foreclose a prosecutor from contesting before a factfinder or an appellate tribunal that, the evidence is new, material, credible, or that it creates a reasonable probability that the defendant did not commit the offense.

If, following review, in the State's Attorney's independent judgment, he or she is satisfied that new, material, and credible evidence creates a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted, the State's Attorney shall promptly take all necessary steps to seek a vacatur of the defendant's conviction.

A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of this standard, though subsequently determined to have been erroneous, does not constitute a violation of these standards.

[NDAA Nat. Pros. Stds. Standards 9-1.1 through 9-1.8; ABA Crim. Just. Stds. Standards 3-8.1 through 3-8.3, inclusive, & 3-8.5; R. Prof. Conduct Rule 3.8(6); C.G.S. §§ 52-270, 52-582, & 52-466 et seq.; P.B. §§ 23-21 et seq., 61-6]

### **Commentary**

A prosecutor handling a post-conviction proceeding continues to be a minister of justice and, in fulfilling that role, must strike a balance between his or her responsibility to defend valid convictions and the duty to ensure that the wrongly convicted and the innocent are protected from further harm. Striking that balance may prove challenging, especially in a situation in which the evidence, after being reasonably evaluated, indicates that a mistake has been made. In making such an evaluation, a prosecutor handling a post-conviction proceeding must always exercise independent judgment and set aside any concerns relating to possible embarrassment to the prosecutor's office or law enforcement, and concerns relating to any other factors that would interfere with seeing that justice prevails. See generally C.G.S. §§ 52-270 (petition for new trial), 52-582 (imposing three year statute of limitations on petition for new trial), 52-466 et seq. (writ of habeas corpus).

Although habeas corpus matters are civil in nature, the general rules of civil discovery do not apply in habeas corpus cases. P.B. § 23-38 (b); see Vasquez v. Commissioner of Correction, 128 Conn. App. 425, 434-35, cert. denied, 301 Conn. 926 (2011). Discovery as of right in Connecticut habeas cases is limited to witness lists and certain statements of expert witnesses. P.B. § 23-38 (a). Beyond that, the parties are allowed to "cooperatively engage in informal discovery." P.B. § 23-28 (b). "Upon motion, the judicial authority may order such other limited discovery as the judicial authority determines will enhance the fair and summary disposal of the case." P.B. § 23-38 (c).

It bears noting that, as adopted here, Standard 9-1.8, by virtue of incorporating the phrase “evidence which *may create* a reasonable probability [defendant did not commit offense of which convicted],” requires Connecticut prosecutors adhere to a duty of disclosure that exceeds that required by Rule 3.8 of the Rules of Professional Conduct. Rule 3.8 requires that the prosecutor disclose when he or she knows of “evidence *creating* a reasonable probability [defendant did not commit offense of which convicted]” (emphasis added).

The Commentary to Rule 3.8 explains that “[a] ‘reasonable probability that the defendant did not commit an offense of which the defendant was convicted’ is ‘a probability sufficient to undermine confidence in the outcome,’ as articulated in Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).” Therefore, Rule 3.8 and its commentary would seem to suggest that prosecutors must decide on the ultimate issue – as to whether the evidence in question undermines confidence in the outcome of petitioner’s underlying conviction – before the duty to disclose is triggered under the rule. By contrast, Connecticut Prosecution Standard 9-1.8, requires the disclosure of evidence to defendant’s counsel before reaching the ultimate conclusion that confidence in the conviction is undermined by that evidence. By articulating that any decision to disclose is not to be viewed as a concession regarding disputed issues, the standard encourages disclosure to counsel even if the prosecution maintains a good faith basis for disputing the newness, materiality, or credibility of the evidence at a later proceeding. Regardless, the standard provides that, if the State’s Attorney, in his or her independent judgment, *does conclude* that confidence in the underlying conviction is undermined by new, material, and credible evidence, he or she should promptly take the necessary steps to have the conviction overturned and the case restored to the docket, if appropriate under the circumstances.

Prosecutors should familiarize themselves with the Commentary to Rule 3.8 as it sets forth suggested procedures for providing notice when a prosecutor knows of new and credible evidence creating a reasonable probability that a person outside the prosecutor’s jurisdiction (i.e., another state or federal court) was convicted of a crime that the person did not commit. See R. Prof. Conduct Rule 3.8, commentary.