

ETHICAL CONSIDERATIONS

Filing cases in the Sex Crimes Unit is one of the most important and difficult challenges you will face as an Assistant State Attorney. The subject matter of these cases is extremely emotional and very volatile. It is often difficult to make your decisions objectively and fairly in light of the emotional pleas of the highly traumatized victims. The subject matter of your decisions is frequently the object of public scrutiny and the pressure to make the correct decision can be immense. The average case has very little evidence, yet you know the suspect will likely molest again if not stopped.

Many of your decisions will involve gray areas. For instance, where do you draw the line between excessive parental discipline and criminal behavior? When are HRS sanctions appropriate without the need for criminal court intervention? What is the appropriate way to deal with an 18 year old young man who has sex with his fifteen year old girlfriend at her request? What if her only motivation for reporting the incident is to force the boyfriend to fund the abortion? These issues evoke strong yet differing feelings in each of us. What one person may find to be outrageous conduct may seem normal for someone of a different background.

The best way to deal with these issues is to minimize the role your personal feelings and emotions play in your filing decisions. Your decisions should be objective and based upon your ethical duties as an Assistant State Attorney. The guidelines available to you in this area are contained in three primary sources:

1. The Oath of Admission to The Florida Bar

"I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land."

Although this is only one of the seven oaths we all took upon admission to the Florida bar, it is the most significant for purposes of this chapter. We are frequently requested by victims to file a particular case even though we know we cannot prove it. They simply want the defendant to face their accusations in court. If you do not feel that you can in good faith go forward with a provable case, you must explain to the victim the ethical implications of your decision not to prosecute.

2. The Florida Bar Rules of Professional Conduct Rule 4-3.8 (Special Responsibilities of a Prosecutor).

The Prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.

Probable cause is defined in the standard grand jury instructions as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that a particular person is guilty of a particular crime." See the chapter on *Grand Jury Presentment* for more on this subject. You are acting as a one person grand jury when you file a case, and therefore should be familiar with these standards. For instance, you should not consider evidence unless you have a good faith belief it will be admissible at trial.

3. The American Bar Association Standards of Criminal Justice Relating to Prosecution Function.

The Florida Bar has adopted the ABA standards and therefore does not address all of the issues set forth below. The Florida Bar instructs us to look to the ABA standard for further guidance. It should be noted, however, that the ABA states that these standards are meant for guidance only and are not intended to subject attorneys to sanctions or replace a state's code of ethics. See the *comments* under Florida Bar Rules 4-3.8.

Standard 3-1.2: The Function of the Prosecutor.

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

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

Commentary: The *Commentary* under this sections stresses the function of the prosecutor as an essential arm of the government. The framers state that "Although the prosecutor operates within the adversary system, it is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public. Thus, the prosecutor has sometimes been described as a 'minister of justice' or as occupying a quasi-judicial position."

Standard 3-3.4: Decision to Charge.

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

(b) Prosecutors should take reasonable care to ensure that investigators working at their direction or under their authority are adequately trained in the standards governing the issuance of arrest and search warrants and should inform investigators that they should seek the approval of a prosecutor in close or difficult cases.

(c) The prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted.

Commentary: The ABA places a great emphasis on screening procedures by trained attorneys. The *Commentary* under this section states that "if the prosecutor's screening processes are effective, acquittals should not be frequent. In fact, a high acquittal rate is probably a prime indicator of either inadequate exercise of discretion in making a charge or inadequate preparation for or presentation at trial. But it is the duty of the prosecutor to do justice, not merely to 'win' convictions." The framers then conclude that "if competent and experienced lawyers, following screening processes involving several layers of independent professional appraisal, conclude that a case should proceed, it is not unreasonable to assume that there is a strong case against the accused."

Standard 3-3.7: Quality and scope of evidence for informations.

Where the prosecutor is empowered to charge by information, the prosecutor's decisions should be governed by the principles embodied in Standards 3-3.6 and 3-3.9, where applicable.

Standard 3-3.6: Quality and scope of evidence before grand jury.

(a) A prosecutor should only make statements or arguments to the grand jury and only present evidence to the grand jury which the prosecutor believes is appropriate or authorized under law for presentation to the grand jury. In appropriate case, the prosecutor may present witnesses to summarize admissible evidence available to the prosecutor which the prosecutor believes he or she will be able to present at trial. The

prosecutor should also inform the grand jurors that they have the right to hear any available witnesses, including eyewitnesses.

(b) No prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense.

(c) A prosecutor should recommend that the grand jury not indict if he believes the evidence presented does not warrant an indictment under governing law.

(d) If the prosecutor believes that a witness is a potential defendant the prosecutor should not seek to compel the witness's testimony before the grand jury without informing the witness that he or she may be charged and that the witness should seek independent legal advice concerning his or her rights.

(e) The prosecutor should not compel the appearance of a witness whose activities are the subject of the inquiry if the witness states in advance that if called he will exercise his constitutional privilege not to testify.

Standard 3-3.8: Discretion as to non-criminal dispositions.

(a) The prosecutor should consider in appropriate cases the availability of non-criminal disposition, formal or informal, in deciding whether to press criminal charges which would otherwise be supported by probable cause; especially in the case of a first offender, the nature of the offense may warrant non-criminal disposition.

(b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

Standard 3-3.9: Discretion in the charging decision.

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

(b) The prosecutor is not obliged to present all charges which the

evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
 - (ii) the extent of the harm caused by the offense;
 - (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
 - (iv) possible improper motives of a complainant;
 - (v) reluctance of the victim to testify;
 - (vii) cooperation of the accused in the apprehension or conviction of others; and
 - (viii) availability and likelihood of prosecution by another jurisdiction.
- (c) A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused.
- (d) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions.
- (e) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in his jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.
- (f) The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.
- (g) The prosecutor should not condition a dismissal of charges, nolle prosequi, or similar action on the accused's relinquishment of the right to seek civil redress unless the accused has agreed to the action knowingly and intelligently, freely and voluntarily, and where such waiver is approved by the court.

Commentary:

Necessity for probable cause: The framers note in the commentaries that the charging decision is the heart of the prosecution function. It is of manifest importance that this power be exercised fairly and uniformly. The framers then note that "A prosecutor ordinarily should prosecute if, after full investigation, he or she finds that a crime has been committed, the perpetrator can be identified, and there is sufficient admissible evidence available to support a verdict of guilty." It is further explained that "A probable cause standard, which is substantially less than sufficient admissible evidence to sustain a conviction, is sufficiently minimal that a prosecutor should not err in deciding whether the quantum of evidence is adequate to institute criminal proceedings."

Factors that may be properly considered: Because of the breadth of criminal legislation, much conduct that technically falls within its literal terms should not always lead to criminal prosecution. It is not desirable to prosecute all crimes at the highest level. The differing circumstances surrounding each case should be considered so that a proper filing decision can be made. "The public interest is best served and evenhanded justice best dispensed, not by the unseeing or mechanical application of the '[letter of the law,]' but by a flexible and individualized application of its norms through the exercise of a prosecutor's thoughtful discretion."

Discretion in selecting the number and degree of charges: A prosecutor should file charges which he or she feels in good faith fairly reflect the gravity of the offense. The prosecutor must make his or her initial decision at a stage when it will not necessarily be in the same form as at trial. More charges may need to be added or dropped at a later stage. "If the facts fairly warrant multiple charges growing out of a single episode, the prosecutor is, of course, entitled to charge broadly. A defendant accused of breaking and entering, robbery, rape, and murder committed in a single course of conduct involving one victim can hardly complain of 'overcharging' if there is evidence of conduct supporting each charge." "The line separating overcharging from the sound exercise of prosecutorial discretion is necessarily a subjective one, but the key consideration is the prosecutor's commitment to the interests of justice, fairly bringing those charges he or she believes are supported by the facts without 'piling on' charges in order to unduly leverage an accused to forgo his or her right to trial."

So. 2d 3 (Fla. 1974).

Before filing an information every state attorney should not only seek probable cause in his investigation, but also determine the possibility of proving the case beyond and to the exclusion of every reasonable doubt. If the latter cannot be accomplished, no information should be filed and the defendant should be released.

In conclusion, your job as a prosecutor is not to obtain convictions, but to seek justice. As an attorney, you are entrusted to use sound judgment and make reasonable decisions. When you evaluate a case, think of the above standards and just try to do what is right. If personal convictions, emotions or feelings cloud your judgment, do not hesitate to discuss your filing decision with other attorneys in the office..

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