



ENHANCING
CONVICTION
INTEGRITY

Achieving Justice: Ethical Considerations in Sexual Assault and Homicide Cases

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Patricia D. Powers

Patti Powers joined AEquitas after serving as a Senior Deputy Prosecuting Attorney in Washington State for 27 years, bringing extensive litigation expertise as a well-respected trial attorney. She supervised the Sexual Assault-Domestic Violence Unit and prosecuted and tried a high volume of violent crimes—specializing in adult sexual assault, child sexual assault and abuse, sexual exploitation of minors, domestic violence, and related homicides (including complex litigation of high-profile, as well as cold and current cases). Patti served on the domestic violence and child fatality review committees and was a member of the Washington State Technical Assistance Committee for Child Death Review Guidelines. For five years, she was appointed as a Highly Qualified Expert for the United States Army, Criminal Investigation Division; in this role, she provided training for army criminal investigation agents and prosecutors at Fort Leonard Wood, Missouri, and in Germany. Patti is the lead Attorney Advisor on the SAKI project.



John F. Wilkinson

John F. Wilkinson, an Attorney Advisor with AEquitas, presents on trial strategy, legal analysis and policy, and ethical issues related to violence against women at the local, state, national and international levels. He conducts research; develops training materials, resources, and publications; and provides case consultation and technical assistance for prosecutors and allied professionals. John served as an Assistant Commonwealth's Attorney in Fredericksburg, VA prosecuting cases involving intimate partner violence and sexual assault, including cases of campus sexual assaults and domestic violence homicide. He also served on the Fredericksburg Area Sexual Assault Response Team and prosecuted child sexual and physical abuse and neglect cases and infant homicides.



Objectives

- 1 Advance filing decisions based on the evidence, the law, and ethical obligations.
- 2 Safeguard victim privacy throughout proceedings.
- 3 Ensure that discovery obligations are satisfied.
- 4 Collaborate with law enforcement and advocacy professionals regarding discovery responsibilities.
- 5 Recognize how media interactions implicate prosecutors' ethical responsibilities.

Prosecutor: A Quasi-Judicial Officer of the 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....**”*

Berger v. U.S., 295 U.S. 78, 88 (1935)

Prosecutor Responsibilities

The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This 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 rights of all participants, particularly victims of crime, are respected.

NATIONAL PROSECUTION STANDARDS § 1-1.1
(NAT'L DIST. ATTORNEYS ASS'N, 3rd ed.)



Crime Victims' Rights

18 U.S. Code § 3771

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

Crime Victims' Rights

18 U.S. Code § 3771

(5) The reasonable right to **confer with the attorney for the Government** in the case.

(6) The right to **full and timely restitution** as provided in law.

(7) The right to proceedings **free from unreasonable delay**.

(8) The right to be treated with **fairness** and with respect for the victim's **dignity and privacy**.

(9) The right to be **informed in a timely manner of any plea bargain** or deferred prosecution agreement.

(10) The right to be informed of the rights under this section.

Charging and Indictment Decisions

Ethical Considerations

Primary Duty of the Prosecutor

The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.

CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (Am. Bar Ass'n, 4th ed.)

A prosecutor may file and maintain charges even if juries in the jurisdiction have tended to acquit persons accused of the particular kind of criminal act in question.

CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4(c) (Am. Bar Ass'n, 4th ed.)

A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.

CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.3(a) (Am. Bar Ass'n, 4th ed.)

Assessing the Viability of Charges in Homicide and Sexual Assault Cold Cases: Ethical Considerations



First Steps: Current Cases of Homicide and Sexual Assault

Review reports, identify evidence and chain of custody, submit for testing

Crime scene documentation, video, photographs, measurements analysis

Consult with ballistics, blood spatter, fingerprint experts, DNA analysts

Homicide witness interviews, possible res gestae statements by victim, statements/admissions of suspect

Consider impact of trauma and need for expert

Consult with forensic pathologist/ SANE

Determining potential defenses

Denial, alibi, self defense (homicide), consent (sexual assault)

Determining Admissibility of Evidence

Crawford, et al.: declarant availability or exception,
e.g., forfeiture by wrongdoing



Search and seizure issues: abandoned DNA /
surreptitiously obtained



Miranda: interrogation



Williams v. Illinois: unavailable witness



Relevant and material to elements of crime



Evidence Review: How SART Members and Experts Can Help



Relationship With Victims and Witnesses

Consistent with any specific laws or rules governing victims, the prosecutor should provide victims of serious crimes, or their representatives, an opportunity to consult with and to provide information to the prosecutor, prior to making significant decisions such as whether or not to prosecute, to pursue a disposition by plea, or to dismiss charges. The prosecutor should seek to ensure that victims of serious crimes, or their representatives, are given timely notice of:

- (i) judicial proceedings relating to the victims' case;
- (ii) proposed dispositions of the case;
- (iii) sentencing proceedings; and
- (iv) any decision or action in the case that could result in the defendant's provisional or final release from custody, or change of sentence.

CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-3.4(i) (Am. Bar Ass'n 4th. ed.)

Providing Information

Ethical Considerations

Information Requests



Prosecution/ Investigation

Public
Record
Requests

Working with victims/witnesses/
families

System
based
advocates

Community
based
advocates

Defense counsel, Attorneys for
victims

Discovery

Relationship with the Media

- a) For purposes of this Standard, 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.

- b) The prosecutor’s public statements about the judiciary, jurors, other lawyers, or the criminal justice system should be respectful even if expressing disagreement.

Relationship with the Media

Cont'd

(c) The prosecutor should not make, cause to be made, or authorize or condone the making of, a public statement that the prosecutor knows or reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding or heightening public condemnation of the accused, but the prosecutor may make statements that inform the public of the nature and extent of the prosecutor's or law enforcement actions and serve a legitimate law enforcement purpose. The prosecutor may make a public statement explaining why criminal charges have been declined or dismissed, but must take care not to imply guilt or otherwise prejudice the interests of victims, witnesses or subjects of an investigation.

CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3.1-10(c) (Am. Bar Ass'n 4th ed.)

Managing Release of Information

Prosecution and Law Enforcement

Media coverage:
press releases,
requests for
comment

PRA Requests

Releasing Information

01

Media may request copies of public records: filing documents, police reports, witness statements

02

Review law to determine exemptions and redactions

03

Determine which, if any, records may be sealed and applicable case law for criterion for sealing

Preserving the Integrity of the Case: Working with Victims and Witnesses

- Victims and witnesses may request information from the prosecutor
- Victims and witnesses are members of the public and may make Public Record Requests
- Communication is essential to provide information about impact of securing additional information
- Public Records Request and dissemination of information may be disclosable
- Develop communication with victim's attorney regarding disclosure of information

Collaboration and Ethical Responsibilities

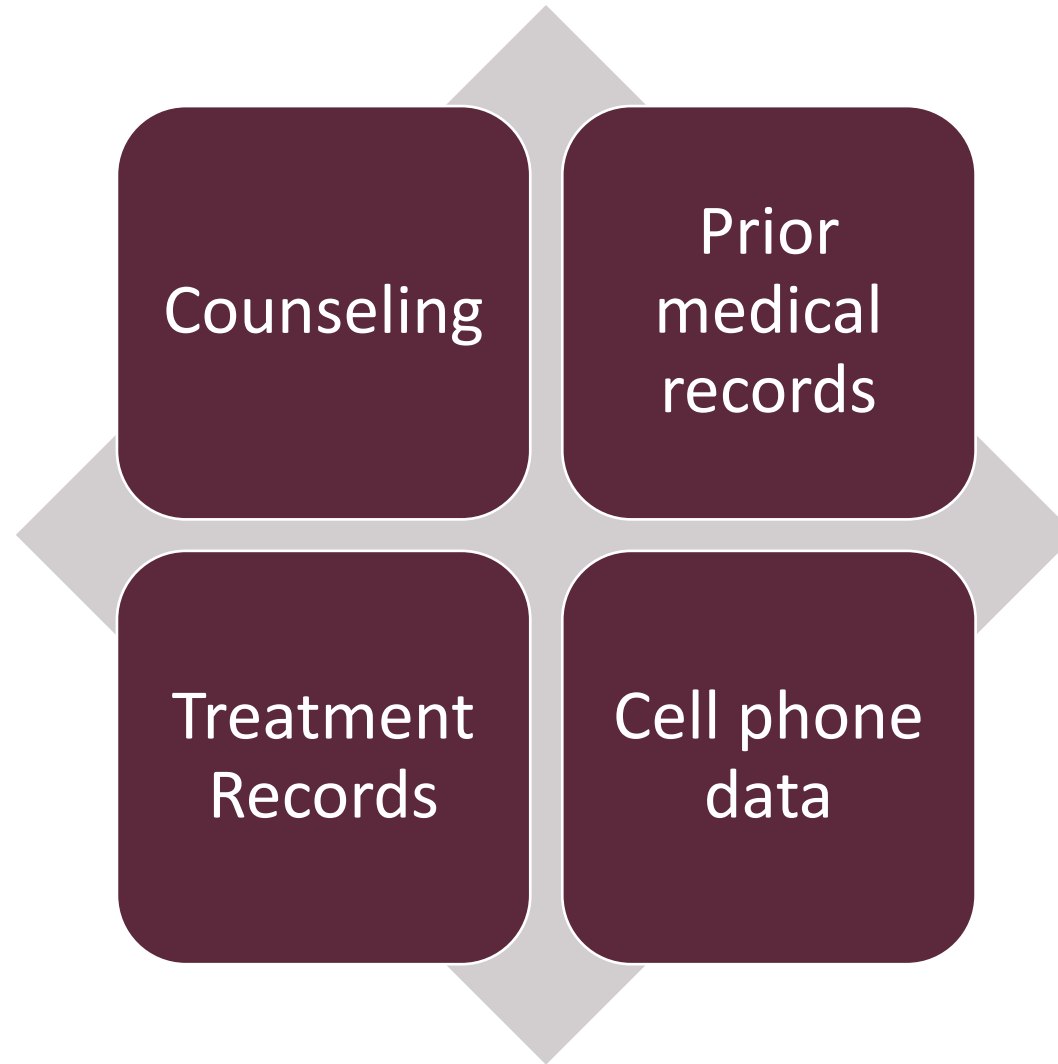


Victim Privacy

For many victims, “privacy is like oxygen; it is a pervasive, consistent need at every step of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot.”

*Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*,
38 SUFFOLK U. L. REV. 467, 473 (2005).*

Victim's Records



Responses to Motions to Compel

The item is not within your care, custody, or control

Rule 16, Federal Rules of Criminal Procedure



Victim has a right to privacy

See, e.g., Griswold v. Connecticut, 381 U.S. 479, 484 (1965)



Defendant cannot go on a "fishing expedition"; they must articulate a specific reason why they believe the evidence is necessary or exculpatory

Subpoena duces tecum

- Notice may or may not be provided to the prosecutor
- Third party provider may notify prosecutor
- Considerations for response: communication with issuing attorney; communication with attorney, if any, representing provider; potential objection and/or request for *in camera review*
- There must be a showing of reasonable expectation of material information, not based upon conjecture
- May be directed to a provider

Discovery of Forensic Examination

Comply with discovery and due process obligations

- Discovery is material if the information sought is relevant to the case and will lead to the discovery of admissible evidence. *See US v Holihan*, 236 F.Supp.2d 255 (2002); *United States v. Stevens*, 985 F.2d 1175 (2d Cir.1993)

Make appropriate redactions

Ask for an *in camera* inspection of forensic report

Discovery and *Brady* Obligations

Due Process

Brady v. Maryland, 373 U.S. 83 (1963)

Duty to disclose *Brady* material is a due process right, not a discovery rule dependent on a request by the defense

- **United States v. Agurs (1976) 427 U.S. 97**

The standard of materiality is the same regardless of whether there has been no request for discovery

- **United States v. Bagley (1985) 473 U.S. 667**

“A prosecution team may have many members with different responsibilities. At its core, members of the team perform investigative duties and make strategic decisions about the prosecution of the case...Interacting with the prosecution team, without more, does not make someone a team member...Among many others, these circumstances include whether the individual actively investigates the case, acts under the direction of the prosecutor, or aids the prosecution in crafting trial strategy.”

IAR Sys. Software, Inc. v. Superior Court, 12 Cal. App. 5th 503, 517, 218 Cal. Rptr. 3d 852, 862 (Ct. App. 2017), as modified on denial of reh'g (June 30, 2017), review denied (Oct. 11, 2017) (citations removed)

Identification and Disclosure of Information and Evidence

(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) 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 in (a) above.

Identification and Disclosure of Information and Evidence

Cont'd

(c) Before trial of a criminal case, a prosecutor should make timely disclosure to the defense of information described in (a) 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. A prosecutor should not intentionally attempt to obscure information disclosed pursuant to this standard by including it without identification within a larger volume of materials.

(d) The obligations to identify and disclose such information continue throughout the prosecution of a criminal case.

Rules for Discovery

Governed by court rules of the jurisdiction

Considerations for physical or electronic transmission

Documenting discovery provided

Practice Tips

- Redact references to victim's personal identification information in case reports, preserving original documents
- Request that Court order defendant not to disseminate discovery
 - In custody and out of custody considerations

Giglio v. United States

405 U.S. 150 (1972)

Requires disclosure of:

- Any “deals” made by the government to a witness
- Any impeachment evidence for any witness

Has been construed to require the disclosure of anything of value provided to a witness by the “prosecution team”

Practice Tips

Cross training for prosecutors, law enforcement, advocates

Information regarding:
Brady / Giglio disclosure

Process for documenting and
advising prosecutor

Disclosure to the defense

Jury Selection

Ethical Considerations

Juror Challenges

Race

- *Batson v. Kentucky*, 476 U.S. 79 (1986)
- *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019)

Native American

- *Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006)

Sex

- *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994)

LGBTQ


- *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (2014)

Batson Analysis

Moving party must establish a *prima facie* case of impermissible discrimination;



Burden shifts to the opposing party to articulate a neutral, nondiscriminatory reason for the peremptory; and



The court determines whether the moving party has carried their burden of proving purposeful discrimination.

Defending Against a *Batson* Challenge

Take good faith
peremptory
challenges

Prepare to justify if
necessary

Take time
questioning the
panelist

State behavioral
observations clearly
on record if they
form part of concern

Maintain notes to
record all areas of
concern

Batson v. Kentucky, 476 U.S. 79, 89 (U.S. 1986) ;
J.E.B. v. Alabama ex rel T.B., 511 U.S. 127 (1994)

Raising a *Batson* Challenge

- Carefully evaluate composition of panel within the range of peremptory challenges
- If concern develops during defense inquiry, ask questions to rehabilitate if possible
- Look for pattern of strikes or object on basis of one strike
- Fairly analyze necessity as opposed to unfair striking of member of cognizable class
- Motion can be brought at any time before seating of jury

Georgia v. McCollum, 505 U.S. 42 (1992)

Raising a *Batson* Challenge

1

Establish prima facie case of purposeful discrimination

2

Identify stricken juror as member of protected cognizable group

3

Argue that membership in group and relevant circumstances creates inference that strike was based on membership

CHALLENGES FOR CAUSE

Open court

On the record with defendant present

Frame objection based upon core of concern for fairness and impartiality, respecting panelists' candor

Be aware of context of objection and reactions of other panelists

Going Forward

Determine charging decisions based on the evidence, the law, and ethical obligations.

Safeguard victim privacy throughout proceedings.

Ensure that discovery obligations are satisfied.

Collaborate with law enforcement and advocacy professionals regarding discovery responsibilities.

Recognize how media interactions implicate prosecutors' ethical responsibilities.

“Justice is truth
in action.”

Benjamin Disraeli



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