

ETHICS POLICY FOR THE MONTGOMERY COUNTY
DISTRICT ATTORNEY'S OFFICE

I. Statement of Ethics Policy. Prosecutors are not expected to win every case, but are expected to conduct themselves in every situation in accordance with the highest standards of honesty, fairness, and ethics. Prosecutors serve “the People,” and that includes not only those victimized by crime, but also those accused of crime, their families and friends, and the community at large. A criminal charge may be life-changing to a victim or to an accused, and that possibility may never be taken for granted. The prosecutor has the unique duty to seek the truth while protecting the rights of persons on both sides of a controversy, and that duty gives prosecutors greater freedom than other actors in the criminal justice system to do “the right thing,” and, at the same time, presents unique ethical challenges. With those standards in mind, and in the interest of ensuring that Assistant District Attorneys in Montgomery County continue to meet the highest ethical standards, Montgomery County District Attorney Kelli P. McCoski establishes this Ethics Policy for the Montgomery County District Attorney's Office.

II. Ethics Officers

A. The District Attorney is the designated “ethics officer.”

B. The ethics officer will:

1. Investigate allegations of prosecutorial misconduct, including violations of this policy, and determine whether further investigation, discussion, or action is warranted.
2. The District Attorney will make the final decision about whether any form of counseling or disciplinary action is warranted.
3. As directed by the District Attorney, carry out any counseling or disciplinary action resulting from any investigation into prosecutorial misconduct, including violations of this policy.
4. As necessary, review ethics practices within the office, including this policy, and issue ethics guidelines to staff.
5. Document any investigations of prosecutorial misconduct, including the facts of those investigations and any steps taken in response to the misconduct.

III. Distribution of Ethics Materials

A. Paper or electronic copies of the most-recent versions of the following materials regarding the ethical obligations of ADAs will be distributed to each ADA:

1. This policy.
2. New York Rules of Professional Conduct, 22 NYCRR Part 1200.
3. *“The Right Thing:” Ethical Guidelines for ADAs* (District Attorneys Association of the State of New York).
4. District Attorneys’ Code of Conduct for Political Activity (District Attorney’s Association of the State of New York).

B. In the event of updates or amendments to the above documents, any changes will be distributed to all ADAs.

IV. Ethics Education Obligations of ADAs

Each ADA must:

A. Read and understand this policy, and comply with all ethical rules pertaining to attorneys and, specifically, prosecutors, including especially Rules of Professional Conduct 3.8, Special Responsibilities of Prosecutors and Other Government Lawyers.

B. Thoroughly read and understand the documents described in III.A, above, and submit a written certification, signed and dated, that he or she has done so. The signed certification will be kept in each ADA’s personnel file. Each ADA is obligated to follow the rules prescribed in those documents, and to keep those documents on hand and readily available for reference.

C. Earn the required continuing legal education credits in ethics.

D. Read the New York Prosecutors Training Institute (NYPTI) ethics update, *Ethics Watch*. ADAs are expected to periodically review recent ethics decisions on that site as part of their due diligence in remaining current with relevant ethics case law.

E. Participate in ethics training programs offered by the office.

F. Review ethics materials distributed within the office outside of formal training programs.

G. Participate, as possible, in ethics training programs offered by outside entities, such as NYPTI, the Association of Prosecuting Attorneys, and the National District Attorneys Association.

V. Duty to Report and Consult

A. Each ADA must report to the District Attorney any allegation of professional misconduct committed by any ADA, including any violation of this policy, whether the allegation is made by a citizen, lawyer, judge, or another ADA, or is personally known to the reporting ADA, including allegations of misconduct raised on appeal or in post-judgment motions. The duty to report includes allegations of professional misconduct contained in any written judicial opinion.

B. If an ADA is unsure about any ethical obligation, the ADA must consult the District Attorney. If prior consultation is not possible, the ADA will advise the District Attorney about the issue at the earliest opportunity.

VI. Disclosure Obligations

A. The Montgomery County District Attorney's Office expects all ADAs to fully comply with all disclosure requirements, and encourages early and liberal disclosure of appropriate materials to defendants.

B. Disclosure obligations include:

1. Compliance with all of the disclosure obligations of Criminal Procedure Law Article 240.
2. Compliance with all of the disclosure obligations set forth in *People v. Rosario*, 9 N.Y.2d 286 (1961), and its progeny. This obligation includes the preservation and disclosure of emails, text messages, and voice mail messages that contain any discussion of the facts of a case. The obligation of preservation includes the duty to make contemporaneous notes of such materials for use in the event that the original is destroyed.
3. Compliance with all of the obligations to preserve and disclose exculpatory material, in the context of pretrial hearings and trials, that is, *Brady*, *Giglio*, and *Geaslen* material. Although the People's constitutional obligation to disclose such material is satisfied when the defendant has been given a meaningful opportunity

to use the material, ADAs are expected to disclose exculpatory material as soon as practicable. The obligation to preserve and disclose exculpatory material extends to the existence of witnesses' criminal records maintained in the Office's PCMS and DACTS (pre-2005) databases, except to the extent that disclosure would violate statutory sealing provisions. In the absence of a good reason, *see, e.g.*, Section VI.C, below, exculpatory material should be disclosed promptly after it has come into the possession of the office or after its exculpatory character becomes apparent, whichever is earlier.

a. Compliance with the obligation to preserve and disclose exculpatory material extends to any such material that an ADA obtains post-judgment. In the event that such exculpatory material comes to light, the ADA should immediately bring the information to the attention of a supervisor, with an eye toward prompt disclosure, unless the seeking of a protective order is appropriate. Disclosure of post-judgment exculpatory material must be made, without regard to the effect that the disclosure might have on the judgment or the viability of the case.

C. Sometimes discoverable items must be withheld because disclosure would:

1. Jeopardize the safety of a witness or informant;
2. Render other probative evidence irretrievably lost or compromised; or
3. Constitute a violation of law or adversely affect a legally protected right or interest of a third party.

In those instances, ADAs are expected to timely notify the District Attorney and, where necessary, to seek the assistance of the court for the purpose of arranging an in-camera review of the material at issue or the issuance of a protective order granting permission for the non-disclosure, redaction, or delayed disclosure of the material.

VII. Handling and Maintaining Cases

A. Cases Handled by Multiple ADAs. Often, several ADAs will handle a case between inception and conclusion. It is each ADA's responsibility, no matter at what stage of the case they are assigned, to make sure that there is sufficient evidence to proceed with the prosecution, that the charge is supported by probable cause, and that all discovery and ethical obligations have been met.

B. Relations with Outside Parties. All ADAs must handle cases in an ethical, fair, and just manner. They must be honest with their victims, witnesses, defense counsel, and the

court. It is improper to overstate the strength of a case when dealing with opposing counsel or conferencing cases with the court. Opposing counsel should be treated with courtesy and respect at all times.

C. Defendants Incarcerated in Another Jurisdiction. In situations where an ADA knows that there is a warrant for a defendant and knows that the defendant is being held in a correctional facility in another jurisdiction, the ADA should use due diligence to try to get the defendant produced on the Montgomery County charges as soon as possible. In the event that a defendant is being held in a facility in another state, the ADA will use due diligence to extradite the defendant and, if the Office will not pursue extradition, to determine whether or not to continue the prosecution. Defendants who complete a jail sentence in one jurisdiction may not be released if a warrant is lodged as a detainer. They will then be in jail longer than necessary and they will often not know why. That should not occur if we have the ability to secure the defendant's production in court. It is also improper for a felony ADA who knows that a warrant has been issued against a defendant, and who knows the defendant's location, to defer to a local court ADA the responsibility to get the defendant produced.

D. Witness Impeachment Material. In order to help ensure that each ADA has complete information about the credibility of witnesses, and to ensure that discovery obligations are met, each ADA will discuss with potential witnesses any information that might reflect on the witness's credibility. The specific content of those discussions is left to the discretion of the individual ADA, but ADAs should consider at least the following topics:

1. Whether the witness has used or was previously known by another name;
2. Whether a court has ever found the witness's testimony to be not credible;
3. Whether the witness has ever been convicted of a crime;
4. Whether the witness has any pending criminal cases;
5. Whether the witness has any pending or settled civil cases where a party claimed that the witness was involved in misconduct or acted dishonestly or fraudulently;
6. In the case of police witnesses, whether the witness has ever been found by any agency to have engaged in any form of misconduct;
7. In the case of police witnesses, whether the witness is currently under investigation for any type of misconduct;
8. Whether the witness has any type of social media accounts that may contain information about the case or may otherwise reflect on the witness's credibility;
9. Whether any prosecutor, judge, or agency official has ever made public statements about the witness's reputation or character for truthfulness;

10. Whether the witness has made any prior statements that are inconsistent with the information the witness has previously provided in the case;
11. Whether the witness is aware of any other information that might suggest that the witness has a bias with respect to the case.

In the event that information in any of the above areas is determined to constitute discoverable material, as described in Section VI, above, the ADA will comply with all legal obligations to disclose that information.

E. Disposition of Cases. An ADA's job is not only to seek convictions, but to do justice. As a result, several things should be kept in mind:

1. Dissatisfied Victim or Police Officer. Often, the outcome a victim or police officer wants may not ultimately coincide with what is ethical, fair, and just. In addition, evidentiary issues, suppression issues, or other issues often impede an ADA's ability to obtain a result that is satisfactory to the victim or police officer. ADAs must dispose of cases ethically, fairly, and justly, even if it means that victims or police officers are dissatisfied. In the event that a case must be disposed of in a manner that is not satisfactory to the victim or police officer, the file must reflect that all issues of fact and law were explained to the victim or police officer, and must reflect the rationale for disposing of the case in that manner. Outright dismissal of specific charges or an entire case may be required, and ADAs must do what is required in those situations.

2. Potential Lawsuits Against Police. No ADA will decline to dismiss a case or a charge solely because a police officer or police department may be sued, and no supervisor will advise any ADA to do so. It is not an ADA's job to protect police officers or departments from lawsuits.

3. Cases Where Evidence is Insufficient. If there is insufficient evidence to establish a prima facie case at trial, the case must be dismissed. The philosophy of "try it and lose it" has no place in a prosecutor's office.

VIII. Personal Behavior

A. In General. ADAs are expected to conduct themselves in a manner that creates and maintains respect for the office. In all activities, personal and official, they should always be mindful of the high standards of behavior expected of them.

B. Public Commentary. Particular care should be paid to the avoidance of public commentary in the following areas, unless otherwise approved by the District Attorney:

1. Commentary that would lend the weight and prestige of the Office of the District Attorney to a private dispute, cause, civil action, or other matter not within the province of the office. This prohibition includes commentary on any non-work-related matter in which the ADA uses his or her professional title or references any affiliation with the office.

2. Commentary that would be in violation of the District Attorneys' Code of Conduct for Political Activity, issued by the District Attorney's Association of the State of New York.

3. Commentary that would generally be in violation of the New York Rules of Professional Conduct.

4. Commentary that would be in violation of the New York Rules of Professional Conduct under the specific requirements of Rule 3.8, Special Responsibilities of Prosecutors and Other Government Lawyers.

C. Online Behavior. The Montgomery County District Attorney's Office recognizes no distinction between public behaviors, words, and actions done in person and public behaviors, words, and actions done electronically, such as through the use of the Internet, text messaging, or any other form of electronic communication. ADAs are expected to observe the same high standards of personal and professional conduct in their online activities as they would in person.

D. Personal Gifts. Gifts may not be solicited, nor accepted from members of the public, the defense bar, the judiciary, law enforcement agencies or officers, witnesses, crime victims or their family members, or any other person or group. This prohibition applies to all offers or gestures of gifting that occur within the context of an ADA's employment, which must politely be declined.