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Professional Responsibilities of the Federal Prosecutor

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PROFESSIONAL RESPONSIBILITIES OF THE FEDERAL PROSECUTOR

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I. INTRODUCTION

The United States Attorney is in a unique and powerful position to affect the lives of many persons in the administration of justice in his district.[1] He is vested with broad discretionary authority as the district's chief federal law enforcement officer and prosecutor; this includes the authority to initiate investigations and to bring charges.[2] In exercising his responsibilities, he must be vigorous and vigilant in attacking crime, but must temper his zeal with a recognition that his broader responsibilities are to seek justice and not merely to prosecute with the single-minded goal of winning cases and achieving convictions. He must seek to protect the innocent, as well as to vindicate the public's interest against those who violate its laws. His client is the public whose interest is in justice being served, not merely the parochial interests of a government agency.

In an oft-quoted passage, the Supreme Court described the obligations of United States Attorneys as follows:

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1. The 94 United States Attorneys, appointed by the President with the advice and consent of the Senate, serve in 95 judicial districts in the 50 states, the Virgin Islands, the Canal Zone, Guam, and the North Marianna Islands. *See* 28 U.S.C. § 541 (1976). Each state and territory has at least one district, and each district has one United States Attorney, except that the districts of Guam and the North Marianna Islands share a United States Attorney.

2. *See* 28 U.S.C. § 547 (1976). The United States Attorney is charged with (1) prosecuting all offenses against the United States in his district, (2) prosecuting and defending all civil cases on behalf of the federal government and its agencies, (3) defending revenue and customs agents, and (4) collecting debts, revenue, fines, penalties and forfeitures owed to the United States. *Id.* While this article discusses professional responsibilities related to criminal prosecution, the duty of the United States Attorney to adhere to the highest ethical standards applies in civil matters as well.

> The United States Attorney 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.[3]

While defense counsel are given broad leeway in defense of the accused, the prosecutor as representative of the sovereign should strive to epitomize the twin ethic of integrity and fairness.[4] The

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

4. Former Attorney General Benjamin R. Civiletti has written:

> The lines which are so carefully drawn to limit the scope of advocacy do not, however, constrain prosecution and defense equally. The sixth amendment right to counsel carries with it the right to zealous representation, and its force presses the defense lawyer to the outer boundaries of the system. Failure to be sufficiently vigorous risks the client's liberty and reputation, while zealousness risks little. The only immediate sanction for overstepping these boundaries is the contempt citation, a penalty rarely imposed. On the other hand, the prosecutor must be constantly alert that he does not even come close to the bounds of propriety, that there be not even the suggestion of overreaching. He must be cognizant of the specific rules which govern his conduct and of the risk that he will be perceived to be misusing his power, or the possibility that he will taint the proceeding through some generalized or cumulative violation of fair process.

Civiletti, *The Prosecutor As Advocate*, 25 N.Y.L. SCH. L. REV. 1, 17 (1979). *See generally* Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L. J. 1030, 1033-34 (1967); Schneider & Marks, *The Contrasting Ethical Duties of the Prosecutor and Defense Attorney in Criminal Cases*, 7 U. WEST L.A. L. REV. 120 (1975).

Some scholars have even asserted the propriety of allowing defense counsel to permit a client to perjure himself. *See, e.g.*, Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475-78, 1482-84 (1966). However, perjury by the defendant and subornation of perjury by counsel are illegal acts for which both may be subject to criminal prosecution. *See* Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493, 1496 (1966).

The American Bar Association's Commission on Evaluation of Professional Standards considered the lawyer's duties where his client insists on giving testimony which the lawyer knows to be perjurious. Three solutions were proposed: (1) to permit the accused to testify by a narrative without guidance by a lawyer's questions, (2) to excuse the advocate entirely from the duty to disclose the perjury, and (3) to require that the lawyer reveal the client's perjury if necessary to rectify the matter. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment, at 21 (Final Draft 1981), *reprinted in* 68 A.B.A.J. 1298 (1982).

The ABA Commission initially took the position that an advocate's duty to refuse to offer

maintenance of a fair and lawful system of investigating and prosecuting crime is paramount to the safeguarding of freedom and liberty. According to the values governing the administration of criminal justice, the fairness of procedures takes precedence over the conviction of any single offender. The procedural safeguards set forth in the Bill of Rights and the presumption of innocence enjoyed by an accused in a criminal case, coupled with the burden on the government to prove guilt beyond a reasonable doubt, express the societal value that it is more important that the innocent be free than the guilty, punished.

The ethical responsibilities of the United States Attorney in administering criminal laws differ markedly from those which govern his advocacy in civil matters on behalf of client agencies.[5] In the latter, his duties more closely track those of the private practitioner who is responsible for representing his client's special interest and who must obtain his client's authority before initiating or settling litigation. Even in civil matters, however, his public responsibility may overshadow the particular interest of a government agency since he is responsible for maintaining ultimate control over litigation tactics and strategy; and he must ensure that opposing parties are treated fairly and even-handedly by the government. In administering criminal laws, the prosecutor has no identifiable client. Instead, he makes decisions a client would make and the interest he seeks to vindicate is the general welfare of society in the pursuit of justice.

The *Model Code of Professional Responsibility* sets forth the broad ethical standards of the prosecutor as follows:

> The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to

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evidence he knows to be false and to reveal his client's perjury is qualified by the constitutional provisions of due process and right to counsel in criminal cases. The ethical duty of candor toward the court may in particular circumstances and in some jurisdictions be superseded by the Constitution. *Id.* at 21-22. Subsequently, the Commission deleted the constitutional qualification of the canon. The final report provides without qualification that a lawyer should refuse to offer evidence he reasonably believes is false. *See The New Model Rules of Professional Conduct: A Report to the Bar*, 68 A.B.A.J. 1019, 1022 (1982).

5. See generally M. SCHWARTZ, LAWYERS AND THE LEGAL SYSTEM: CASES AND MATERIALS 241-69 (1979).

> prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice, the accused is to be given the benefit of all reasonable doubts.[6]

In addition, there are myriad guideposts in the statutes, departmental regulations, policy statements[7] and court decisions which govern the prosecutor's conduct.

Such standards are often too general to provide specific instruction for each of the prosecutor's many and complex decisions. His daily decisions to investigate and prosecute crime and his dealings with targets of investigations, witnesses, and defense counsel must therefore be guided in the final analysis by his own personal standards of integrity and fairness. To insure consistency in the dealings of his office with others, the United States Attorney should strive to infuse his office with his own high standards to augment the more general professional canons, statutes, departmental regulations, and case decisions. To insure that his office adheres to these standards he must establish an internal system of accountability and control.[8]

This article discusses the federal prosecutor's professional responsibilities in dealing with ethical issues and policy considerations in the various stages and features of criminal prosecution: the conduct of investigations, the decision to charge, grand jury proceedings, discovery matters, plea bargaining, the conduct of the trial, and relations with the press.

II. INVESTIGATIONS

A. *Priorities*

The decision to investigate often involves a policy consideration of setting priorities because the federal government has limited ju-

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6. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1979).

7. In an effort to standardize federal prosecutional policies and practices, the Department of Justice has published a policy statement. *See* U.S. DEPT. OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION (1980) [hereinafter cited as PRINCIPLES]. This publication was designed to rationalize the decision making process while maintaining needed flexibility. It is therefore presented in general terms merely to provide guidelines rather than to mandate particular results. *Id.*, preface at i. Thus, the principles expressly decline to grant any substantive rights and are nonenforceable in court. *Id.* at 4.

8. *Id.* at 203.

risdiction over the investigation and prosecution of crimes[9] and has limited investigative and prosecutorial resources. The setting of priorities also reflects a judgment about the relationship between federal and state law enforcement efforts. Criminal activities often overlap federal and state jurisdictions. Therefore, the determination of which authority will assume jurisdiction over a given case[10] depends on the particular violations involved, a balancing of the relative federal and state interests, and a comparison of the investigative and prosecutory resources of both sovereigns.[11]

To combat certain forms of fraud and corruption, the federal prosecutor has at his disposal a more effective arsenal of criminal statutes than does his state counterpart. For example, cases involving official corruption, business fraud, and organized crime have been prosecuted successfully in federal court when state statutes were inadequate. The Hobbs Act,[12] the Travel Act,[13] the mail and wire fraud statutes,[14] the Racketeer Influenced and Corrupt Organizations (RICO) Act,[15] and the Internal Revenue Code[16] have successfully been used to root out corrupt local and state officials and to combat organized and white collar crime.[17] The federal conspir-

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9. *See generally* Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion*, 13 LAW & CONTEMP. PROBS. 64 (1948). Most common law crimes—such as assault, burglary, larceny, murder, robbery and rape—are within the exclusive jurisdiction of the state and local authorities. Federal jurisdiction to combat crime is derived from several specific constitutional provisions, including the power to regulate interstate commerce, the taxing powers, the power to issue currency, the control over the mails, and the chartering of national banks. The federal government also has the inherent power to regulate its own programs and to supervise the conduct of its own officials.

10. Under the theory of "dual sovereignty," dual prosecution in federal and state courts for the same act is not barred by the double jeopardy clause of the fifth amendment. United States v. Wheeler, 435 U.S. 313 (1978); Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959). The policy of the Department of Justice, however, is not to prosecute a person who is already being tried by state authorities, absent an overriding federal interest. *See* Petite v. United States, 361 U.S. 529 (1960); U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-2.142 (1979) [hereinafter cited as U.S. ATTORNEY'S MANUAL]. Such an interest may exist, for example, in a civil rights case.

In Virginia, a "prosecution or proceeding" in federal court is a bar to state prosecution. *See* VA. CODE ANN. § 19.2-294 (Repl. Vol. 1975).

11. *See generally* Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171 (1977).

12. 18 U.S.C. § 1951 (1976) (anti-racketeering legislation).

13. *Id.* § 1952 (1976) (prohibits interstate or foreign travel in aid of racketeering).

14. *Id.* §§ 1341-43 (1976).

15. *Id.* §§ 1961-68 (1976).

16. *Id.* §§ 7201-17 (1976).

17. *See* Ewing, *Combating Official Corruption by All Available Means*, 10 MEM. ST. U.L. REV. 424 (1980) (discussing the statutes often used in prosecuting public officials).

acy law[18] also allows the federal prosecutor to tie together evidence of criminal activity in obtaining convictions where more narrow state laws might not succeed.

Considerations of federal-state relations and judgments about the relative interests of the respective sovereigns in a particular case also enter into the decision to investigate. For example, in recent years federal authorities have substantially reduced the incidence of Dyer Act[19] prosecutions on the ground that automobile theft primarily affects state and local interests. In addition, opinions differ about the appropriateness of federal investigation and prosecution of local public officials, absent an impact of such local corruption on a primary federal interest.[20]

Finally, a weighing of the resources commanded by the respective sovereigns for investigating and prosecuting a particular case is a significant factor in the decision whether to initiate a federal investigation. Federal law enforcement agencies—including the Federal Bureau of Investigation, Drug Enforcement Administration, Secret Service, Bureau of Alcohol, Tobacco and Firearms, Internal Revenue Service, and Inspectors General of the various departments—in general have at their disposal substantially greater resources to devote to a particular investigation than do their state and local counterparts. Likewise, the federal prosecutor's caseload

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18. 18 U.S.C. § 371 (1976). *See generally* Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice,* 65 GEO. L.J. 925, 942-46 (1977) (advantages of federal prosecution of conspiracy cases).

19. 18 U.S.C. §§ 2311-2313 (1976) (interstate transportation of stolen vehicles). Guidelines for investigating and prosecuting such cases requires the existence of an organized ring or multiple thefts and forbids pursuing cases involving joyriding, first offenders, and juveniles without prior arrests. *See* U.S. ATTORNEY'S MANUAL, *supra* note 10, § 9-61.133.

20. *See* United States v. Archer, 486 F.2d 670 (2d Cir. 1973). The court, in reversing on jurisdictional grounds corruption convictions involving a local prosecutor, questioned the propriety of such investigations by the federal authorities. The court questioned whether the prosecution should be dismissed because "the initiative of the investigation was founded on a grossly inflated conception of the role of the federal criminal law," *id.* at 677, since the federal agents had no information that the alleged corruption in the local district attorney's office involved federal violations. *See also* United States v. Craig, 528 F.2d 773, 779 (7th Cir. 1976), *cert. denied sub nom.* Markert v. United States, 425 U.S. 973; 429 U.S. 999, *reh'g denied,* 429 U.S. 1066 (1977). "While it is *within* the province of the United States Attorney to prosecute local officials who violate federal law, the primary responsibility for ferreting out their political corruption must rest, until Congress directs otherwise, with the State, the political unit most directly involved." 528 F.2d at 779.

This view has been vigorously contested by Whitney North Seymour, Jr., who points out "[o]verwhelmingly, cases where corruption has been unearthed and successfully prosecuted have been those where an outside investigative body—often the Federal Government—has been involved." W. SEYMOUR, UNITED STATES ATTORNEY 174 (1975).

is substantially less voluminous than that of the state prosecutor, who must handle a multitude of traffic cases as well as major felonies. The federal prosecutor also has at his disposal the Witness Protection Program, which has been an indispensable tool for the prosecution of organized crime figures. Finally, he has available the grand jury for investigating complex criminal activities. Only a small number of state prosecutors have available and use the grand jury as an investigative tool.[21]

In view of these considerations, the Justice Department in recent years has established formal priorities as a guide to deployment of federal investigative and prosecutorial resources. These include: white collar crime, public corruption, organized crime, and narcotics and dangerous drugs. More recently the Reagan Administration has added violent crime to this list. The United States Attorney may establish his own priorities to fit the special considerations in his district within the priorities set nationally by the Attorney General.[22] For example, districts with major port or border entrances may emphasize drug smuggling. In the Western District of Virginia, one emphasis in recent years has been enforcing the 1977 Mine Safety and Health Act because southwest Virginia is a major coal producing region. Most United States Attorneys also establish district guidelines with the various federal law enforcement agencies for the automatic declination of less serious cases which need not be fully investigated.[23]

The federal interest in investigating and prosecuting crime has grown considerably as a result of the expansion of federal regulation of the economy over the last fifty years, the spread of organized criminal activity in the economic structure of the country, and the more recent adoption of federal occupational health and safety standards. In the last ten years, there has also been a dramatic increase in the number of public officials prosecuted for violating the public trust, as well as an increase in activities related to or-

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21. *See* Ruff, *supra* note 11, at 1211.

22. *See* PRINCIPLES, *supra* note 7, at 8.

23. The confidential declination guidelines confer no substantive right upon any litigant and are subject to change; they are merely an administrative aid to efficient deployment of resources.

For discussions on the relationship between federal prosecutors and law enforcement agents in investigating and prosecuting crime, see J. EISENSTEIN, COUNSEL FOR THE UNITED STATES 150-69 (1975); Kaplan, *The Prosecutorial Discretion - A Comment*, 60 NW. U.L. REV. 174, 182 (1965).

ganized crime control.[24] Increased public attention to corruption in public offices, coupled with the federal government's superior investigative resources and the federal prosecutor's relative independence of local political influence, support continued involvement by United States Attorneys in prosecuting public corruption at all levels. Similarly, the federal interest in the economy and in the solvency and integrity of financial institutions support active federal investigation and prosecution of white collar and organized crime.

Since organized crime tends to cross jurisdictional lines, the federal government has developed resources for multijurisdictional coordination, including cooperation with state and local authorities. Successful investigations have been conducted in recent years in the Western District of Virginia by several federal law enforcement agencies in cooperation with local and state authorities in a number of states. Nine persons were convicted in 1981 in a conspiracy to transport stolen heavy equipment from Georgia to Virginia.[25] The case represented the joint efforts of local, state, and federal officials in Georgia and Virginia and was a classic example of organized criminal activities which cross jurisdictional lines. In another case,[26] a number of corporations and individuals residing in such diverse states as Ohio, Pennsylvania, New Jersey, New York, and Virginia were convicted in a conspiracy to manufacture and distribute illegal M-80 fireworks in two plants in western Virginia. In 1980, a seven state law enforcement cooperative, known as the Leviticus project, was created to deal with organized crime in the nation's coal fields. This project has resulted in prosecutions ranging from murder for hire to heavy equipment fraud.[27]

B. *Directing the Investigation*

In directing an investigation, the federal prosecutor has the responsibility to protect the constitutional rights of suspects. This duty stems not only from the ethical concern for fairness, but from the practical concern that important evidence might thereby be ex-

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24. *See* 1979 ATT'Y GEN. ANN. REP. 52-54. *Cf.* 1970 ATT'Y GEN. ANN. REP. 49, 51. Federal organized crime control efforts began in earnest during the Kennedy Administration in the early 1960's and have continued to increase since then. *See In re* Persico, 522 F.2d 41, 49 (2d Cir. 1975).

25. *See* United States v. Mitchell, No. 81-00037 (W.D. Va. Apr. 14, 1981).

26. United States v. McKenzie, No. 80-00121 (W.D. Va. Sept. 16, 1980).

27. *See, e.g.*, United States v. Atkinson, No. 81-00082 (W.D. Va. Aug. 19, 1981); Commonwealth v. Herring, No. F-1719 (Cir. Ct. Lee County, Va., Sept. 15, 1980).

cluded at trial on the grounds it was obtained illegally. Likewise, both ethical and practical considerations require the prosecutor to conduct a thorough investigation prior to seeking an indictment or prosecuting a charge. The ethical canons provide that the prosecutor should not "intentionally" avoid pursuing evidence when he believes it will damage his case or aid the accused.[28] Beyond these minimum requirements, however, a prosecutor has a professional responsibility to investigate his case thoroughly in order to diminish the chance that an innocent person will be charged or that a guilty one will be acquitted.

The federal prosecutor ordinarily should not seek an indictment unless there is a "probability of conviction" and not just "probable cause."[29] This standard is higher than the traditional ethical standard that the prosecutor shall not prosecute a charge which he knows is not supported by probable cause.[30] The policy is founded upon fairness to the defendant and the economic use of taxpayers' funds. Occasionally, a prosecutor may feel that the interests of justice require that he "take his best shot" at prosecuting a certain defendant even though the chances of conviction are not good due to the attitude of the community towards certain factors in the case, such as may exist in a civil rights prosecution. A decision under such circumstances, however, must be very carefully made after weighing all the factors involved.[31]

C. *Timing*

Because he controls the investigation, the federal prosecutor can often control the timing of an indictment, a major advantage in

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28. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1979).

29. PRINCIPLES, *supra* note 7, at 6.

30. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(a) (Final Draft 1982), *reprinted in* 68 A.B.A.J. 1298 (1982).

31. *See* PRINCIPLES, *supra* note 7, at 6-7. There are also times when prosecutors target certain individuals for prosecution and bring charges where the admissible evidence may not be strong. Absent selective or arbitrary prosecution, the interests of justice may require such action in cases in which a known major criminal figure (e.g., Al Capone) can only be successfully prosecuted on some "technical" charge. Although such concentration on certain targets has been criticized by some scholars, *see, e.g.*, Freedman, *supra* note 4, at 1034-35, the approach may be justifiable in certain situations. Organized crime figures, for example, are frequently difficult to prosecute because they are "part of a hierarchy with the highest command level insulated by a series of management echelons from the lowest level of easily-replaceable members who actually perform observable physical acts." *In re* Persico, *supra* note 24, at 48. *See also* D. CRESSEY, THEFT OF THE NATION: THE STRUCTURE AND OPERATION OF ORGANIZED CRIME IN AMERICA 109-40 (1969). *See generally* J. LANDESCO, ORGANIZED CRIME IN CHICAGO (2d ed. 1968).

view of the time constraints under the Speedy Trial Act.[32] Under this Act, a defendant must be tried within seventy days of indictment, or arraignment if not previously arrested, unless a continuance is granted.[33] Some white collar criminal investigations require many months, during which time the prosecution can tie up loose ends, lock in witness testimony before the grand jury,[34] and prepare for trial. In many of these investigations, the target will have been notified. His attorney will have been negotiating with the government and in the process will have learned about the prosecution's case prior to indictment. The Speedy Trial Act insures the defendant's right to be tried expeditiously after he is indicted, but it also protects society's interest in speedy justice. In order to continue a trial beyond the time specified in the statute, the court must set forth on the record reasoned findings "that the ends of justice served [by the delay] outweigh the best interests of the public and the defendant in a speedy trial."[35]

D. *Conflicts of Interest*

Occasionally, a prosecutor may be faced with a conflict of interest in handling an investigation and in making prosecutorial decisions. Examples exist of criminal investigations involving a target who is in some way associated with or related to the prosecutor. To insure the appearance of impartiality, another assistant prosecutor will ordinarily be appointed in such circumstances. Where the United States Attorney's relationship is involved, a Special Assistant United States Attorney from another district may be appointed to handle the investigation and to make all prosecutory

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32. *See* Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-74 (Supp. V 1981).

33. The 70 days begin to run from the date of arraignment after the indictment is returned, unless the defendant is arrested prior to indictment, in which case the time begins to run from the date of indictment. 18 U.S.C. § 1361 (1976).

34. Prior sworn testimony may be introduced as substantive evidence and not solely to impeach the witness where the witness testifies at trial. FED. R. EVID. 801(d)(1).

35. 18 U.S.C. § 3161(h)(8)(A) (1976). If such a continuance is granted, the period of delay occasioned thereby is excluded in computing the date by which the defendant must be tried. The statute states various considerations for a continuance, including the number of parties and the complexity of the case, but forbids a continuance based on general crowding of the docket, failure of the government to locate available witnesses, or inadequate preparation. *See Id.* § 3161(h)(8)(B)-(C) (Supp. V 1981). Courts may be most inclined to grant a continuance requested by a defendant where the continuance is necessary to prevent a denial of the "defendant's constitutional rights to assistance of counsel, to the testimony of witnesses on his behalf, or to a trial free of prejudicial publicity." United States v. Correia, 531 F.2d 1095, 1098 (1st Cir. 1976).

decisions.[36]

III. The Decision To Charge

The decision whether to seek an indictment and the selection of charges are areas in which the federal prosecutor has sole, unreviewable discretion.[37] Where the evidence is insufficient or the case is minor, prosecution may be declined. A case may also be declined, though the evidence is sufficient, where there is no "substantial federal interest" to be served by prosecution;[38] where the defendant can be effectively prosecuted in another jurisdiction;[39] or where there is an adequate non-criminal alternative.[40] Thus, the decision to charge involves an assessment of the strengths of the admissible evidence and the societal and federal interests to be vindicated.

An example of a well-publicized decision not to prosecute occurred in the Western District of Virginia in 1981 and concerned the Professional Air Traffic Controllers Organization (PATCO). On the date that PATCO went on strike, the government obtained a restraining order requiring the strikers to go back to work. When they refused, the strikers were potentially subject to contempt of

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36. The Attorney General is authorized by 28 U.S.C. § 543(a) (1976) to appoint an attorney in order to aid a United States Attorney if the public's interest would be furthered. Such appointees have been distinguished from those appointed under 28 U.S.C. § 515(a) (1976) and do not require specific authorization to conduct grand jury proceedings. *See* United States v. Hawthorne, 626 F.2d 87, 89 (9th Cir. 1980).

37. As a member of the Executive Branch, he is charged with seeing that the laws are "faithfully executed." U.S. Const. art. II, § 3. The courts have upheld his broad discretion in initiating prosecutions and selecting charges. *See, e.g.*, Oyler v. Boles, 368 U.S. 448, 456 (1962).

38. Principles, *supra* note 7, at 7. In deciding whether there is a "substantial federal interest" to be served by the prosecution, the federal prosecutor should weigh, among other relevant factors, the following:

> (a) federal law enforcement priorities; (b) the nature and seriousness of the offense; (c) the deterrent effect of prosecution; (d) the person's culpability in connection with the offense; (e) the person's history with respect to criminal activity; (f) the person's willingness to cooperate in the investigation or prosecution of others; and (g) the probable sentence or other consequences if the person is convicted.

Id.

39. *Id.* at 11. The prosecutor's decision is based mainly on: "(a) the strength of the other jurisdiction's interest in prosecution; (b) the other jurisdiction's ability and willingness to prosecute effectively; and (c) the probable sentence or other consequences if the person is convicted in the other jurisdiction." *Id.*

40. *Id.* at 13. The prosecutor should consider: "(a) the sanctions available under the alternative means of disposition; (b) the likelihood that an appropriate sanction will be imposed; and (c) the effect of non-criminal disposition on federal law enforcement interests." *Id.*

court citation and criminal prosecution.[41] PATCO leaders publicly stated an intention to defy the injunction and not to return to work. However, after careful deliberation, the decision was made not to press for an indictment or otherwise to charge anyone with a federal crime. First, all those who had refused to go back to work during the first forty-eight hours of the strike were fired by President Reagan. This action substantially undercut a principal rationale for prosecuting the strikers, which would have been to force them back to work. Moreover, there had been no intimidation, harassment, or obstruction of operations in western Virginia where the strikers had been peaceful. Thus, the judgment by the United States Attorney as to the federal interest to be vindicated militated against prosecution of the striking PATCO members.

The exercise of prosecutorial discretion in charging a person with a crime must be based on a consistent, evenhanded application of principles. Nothing destroys public confidence in law enforcement more than selective prosecution or selective declination of cases otherwise deserving of prosecution. In addition, the prosecutor must not be affected by the person's race, religion, sex, national origin, political affiliation, or by the prosecutor's personal feelings, or concern for the effect of his decision on his own professional or personal circumstances.[42] Finally, in exercising the decision to prosecute, the federal prosecutor may not responsibly rely entirely upon the advice of the law enforcement agents or the grand jury. The decision to prosecute and the selection of charges is uniquely and exclusively the prerogative of the United States Attorney. It involves rendering a professional judgment after weighing the severity of the crime, the record and character of the defendant, the resources of the office, and the quality of the evidence.

In recent years, the pretrial diversion program has been established as an alternative to prosecuting those persons who are accused of committing relatively minor offenses and who show promise of rehabilitation. Under this program a person is placed under the supervision of the probation office for one year. Upon successful completion of the program, the prosecutor agrees to drop charges. There are established minimum departmental guidelines

41. All federal employees take an oath not to strike against the government. 5 U.S.C. §§ 3333, 7311 (1976 & Supp. IV 1980). Striking against the federal government is a crime. 18 U.S.C. § 1918 (1976).

42. PRINCIPLES, *supra* note 7, at 14.

for determining who should be placed in this program, and each United States Attorney generally has guidelines tailored to the circumstances of his district. The final decision to offer pretrial diversion rests within the sole discretion of the United States Attorney.[43]

IV. GRAND JURY PROCEEDINGS

An area of hot dispute in criminal procedure involves the rights of defendants and witnesses in grand jury proceedings.[44] The only persons who are authorized under the *Federal Rules of Criminal Procedure* to appear at a federal grand jury session are: the witness who is actually testifying, the government counsel, the court reporter, and the grand jurors.[45] Neither witnesses nor targets of investigations are entitled to have an attorney appear with them before the grand jury. The grand jury hearing is not an adversary proceeding. The role of the grand jury is not to determine guilt or innocence but to investigate crimes and to determine whether there is probable cause to believe that a crime has been committed and that the person named in the indictment committed the crime.

Courts have rejected arguments which would turn the grand jury hearing into an adversary proceeding.[46] A target of a grand jury

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43. U.S. ATTORNEY'S MANUAL, *supra* note 10, § 1-12.100. Some states also have a pretrial diversion program. *See, e.g.*, Note, *Kansas Diversion: Defendants' Remedies and Prosecutorial Opportunities*, 20 WASHBURN L.J. 344 (1981). In the federal system, guidelines vary from district to district depending on priorities and resources. Generally, the defendant should have cooperated with the authorities and admitted his or her involvement. In addition, the defendant must at most have a limited prior criminal record. Where money is involved in the crime, it should not be a substantial amount, and certain offenses—such as violations of the public trust, organized crime activities, and crimes involving national security—may not be acceptable for disposition by pretrial diversion. *See* U.S. ATTORNEY'S MANUAL, *supra* note 10, § 1-12.100.

44. Congress has considered broadening the rights of targets by allowing defense attorneys to appear in grand jury sessions. *See, e.g.*, S. 988, 97th Cong., 1st Sess. (1981); H.R. 4272, 97th Cong., 1st Sess. (1981). The American Bar Association supports these bills along with other comprehensive reforms of the grand jury system. *See, e.g., A.B.A. Backs Grant-Jury Reform; Lobbying Fails*, A.B.A.J. 1188 (1977); *ABA Criminal Justice Section, Policy on the Grand Jury*, 68 A.B.A.J. 1214 (1982); *Grand Juries Go on Trial*, 63 A.B.A.J. 775 (1977). The Department of Justice has also studied possible reforms. *See, e.g., Memorandum on the Grand Jury Hearings on H.R.J. Res. 46, H.R. 1277, and Related Bills Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 86-107 (1976); Civiletti & Walsh, *The Grand Jury Goes to Trial*, 4 LITIGATION 37 (1978).

45. FED. R. CRIM. P. 6(d).

46. *See, e.g.*, United States v. Gardner, 516 F.2d 334 (7th Cir.), *cert. denied*, 423 U.S. 861 (1975); United States v. Mandel, 415 F. Supp. 1033, 1040 (D. Md. 1976).

investigation has no right to appear before the grand jury and testify, present any evidence, or make any argument in his own behalf. The Supreme Court has held that questioning a witness under subpoena may not be so coercive as to qualify as custodial interrogation by police so that warnings are not constitutionally mandated.[47]

As a matter of policy, however, the Department of Justice has adopted certain procedures to protect the rights of targets of investigations. When a person becomes a target of a grand jury investigation, the prosecutor may, at his option, send the person a letter advising him of this fact and inviting the person to testify on a voluntary basis. The target is advised of the general subject matter of the grand jury investigation, of his fifth amendment privilege not to answer any questions that might tend to incriminate him, and of the risk that any testimony he gives could be used against him. He is also advised of his right to have an attorney accompany him and wait outside the grand jury room and to consult with his attorney outside the grand jury room at reasonable intervals.[48]

His ethical duties enjoin the prosecutor from misleading the grand jury by withholding important exculpatory evidence or knowingly failing to disclose evidence which tends substantially to negate guilt.[49] However, the extent to which he seeks out and presents exculpatory evidence to the grand jury and cross-examines witnesses to test their credibility is left to his sound judgment. The prosecutor can often better discover the strengths and weaknesses of his case by presenting certain evidence to the grand jury and observing its reaction. Thus, fairness to targets and thoroughness in preparing the case for eventual trial ordinarily require that the prosecutor present exculpatory evidence to the grand jury.[50] Since the rules of evidence do not apply to grand jury proceedings,[51] indictments are often obtained based on a summary of the investigation given by the federal law enforcement agent. However, at least one court has said that the prosecutor must make clear to

47. *See* United States v. Washington, 431 U.S. 181 (1977).

48. U.S. ATTORNEY'S MANUAL, *supra* note 10, § 9-11.250.

49. *See* U.S. ATTORNEY'S MANUAL, *supra* note 10, § 9-11.334.

50. *See generally* Comment, *Criminal Procedure—District Attorney Is Under an Implied Statutory Duty to Inform Grand Jury of Exculpatory Evidence*, 25 CATH. U.L. REV. 648 (1976).

51. *See* United States v. Calandra, 414 U.S. 338, 349-52 (1974); Costello v. United States, 350 U.S. 359 (1956).

the grand jury the quality of evidence being presented.[52]

The grand jury is an effective and potent instrument for the investigation of crime because of its power to subpoena witnesses for secret testimony and compel production of documents and things. Together with the Witness Protection Program, for relocating and changing the identity of crucial witnesses, and the prosecutor's power to grant immunity and force indispensable testimony, the federal grand jury has been particularly effective in uncovering organized criminal activity. It has also been used effectively in coordinating complex multi-agency white collar crime investigations.

Because of his power, the federal prosecutor should not give the appearance of attempting to dominate or manipulate unfairly the grand jury. As a matter of practice, the grand jurors should be advised that they can request additional evidence if they believe it would be helpful or necessary. In some cases, this may include inviting a target to testify. The grand jurors should be treated in practice, and not merely in form, as partners of the prosecutor in developing the evidence. Further, they should be encouraged to exercise their independent judgment and not simply to "rubber stamp" the prosecutor's. Confidence in the fair and effective administration of justice is best achieved by having the grand jury participate fully in the process of investigation and indictment.

The return of an indictment requires concurrence of both the United States Attorney and at least twelve members of the twenty-three member grand jury. Therefore, either can prevent the indictment.[53] Recent publicity concerning the Watergate grand jury's apparent disagreement with Special Prosecutor Leon Jaworski over whether to indict former President Richard Nixon has highlighted this safeguard in the administration of justice. On the one hand, the prosecutor has unique authority and special responsibility in exercising his discretion to seek an indictment. Conversely, the grand jury as representative of the community[54] has the unfettered power to refuse to return a true bill.[55] When the prosecutor, after

52. *See, e.g.*, United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972) (indictment dismissed where prosecutor failed to disclose hearsay nature of evidence and relied on hearsay when first hand evidence was available).

53. FED. R. CRIM. P. 6(b)(2).

54. *See* 28 U.S.C. § 1861 (1976).

55. The fifth amendment to the United States Constitution provides that "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment of a Grand Jury . . . ." U.S. CONST. amend V.

obtaining a "no true bill" from one grand jury, wishes to seek an indictment from another grand jury, he should proceed cautiously and assess his evidence carefully so as not to give the appearance of unfairly manipulating the system. Ordinarily, he should have developed additional inculpatory evidence before proceeding to present his case to a second grand jury.

All grand jury proceedings are secret, and neither the defendant nor his counsel is entitled to have access to what occurs in the session. However, the *Federal Rules of Criminal Procedure* require that all matters occurring before the grand jury be recorded.[56] Where a particularized need is shown, a court may order the United States Attorney to supply transcripts of the grand jury session.[57] Moreover, once a witness testifies in open court, defense counsel may request a court order directing the government to furnish a transcript of the witness's grand jury testimony.[58]

V. Discovery

In most federal districts, the general practice is to allow open-file discovery in the interest of fairness to the defendant. Under the *Federal Rules of Criminal Procedure,* a defendant has the right to discover his own statements,[59] his prior record,[60] and certain docu-

56. Fed. R. Crim. P. 6(e)(2).

57. *See* Dennis v. United States, 384 U.S. 855 (1966).

58. 18 U.S.C. § 3500 (1976).

59. Rule 16(a)(1)(A) provides:

> Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

Fed. R. Crim. P. 16(a)(1)(A).

60. Rule 16(a)(1)(B) provides:

> Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or con-

ments and tangible objects.[61] Moreover, he may discover reports of any examinations and tests material to his defense or to be used by the government in its case in chief.[62] Statements of witnesses, however, are subject to the Jencks Act,[63] which provides that the federal prosecutor need not reveal to the defense the statement of any government witness until after the witness has testified at trial.

The Jencks Act was intended to accommodate the competing interests of preserving the government's evidence while ensuring the defendant's due process right of effective cross-examination. Because of the risk of intimidation, undue influence, or worse, the government should have some way to protect the identities of its witnesses. At the same time, as a matter of fairness and due process, a defendant should have an opportunity to prepare his defense, which requires knowing and investigating the evidence against him and interviewing witnesses. As a practical matter, the competing concerns are resolved informally in most cases, espe-

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trol of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

FED. R. CRIM. P. 16(a)(1)(B).

61. Rule 16(a)(1)(C) provides:

Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

FED. R. CRIM. P. 16(a)(1)(C).

62. Rule 16(a)(1)(D) provides:

Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

FED. R. CRIM. P. 16(a)(1)(D).

63. 18 U.S.C. § 3500 (1976). The Jencks Act is named for Jencks v. United States, 353 U.S. 657 (1957) (defendant entitled to inspect witness statements in the government's possession for use in cross-examination). The Act provides in pertinent part:

After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

18 U.S.C. § 3500(b) (1976).

cially where there is a cooperative, professional working relationship between the prosecutor and defense counsel.[64] Even when the Jencks Act is invoked, the material is rarely delivered to defense counsel later than the night before trial if only to avoid the trial being interrupted by long recesses to allow defense counsel to review the statements. In the interest of fairness and orderly trial proceedings, the Jencks Act should not be invoked unless there is an articulable fear of witness intimidation or undue influence.

Criminal defense attorneys sometimes meet resistance in attempting to interview government witnesses. Counsel should be careful about insisting on talking to a hostile witness; an aggressive interviewing technique might be construed as an attempt to intimidate the witness. In such circumstances, defense counsel can request the prosecutor to intercede. If the witness remains hostile, defense counsel can demonstrate his attitude to the jury on cross-examination.

Federal Rule 16 also provides for limited reciprocal discovery by the government of documents, tangible objects, and reports of examinations and tests which the defense intends to introduce in its case-in-chief.[65] The availability to the government of this discovery

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64. The Federal Rules contemplate that the parties should carry out discovery matters by themselves with court involvement only where necessary. *See* FED. R. CRIM. P. 16 advisory committee notes (1974).

65. Rule 16(b) provides:

(1) *Information Subject to Disclosure.*

(A) *Documents and Tangible Objects.* If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) *Reports of Examinations and Tests.* If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(2) *Information Not Subject to Disclosure.* Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective

device is triggered when the defendant makes a similar request.[66] The government may also request that the defendant file a notice of any alibi defense, setting forth the place where he claims to have been at the time of the offense and the witnesses upon which he relies.[67] Similarly, the defense may be required upon request to give notice of intent to rely upon a defense of insanity or otherwise to present expert testimony on mental condition.[68]

Finally, in discovery proceedings, both ethical and due process concerns require the prosecution to divulge any exculpatory evidence upon request[69] and, if sufficiently material to raise a reasonable doubt as to the defendant's guilt, even without a request.[70] Where there is any question of the materiality of the evidence or the necessity of disclosure, *in camera* review by the court may be requested. Further, the duty to disclose goes beyond matters in the prosecutor's possession; he must look beyond his files and disclose matters which "by the exercise of due diligence may become known."[71]

VI. Plea Bargaining

Another area involving delicate decision-making is that of plea bargaining. In recent years, this has become a controversial area in which the public has perceived that justice is not served when a lenient "deal" is struck between the government and a guilty defendant. However, plea bargaining is essential to conserve the time and resources of the prosecutor and the courts and to avoid the inherent risks of litigation. More significantly, it can be an effective tool for the prosecutor to use in gaining the cooperation and indis-

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government or defense witnesses, to the defendant, his agents or attorneys. Fed. R. Crim. P. 16(b).

66. *See supra* notes 62-63.

67. Fed. R. Crim. P. 12.1.

68. *Id.*

69. The Supreme Court has held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963).

70. In United States v. Agurs, 427 U.S. 97 (1976), the Court refined *Brady* and stated that due process would be violated (1) where the prosecutor knowingly uses perjured testimony, and there is a reasonable likelihood it could have affected the jury verdict; (2) where the prosecutor fails to disclose exculpatory evidence after a specific request, and the undisclosed information might have affected the outcome of the trial; and (3) where, after a general request or no request by the defense, the prosecutor fails to disclose information sufficiently material as to raise a reasonable doubt about the guilt of the defendant.

71. Fed. R. Crim. P. 16(a)(1)(A)-(D).

pensable testimony of persons involved in crimes and thus to convict accomplices.

The *Federal Rules of Criminal Procedure* authorize the prosecutor upon a defendant's plea of guilty to move for dismissal of other pending charges, to make a sentencing recommendation, or not to oppose the defendant's request for a particular sentence.[72] Moreover, the prosecutor may enter into a binding agreement concerning a specific sentence.[73] If a non-binding recommendation is made regarding sentencing, the defendant may not withdraw his plea even if the court imposes a stiffer sentence than was expected.[74]

In the federal system, the judge has sole discretion in sentencing;[75] federal judges are very protective of their prerogative in this area. For this reason, and to avoid any public perception that a "deal" was struck contrary to the public interest, some districts have established a policy whereby the government ordinarily will not make agreements, or recommendations to the court, regarding sentencing. In those districts, plea bargaining is ordinarily limited to dismissing charges. The prosecution may, and often does, introduce information regarding the circumstances of the offense and the character of the accused to assist the court in fashioning an appropriate sentence. However, the primary advisory function regarding sentencing is carried out by the probation office in its presentence report, which carries a confidential sentencing recommendation that neither side is privileged to see.[76]

In negotiating a plea agreement, the prosecution must be aware that the charge or charges to which a defendant pleads guilty should bear a "reasonable relationship to the nature and extent of his criminal conduct"[77] and must be supported by an "adequate factual basis."[78] If restitution is involved, the counts should be sufficient to provide for an appropriate restitution order; the prosecutor should insure that the interests of the victim are not lost in the sentencing process. The prosecution should also insure that the judge has a sufficient maximum range within which to impose an

72. FED. R. CRIM. P. 11(e)(1).

73. *Id.*

74. Since the court may not participate in plea negotiations, *id.*, it is not appropriate for the prosecutor to seek the advice of the probation office, which is an arm of the court, regarding the plea negotiations.

75. *See* FED. R. CRIM. P. 32(a).

76. *Id.* 32(c).

77. *Principles, supra* note 7, at 27.

78. *Id.*

adequate sentence. Finally, any plea agreement should not adversely affect any other investigation or prosecution.[79] In addition to promoting the efficient administration of justice, plea bargaining should further the ends of justice by gaining needed cooperation.

The policy of the Department of Justice has been to oppose any nolo contendere plea on the grounds that such pleas tend to cause public disrespect for the criminal process.[80] Under the *Federal Rules of Criminal Procedure,* a court is required to consider the "views of the parties and the interest of the public in the effective administration of justice"[81] before accepting a nolo contendere plea. Thus, a defendant has no absolute right to enter a plea of nolo contendere. Where a defendant attempts so to plead, the federal prosecutor should make an offer of proof of facts that the defendant committed the offense charged, state on the record why such a plea should be rejected by the court, and oppose dismissal of any charges to which the defendant does not plead nolo contendere.[82] Except in rare circumstances, nolo contendere pleas fail to serve justice since no definite determination is made regarding the guilt of the defendant, and the public perceives a failure of the system in this lack of resolution.

The principal rationale for nolo contendere pleas is to allow the defendant to avoid the use of the criminal conviction against him in a subsequent civil suit or in a licensing or other collateral pro-

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79. *Id.*

80. In 1953, in a Department of Justice directive, the Attorney General expressed objections to such pleas:

> One of the factors which has tended to breed contempt for federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of nolo contendere. While it may serve a legitimate purpose in a few extraordinary situations and where civil litigation is also pending, I can see no justification for it as an everyday practice, particularly where it is used to avoid certain indirect consequences of pleading guilty, such as loss of license or sentencing as a multiple offender. Uncontrolled use of the plea has led to shockingly low sentences and insignificant fines which are no deterrent to crime. As a practical matter it accomplished little that is useful even where the Government has civil litigation pending. Moreover, a person permitted to plead nolo contendere admits his guilt for the purpose of imposing punishment for his acts and yet, for all other purposes, and as far as the public is concerned, persists in his denial of wrongdoing. It is no wonder that the public regards consent to such a plea by the Government as an admission that it has only a technical case at most and that the whole proceeding was just a fiasco.

PRINCIPLES, *supra* note 7, at 33.

81. FED. R. CRIM. P. 11(b).

82. PRINCIPLES, *supra* note 7, at 34-35. *See also* Note, *Nolo Contendere: Acceptance in Federal Courts,* 10 MEM. ST. U. L. REV. 550 (1980).

ceeding.[83] However, allowing a nolo contendere plea is rarely justified on this ground. First, courts have often allowed administrative use of a criminal conviction based upon a nolo contendere plea, such as in a proceeding to revoke a license, anyway.[84] Moreover, where civil liability is involved and the criminal case precedes the civil trial, the victim would receive little benefit from the criminal prosecution if the defendant were allowed to plead nolo contendere and avoid the logical consequences of his criminal conviction. Criminal prosecution should further the interests of victims in being made whole as well as vindicate society's interests. Thus, the prosecutor's opposition to nolo contendere pleas should ordinarily be even stronger where civil recovery is or might be sought as a result of the defendant's criminal activity.

VII. Conduct of the Trial

At the heart of Anglo-American legal tradition is the belief that the truth is best revealed through the adversarial procedure of a trial.[85] A criminal trial is, however, both more and less than a search for the truth. It is an expression of societal values of fairness and due process representing the vindication of individual liberties against the power of the state. Thus, the truth-seeking function may be sacrificed by rules which exclude illegally seized evidence[86] or illegally obtained confessions,[87] and which sanction

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83. Unlike a guilty plea or judgment entered on a jury finding of guilty, a conviction based on a nolo contendere plea may not be used as collateral estoppel to obtain summary judgment in a subsequent civil suit. Nor is such a plea or any statements made in connection with it admissible in any other civil or criminal proceeding against the defendant. Fed. R. Crim. P. 11(e)(6). *See* Dalweld Co. v. Westinghouse Electric Corp., 252 F. Supp. 939 (S.D.N.Y. 1966). Such a plea, however, may be used for impeachment of the witness as a prior "conviction". Fed. R. Evid. 609(a). *See* 18 U.S.C. § 5006(g) ("conviction" defined in Youth Corrections Act as "judgment on a verdict or finding of guilty, a plea of guilty or a plea of nolo contendere.") *See also* Lott v. United States, 367 U.S. 421 (1961); Fisher v. United States, 8 F.2d 978, 981 (1st Cir.1925); Oklahoma v. Allied Chem. Corp., 312 F. Supp. 130, 133-34 (W.D. Okla. 1968); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 211 F. Supp. 712 (N.D. Ill. 1962). But *see* United States v. Morrow, 537 F.2d 120, 142-45 (5th Cir. 1976) (Fifth Circuit rule).

84. *See* Sokoloff v. Saxbe, 501 F.2d 571 (2d Cir. 1974) (physician's license revoked based on nolo contendere plea to illegal distribution of drugs); Maryland State Bar Ass'n v. Agnew, 318 A.2d 811 (Md. Ct. App. 1974) (disbarment of lawyer); Lee v. Wisconsin State Bd. of Dental Examiners, 29 Wis. 2d 330, 139 N.W.2d 61 (1966) (revocation of dentist license).

85. *See generally* Frankel, *The Search for Truth: An Umpireal View,* 123 U. Pa. L. Rev. 1031 (1975).

86. *See* Mapp v. Ohio, 287 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

87. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

the defendant's right not to testify.[88]

This tension between the search for truth and the protection of individual rights places a special responsibility on the prosecutor. He must seek to have the truth of criminal activity disclosed in court, but he must also see that societal values are preserved in the process.[89] Thus, the prosecutor, as well as the judge, has a duty to insure that a defendant receives a fair trial. The prosecution also has an interest in protecting the record and taking steps to avoid occurrences which may cause reversible error or mistrial. The careful prosecutor should try every case with one eye on the trial record and another on the potential for appellate review.

In the heat of trial, it is sometimes tempting for a zealous prosecutor to overreach the bounds of propriety in order to obtain a conviction. However vigorously he advocates, the prosecutor must not knowingly offer inadmissible evidence, introduce false evidence, or otherwise seek to mislead the court or jury.[90] When a government witness testifies with immunity from prosecution or under a plea agreement,[91] the prosecutor should usually disclose this on direct examination.[92] Thus, the virtue of full disclosure joins with the interest of defusing the adverse impact of such evidence on the credibility of the witness. In cross-examining a defense witness whom he knows to be telling the truth, the prosecutor should not attempt to use techniques that make it appear that the witness is lying, since to do so would mislead the court. The prosecutor in such circumstances should confine his cross-examination to the "conventional" ways of testing the witness's perception

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88. *See* Frankel, *supra* note 85, at 1036-37. *See also Schwartz, supra* note 5, at 17-30.

89. Frankel, *supra* note 85, at 1036-37.

90. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1979); STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: THE PROSECUTION FUNCTION § 5.6 (1974) [hereinafter cited as ABA PROSECUTION FUNCTION].

91. Obtaining cooperative testimony from an accomplice may be essential to successful prosecution of others. Since a witness who is also culpable may refuse cooperation on the basis of his fifth amendment privilege against self-incrimination, the prosecutor may seek to induce cooperation in other ways. First, if time permits, the witness himself may be tried and convicted. Then, after he would ordinarily no longer have a valid privilege against testifying, he may be induced to cooperate as a condition of his receiving a lesser sentence. Second, the parties may enter into a plea agreement where the defendant pleads guilty to reduced charges, where the prosecutor makes a sentencing recommendation, or where the parties agree to a specific sentence. Finally, the government may consent to a non-prosecution agreement in return for the cooperation of a witness, or grant "use immunity" to compel testimony. 18 U.S.C. § 6001 *et seq.* (1976 and Supp. IV 1980).

92. The *Federal Rules of Evidence* provide: "The credibility of a witness may be attacked by any party, including the party calling him." FED. R. EVID. 607.

and memory without discrediting him personally by showing bias or evidence of prior convictions.[93]

Because a prosecutor represents the government and law enforcement, jurors may give his statements added credibility. Therefore, while he must prosecute vigorously, he must be scrupulously fair in arguing his case. In closing argument he should not make statements calculated to inflame the jury;[94] neither should he give personal opinions,[95] make unduly harsh characterizations of the defendant, defense witnesses, or counsel,[96] nor argue that in order to acquit, the jury must find that government witnesses committed perjury.[97] The prosecutor also may not comment on the defendant's failure to testify.[98] In some circuits the prosecutor may not argue that the government's evidence in whole or in part is "unrebutted", "uncontradicted", or "undisputed" or use other terms that refer to the defendant's assertion of his fifth amendment privilege not to testify.[99]

The manner in which due process is administered in an open trial by the prosecutor and the court, as perceived by the public, the jury and the defendant, affects our criminal justice system more than the outcome of any given trial. Conscientious adherence to due process values gain for the criminal justice system citizen respect and support by which the system maintains its moral legitimacy.

VIII. Relations with the Press

Publication of the results of law enforcement efforts can often have a deterrent effect on criminal activity. Therefore, in dealing with the press, the United States Attorney should seek a cooperative relationship while guarding against publication of confidential or prejudicial information.[100] In seeking information for a story, ag-

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93. ABA Prosecution Function, *supra* note 90, § 5.7. *See* Civiletti, *supra* note 4, at 18.

94. ABA Prosecution Function, *supra* note 90, § 5.8(c).

95. Model Code of Professional Responsibility DR 7-106(c) (3)-(4) (1979); ABA Prosecution Function, *supra* note 90, § 5.8(b).

96. *See, e.g.*, United States v. Spain, 536 F.2d 170 (7th Cir.), *cert. denied*, 429 U.S. 833 (1976).

97. *See, e.g.*, United States v. Vargas, 583 F.2d 380 (7th Cir. 1978); United States v. Phillips, 527 F.2d 1021 (7th Cir. 1975).

98. *See* Griffin v. California, 380 U.S. 609, *reh'g denied*, 381 U.S. 957 (1965).

99. *See, e.g.*, United States v. Moody, No. 78-1981 (7th Cir. Feb. 27, 1979). This is not the law in the Fourth Circuit today.

100. *See generally The Supreme Court, 1978 Term*, 93 Harv. L. Rev. 1, 62 (1979).

gressive news reporters often attempt to probe confidential areas. Restrictions should therefore be placed on the media's access to the office, and procedures and guidelines should be established for dealing with the press. Also, office security procedures must be adequate to protect confidential information and materials.

The Department of Justice has established regulations governing the release of information to the public.[101] These general guidelines make an effort to strike a "fair balance between the protection of individuals accused of crime or involved in civil proceedings with the government and public understandings of the problems of controlling crime and administering government . . . ."[102] Generally, no comment should be made regarding whether an investigation may or may not be in progress. When an indictment is returned, the guidelines specify the types of information which may legitimately be released.[103] Basically, the United States Attorney should

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101. *See* 28 C.F.R. § 50.2 (1981); U.S. ATTORNEY'S MANUAL, *supra* note 10, § 9-2.200, .210-11.

102. 28 C.F.R. § 50.2(a)(2).

103. The guidelines for release of information in criminal cases are as follows:

(1) These guidelines shall apply to the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise.

(2) At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.

(3) Personnel of the Department of Justice, subject to specific limitations imposed by law or court rule or order, may make public the following information:

(i) The defendant's name, age, residence, employment, marital status, and similar background information.

(ii) The substance or text of the charge, such as a complaint, indictment, or information.

(iii) The identity of the investigating and/or arresting agency and the length or scope of an investigation.

(iv) The circumstances immediately surrounding an arrest, resistance, pursuit, possession and use of weapons, and a description of physical items seized at the time of arrest. Disclosures should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.

(4) Personnel of the Department shall not disseminate any information concerning a defendant's prior criminal record.

(5) Because of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenuously to be avoided during that period. Any such statement or release shall be made only on the infrequent occa-

release only "bare bones" information relative to an indictment. All formal press releases on indictments should end with a statement that the grand jury indictment is only a charge and not evidence of guilt and that the defendant is entitled to a fair trial with the burden on the government to prove guilt beyond reasonable doubt. At no time should the government release information which might reasonably be expected to influence the outcome of a trial.

Despite regulations and diligent efforts by prosecutors to comply, news stories occasionally appear concerning sensitive, highly confidential investigations. Similarly, rumors about investigations sometimes occur, and these too can lead to problems. Whenever news leaks or rumors occur, or there is any suggestion of impropriety, an investigation may be conducted to clear up the matter and insure that the government carries out its activities in a wholly

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sion when circumstances absolutely demand a disclosure of information and shall include only information which is clearly not prejudicial.

(6) The release of certain types of information generally tends to create dangers of prejudice without serving a significant law enforcement function. Therefore, personnel of the Department should refrain from making available the following:

(i) Observations about a defendant's character.

(ii) Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement.

(iii) Reference to investigative procedures such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests, or to the refusal by the defendant to submit to such tests or examinations.

(iv) Statements concerning the identity, testimony, or credibility of prospective witnesses.

(v) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.

(vi) Any opinion as to the accused's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea to a lesser offense.

(7) Personnel of the Department of Justice should take no action to encourage or assist news media in photographing or televising a defendant or accused person being held or transported in Federal custody. Departmental representatives should not make available photographs of a defendant unless a law enforcement function is served thereby.

(8) This statement of policy is not intended to restrict the release of information concerning a defendant who is a fugitive from justice.

(9) Since the purpose of this statement is to set forth generally applicable guidelines, there will, of course, be situations in which it will limit the release of information which would not be prejudicial under the particular circumstances. If a representative of the Department believes that in the interest of the fair administration of justice and the law enforcement process information beyond these guidelines should be released, in a particular case, he shall request the permission of the Attorney General or the Deputy Attorney General to do so.

Id. § 50.2(b). Similar guidelines, though less restrictive, apply with respect to release of information in civil actions. *See id.* § 50.2(c).

proper fashion.

The role of the prosecutor is not only to prosecute the guilty, but to clear the air regarding results of closed investigations when there has been adverse publicity concerning innocent people. Even when a person can not be "cleared," an investigation which has received public attention may warrant issuance of a statement that it is closed. The prosecutor, therefore, has a duty to protect the names and reputations of the innocent, as well as to prosecute the guilty.

IX. Conclusion

The United States Attorney is the litigating authority for the federal government in his district in both civil and criminal matters. As prosecutor and chief federal law enforcement officer, he has a great responsibility to ensure that justice is served. In carrying out his responsibilities, he should remember the inscription in the Attorney General's office: "The government wins its point when justice is done its citizens in the courts."

In attempting to give content to the abstract ideal of justice, he may establish, in his district, priorities for investigating and prosecuting crime which are consistent with the limitations of resources and jurisdiction, the priorities set nationally by the Attorney General, the considerations of federal-state relations, the circumstances in his district, and his own philosophy. The setting of such priorities is not only necessary, but desirable to ensure that law enforcement objectives are responsive and responsible to changing circumstances and evolving societal values. The principles underlying his decisions to investigate and prosecute must be supported by established legal and ethical standards and applied in a consistent and even-handed manner. The federal prosecutor should recognize the paramount importance of preserving the values governing the administration of criminal justice. In conducting investigations and initiating charges, he should exercise his considerable discretionary powers fairly, thoughtfully and evenly. In dealing with opposing counsel, he should seek a cooperative and professional relationship. His advocacy at trial should be vigorous, but accord with traditional due process values and principles of fair play. In assisting the court in fashioning an appropriate sentence, he should seek vindication of the interests of both society and victims. Finally, he should seek a cooperative relationship with the press so that the public is informed of law enforcement efforts

and such publicity achieves some measure of deterrence.

The manner in which he carries out his duties—his vigor and competence and his sense of integrity and fairness—determines the degree of success and effectiveness of his office. Public confidence in the enforcement of the laws is enhanced by his aggressive pursuit of criminals. However, his credibility, and hence his effectiveness as an instrument of the law, is judged by his sense of fairness. The prosecutor serves justice when he exercises his considerable powers fairly and impartially and with sensitivity to the impact of his decisions on those with whom he deals.