

PAAM BEST PRACTICES
2019

Michigan Prosecutors' Justice Initiative (MPJI)

Best Practices Committee

The Michigan Prosecutors' Justice Initiative (MPJI) Best Practices Committee was established in 2014 to ensure justice is delivered with the highest degree of integrity through the development of professional standards designed to improve public safety, protect the rights of the accused, secure justice for crime victims, and hold offenders accountable. The committee meets on a regular basis to discuss the challenging issues of the day and to provide guidance on a variety of subjects.

Policies adopted by the MPJI are contained within this document and serve as guidance for prosecutors on a variety of issues.

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Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION *BRADY/GIGLIO* MATERIAL

In *Brady v Maryland*, 373 US 83, (1963), the United States Supreme Court held that it is the duty of the prosecuting attorney in a criminal trial to disclose to the defense, material information that is favorable to the defendant. Failure to disclose such evidence may violate due process if the evidence is material to either guilt or punishment, regardless of the “good faith or bad faith of the prosecution.” In *Giglio v United States*, 405 US 150 (1972), the Court made clear that *Brady* information includes not only information directly related to the crime, but also, under certain circumstances, information that would negatively affect the credibility of a prosecution witness.

Because prosecutors have an obligation to assure a defendant is provided a fair trial, to meet the demands of disclosure under *Brady* and its progeny, as well as applicable statutes and court rules, the Prosecuting Attorneys Association of Michigan (PAAM) recommends:

- Prosecutors remain well-informed as to the legal requirements of *Brady* and its progeny, as well as any laws or court rules which bear on these obligations. Continuing education in this area is essential, particularly for new prosecutors.
- Prosecutors shall be responsible for knowing applicable discovery obligations, as well as the duty to disclose material exculpatory and impeachment evidence. This obligation should not be delegated to support staff, but is the responsibility of the case attorney.
- In order to fulfill the constitutional requirement of *Giglio*, prosecutors should contact police agencies within their jurisdiction to advise them of the duty to disclose impeachment evidence and to develop procedures to determine whether such information exists concerning a law enforcement officer.
- *Brady/Giglio* materials must be disclosed even in the absence of a request from the defendant and must be disclosed in a timely manner.
- Prosecutors should coordinate with police agencies to ensure that all supplemental reports and case information are turned over to the prosecution.
- Prosecutors should determine whether their office possesses potential impeachment evidence regarding a witness. This determination should include, but is not limited to, for example, searching the case management system used by the prosecutor’s office to determine whether the witness has

been charged with or convicted of an impeachable crime, or has agreed to cooperate pursuant to a plea agreement.

- If there is a question regarding the necessity of disclosing any particular piece of information it may be advisable to file a motion with the court for an in camera review to obtain a ruling.
- When conducting a *Brady/Giglio* review, prosecutors should use their individual discretion to determine the disclosable facts specific to each case. If uncertain whether disclosure is appropriate, the case attorney should review the applicable law and consult with other staff and/or prosecution resources, always against the backdrop of the obligation to ensure the defendant's right to a fair trial.
- Prosecutors should adopt office practices and procedures to assist in fulfilling these obligations.

A best practices recommendation by the Prosecuting Attorneys Association of Michigan (PAAM) is the product of careful consideration of experienced prosecuting attorneys. However, it is only a recommendation. A best practices recommendation may or may not be feasible or desirable to implement in every jurisdiction. There may be other methods in local jurisdictions to reach the same or similar objectives.

Date approved by PAAM: June 17, 2016



Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION CONTINUOUS LEGAL EDUCATION

In order to ensure that prosecutors maintain a level of knowledge and skill necessary for duties required, and to improve their abilities to seek justice for victims, defendants and their communities, ongoing legal education is recommended. Specifically, PAAM recommends:

- All assistant prosecutors participate in a minimum of 30 hours of legal education over the course of a two year period.
- New assistant prosecutors undergo an orientation to provide an understanding of their responsibilities in the criminal justice system, office protocol and technical skills. Included within this orientation would be a minimum of one hour trainings on the Michigan Rules of Professional Responsibility, ethics and *Brady/Giglio* issues.
- Legal education should include areas of substantive law (e.g. domestic violence), rules of evidence, discovery, forensic evidence, trial advocacy and other matters relevant to their duties as prosecutors. Ethics education, either as a component to a larger subject or as a stand-alone, should be a component of a prosecutor's training.
- The prosecuting attorney for each office shall determine the suitability of the legal education, which may include but is not limited to training performed within the office, offered by the Prosecuting Attorneys Association of Michigan (PAAM) or the Prosecuting Attorneys Coordinating Council (PACC), and trainings offered by other acceptable local, statewide or national organizations. Legal education can be fulfilled by attendance at trainings, online participation, review of online or written documents or materials or any other method that the prosecuting attorney approves.
- Prosecutors should seek funding in their budgets to meet these standards, emphasizing the essential role that training has in assuring the fair, efficient and effective performance of prosecutorial duties. Counties should be responsive to such requests by providing a serviceable level of funding for training, including appropriate staffing to allow for same.

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Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION CONFLICT OF INTEREST/SPECIAL PROSECUTOR

Central to the integrity of the criminal justice system is a prosecuting official free of bias or conflict that would undermine faith in the independence of the office. A prosecutor's ability to ensure the guilty are held accountable, the innocent are protected and the interests of crime victims and the community are safeguarded requires such independence.

Prosecutors are elected to represent the People of the State of Michigan in their community and not any one entity or individual. Because of that unique position in the criminal justice system, disqualification is not a decision to be taken lightly.

Seeking to maintain the dignity and honor of the profession and compliance with the high standard of professionalism required to maintain the public trust, the Prosecuting Attorneys Association of Michigan (PAAM) recommends:

- Prosecutors should be knowledgeable of the Michigan Rules of Professional Conduct as to this subject, including relevant case law, statutes, and ethics opinions.
- An elected prosecutor who has a conflict will require recusal of the entire prosecutor's office. A supervising prosecutor with a conflict may require office recusal depending on the screening procedures in place.
- Procedures within a prosecutor's office should be established to address actual or potential conflicts, which include the creation of firewalls and conflict teams or supervisors to ensure conflicts are identified and necessary screening occurs. The manner in which conflicts or potential conflicts are handled should be documented. National Prosecution Standards (NDAA) 1-3.4.
- As soon as a conflict is discovered that requires the disqualification of a prosecutor's office, the prosecuting attorney should seek a special prosecutor by submitting a petition and supporting documents (e.g. police report) to the Department of Attorney General, pursuant to MCL 49.160. The petition should articulate the basis for the disqualification and rely on more than a mere claim that someone might question whether the prosecutor should be disqualified. A copy of the petition and supporting documents should be provided to the Prosecuting Attorneys Coordinating Council. If the supporting documents are voluminous, a summary of the case or investigation should be provided. The

procedure for appointment of special prosecutors as established by PAAM should be followed.

- A prosecutor should not accept appointment as a special prosecutor unless the prosecutor is confident that they possess the ability, expertise, staff, and other support and resources necessary to prosecute a case through conclusion, including any interlocutory or post-conviction appeals.
- Once the appointment of a special prosecutor is made, the disqualified prosecuting attorney should refrain from discussing the merits and any potential disposition of the case with the special prosecutor or the media. This does not limit contact between offices to insure that all relevant material is transferred to the special prosecutor. It is generally permissible for the disqualified prosecutor to provide general information to the Special Prosecutor, including information about victim services available in that county. The Special Prosecutor should be responsible for all victim notifications and ensuring that the requirements of the Crime Victim's Rights Act are observed. Additionally, the special prosecutor should notify the disqualified prosecuting attorney as to the disposition of the case upon its conclusion. Nothing in this recommendation should be construed to limit consultation by the Special Prosecutor with any victim under the Crime Victim's Rights Act.

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Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION EYEWITNESS IDENTIFICATION AND PROCEDURES

In order to ensure that identification procedures are conducted in a fair and reliable manner, PAAM recommends:

- All law enforcement agencies should adopt clear, written policies and training on photo array and live lineup administration. In addition, agencies should provide their officers with training on the variables that affect eyewitness identification, on practices for minimizing contamination, and on effective eyewitness identification protocols.
- To the extent practicable, considering the size of the agency as well as personnel and staffing issues, all law enforcement agencies should adopt blind or blinded administration of both photo arrays and live lineups as a preferred practice. However, because a fair and impartial identification procedure can be conducted by an investigator familiar with the case, a blind administrator is not required.
- Law enforcement agencies should adopt and use a standard set of easily understood instructions when engaging a witness in an identification procedure.
- Law enforcement should document a witness' level of confidence verbatim at the time of an identification.
- The identification procedure should be documented. To the extent practicable, considering the costs and availability of appropriate technology, video recording of eyewitness identification procedures is preferred.

It is significant to note that these recommendations do *not* recommend or require that a sequential or simultaneous method of conducting eyewitness identifications be adopted.

While the 2012 policy-writing guide produced by the State Bar of Michigan's Eyewitness Identification Task Force recommended a sequential method of conducting eyewitness identification procedures, the science underlying that recommendation is unsettled. According to a subsequent 2014 report by the National Academy of Sciences, the Academy specifically chose *not* to endorse sequential identification procedures as preferred over simultaneous identification procedures.

The Academy report states “... the relative superiority of competing identification procedures (i.e., simultaneous versus sequential lineups) is unresolved.” Some research has suggested that accurate identifications are lost using a sequential procedure and that simultaneous presentation is better at identifying the guilty and excluding the innocent. The Academy recommends further social science research in this area. As the science further develops, current practices will need to be reevaluated.

Based on the unsettled nature of the underlying science, PAAM makes no recommendation as to which identification procedure is preferred. Either sequential or simultaneous identification procedures can be adopted by local police agencies and prosecutors. Whichever procedure is adopted, however, the recommendations identified by PAAM will help ensure that identification procedures will be conducted in a fair and reliable manner. PAAM recommends that as additional research in this area is conducted, current practice should be reevaluated.

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Prosecuting Attorneys Association of Michigan

PROPOSED BEST PRACTICES RECOMMENDATION INVESTIGATIONS OF JUDGES

Overseeing, instituting, or reviewing a complaint of potential criminal conduct involving a judge in a prosecutor's jurisdiction raises a serious potential conflict of interest for the county prosecutor that must be carefully reviewed and considered before the prosecutor should proceed.

Among the concerns that are inherent in allegations against judges:

- That the prosecutor's independence could be threatened by a risk of retaliation by the judge, or by the judge's colleagues that sit on the bench in that county;
- The potential that a decision to decline prosecution could appear to be motivated by favoritism;
- The potential that a decision to file charges could appear to be motivated by concerns other than the impartial administration of justice.

These concerns exist not only with a decision whether to file charges, but also if charges are filed, decisions about whether a plea agreement or sentencing recommendation should be offered, as well as what terms and conditions such an offer should include.

Additionally, if a prosecutor becomes involved in reviewing a criminal complaint against a judge, the judge may be required to disqualify themself in any case involving the Prosecutor's Office.¹ Otherwise, the propriety of any judicial decision by a judge under investigation or facing charges could reasonably be questioned as either an attempt to curry favor with the prosecutor or an attempt to intimidate or threaten the prosecutor. Moreover, any conviction in such a case could be subject to attack on appeal. Disqualification of a judge from hearing cases involving the Prosecutor's Office would, in most jurisdictions, have a devastating impact on how criminal cases are heard and prosecuted in that county.

Accordingly, to avoid these potential conflicts of interest, a county prosecutor should carefully weigh the circumstances in determining whether to become involved in the investigation or review of complaints of criminal conduct by a judge in the prosecutor's jurisdiction.² As soon as a prosecutor learns of any circumstances

¹See *Rippo v Baker*, 137 S Ct 905 (2017).

²This recommendation does not apply to the Attorney General's Office. The Attorney General is uniquely situated because they have statewide jurisdiction over every judge in

encompassing possible criminal conduct by a judge, the county prosecutor should determine whether recusal of the Prosecutor's Office from any further involvement is appropriate. If recusal is appropriate, the prosecutor must promptly notify the Attorney General of the need for recusal so that the Attorney General can take necessary action. The Prosecutor should fully cooperate with the Attorney General and any investigating authority.

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the State of Michigan and the concerns that would apply to a county prosecutor that would raise a potential conflict of interest would not generally exist.



Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION OUTSIDE EMPLOYMENT AND ACTIVITIES

A full-time position as an assistant prosecuting attorney entails a full-time commitment. It requires a dedication to serving the public and working to ensure justice. It is important that our pursuit of justice not be subject to a conflict of interest that would detract from a prosecutor's primary function.

Accordingly, a prosecutor should endeavor to avoid creating unnecessary conflicts of interest that would require disqualification. In order to reduce the potential for unnecessary conflicts of interest, each prosecutor should develop a policy governing outside employment and activities of assistant prosecutors that addresses the following:

- Identify whether outside employment or activities are permissible or not. Areas of possible outside employment or activities that should be reviewed include: representation of private clients, preparation of legal documents such as wills and trusts, representation of family members in estate or other matters, teaching, board memberships, community activities, or other non-legal employment.
- If outside employment or activities are permitted, the areas of such employment or activity should be identified in advance and a procedure for notice and prior approval of such employment or activity is recommended as well as confirmation of restrictions on the use of office resources.
- Under no circumstances should outside employment or activities interfere with an assistant prosecutor's professional obligations or those of the prosecutor's office.
- Because conflicts of interest can be created by outside employment and activities of non-attorney members of the prosecutor's office, an outside employment policy should be developed for those employees.

A prosecutor may also wish to consider procedures governing work-related presentations or activities outside the office.

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attorneys. However, it is only a recommendation. A best practices recommendation may or may not be feasible or desirable to implement in every jurisdiction. There may be other methods in local jurisdictions to reach the same or similar objectives.

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Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION

PROSECUTOR AND LAW ENFORCEMENT COMMUNICATION TO MEDIA

Prosecuting attorneys and law enforcement must act in a judicious manner to ensure and maintain an impartial trial for all involved in a criminal case. The Prosecuting Attorneys Association of Michigan (PAAM) recommends:

- Prosecutors observe Michigan Rules of Professional Conduct Rule 3.6, which provides in pertinent part:

“A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materiality prejudicing an adjudicative proceeding in the matter. A statement is likely to have a substantial likelihood of materiality prejudicing an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to...”

- The character or credibility of a party, suspect or witness, or the expected testimony of a witness.
 - The possibility of a plea of guilty or the existence or contents of a confession, admission or statement given by a defendant or suspect or that person’s refusal to give a statement.
 - The performance or result of any examination or test, or the failure to submit to same, or the identity or nature of physical evidence.
 - Any opinion as to guilt or innocence of a defendant or suspect.
 - Information that is likely to be inadmissible at trial, and if disclosed would create a substantial risk of prejudice.
 - The fact that a defendant has been charged with a crime unless there is included a statement explaining the presumption of innocence.
- Rule 3.8 provides that prosecutors shall exercise reasonable care to prevent law enforcement in a criminal case from making extrajudicial statements that a prosecutor is prohibited from making under Rule 3.6. Consequently, all Prosecuting Attorney Offices should adopt clear, written policies on what may be communicated to media outlets by local law enforcement before, during and after a criminal case to comply with Rules 3.6 and 3.8. This will include, but not be limited to, guidelines for the use

of social media relative to a pending investigation, criminal proceeding, or outcome of a case. The Prosecuting Attorney shall meet with chiefs and sheriffs to clarify communications policies as needed. To the extent practicable, the Prosecuting Attorney's Office should provide police agencies with training and/or explanation of the Michigan Rules of Professional Conduct (MRPC) 3.6 and 3.8.

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Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION: RESTITUTION

Crime victims have constitutional and statutory rights to full, maximal and complete restitution from defendants who cause financial harm by their course of criminal conduct. Receipt of full restitution is one measure for victims that justice has been accomplished.

Prosecutors are champions of justice on behalf of the People of the State of Michigan in their community. Prosecutors are also advocates for victims, especially at sentencing hearings where restitution is a cornerstone of a valid sentence.

The Prosecuting Attorneys Association of Michigan (PAAM) recommends:

- Prosecutors and victim advocates should be knowledgeable of standards for defining, calculating, ordering, enforcing, collecting and disbursing restitution that benefits their crime victims, including statutes like the William Van Regenmorter Crime Victim's Rights Act (CVRA) and the Code of Criminal Procedure (CCP), and relevant case law. Prosecutors should provide local training for victim advocates, probation/parole officers, court staff and judges about restitution.
- Prosecutors should, after consultation with the law enforcement agency, support returning property to victims or rightful owners at the earliest possible date, unless the prosecutor determines a need to retain items as evidence, to protect a defendant's right to fair trial, or to otherwise comply with requirements of the CVRA (e.g., MCL 780.754(4)) or other laws. In appropriate cases, property should be photographed before release and the victim urged to retain it until the case is adjudicated.
- Restitution information can influence what charge should be issued. Police investigations should provide prosecutors with property value or victim loss information that is critical to determining the level of an appropriate charge.
- Consultation with victims should address financial losses directly and proximately caused by the crimes that might be prosecuted. Prosecutors should solicit restitution data and supporting documentation from victims early in the case, before plea negotiations have concluded whenever possible.
- Prosecutors can bridge information gaps to create a more efficient restitution process. All restitution information received by prosecutors should be

forwarded to the court or its probation staff before sentencing to assist the court ordering full, accurate restitution. Victim identification and contact information should be provided to court clerks or probation officers so restitution collections can be disbursed quickly.

- District court judges sometimes sentence defendants without presentence reports or a restitution investigation. Examples include larcenies and malicious property damage crimes. Prosecutors should assist misdemeanor courts in ordering full restitution by providing information at the earliest, most appropriate opportunity that restitution may be outstanding.
- Prosecutors should be cognizant of how their charging or plea negotiation decisions will affect the victim's opportunity to receive restitution.
- The CVRA and CCP do not provide authority for restitution in civil infractions. Before negotiating a charged crime to a civil infraction, prosecutors should carefully review and consider the impact on victim restitution.
- Restitution for losses caused by the defendant's uncharged criminal conduct should be included in the prosecutor's negotiated plea agreement, where possible and appropriate.
- Prosecutors should support imposition of full restitution orders to all people or entities that pay the direct victim's losses as provided by law, including insurance companies.
- Prosecutors should advocate for and encourage courts to use available processes to enforce restitution orders. Examples include garnishing income and tax refunds, perfecting liens on defendants' personal and real property, convening regular show cause hearings and issuing sanctions against defendants not paying restitution to their abilities, and assigning personnel dedicated to investigating and enforcing defendants' financial obligations.

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Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION SOCIAL MEDIA

Given the predominance of social media within society, it is understandable that prosecutors and staff will participate in its use. In the rapidly expanding world of electronic communication, social media can mean many things. Social media includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal website, social networking or affinity website, web bulletin board, or a chat room, as well as any other form of electronic communication.

It is essential for participants in social media to be aware that all communications made via social media are public in nature. As such, it is recommended that every prosecutor office adopt a policy addressing social media, which includes the following recommendations:

- All social media posts must comport with standards relating to ethics, harassment, discrimination, and case confidentiality. Those guidelines arise from applicable law, ethical rules, as well as individual office policies, mission and values.
- Applicable office policies include, but are not limited to, those pertaining to sexual harassment, victim's rights, confidentiality and disclosure, media policy, and those relating to the use of equipment and services, including internet policy. Posts should not disclose confidential or proprietary information, particularly regarding current or anticipated cases, or other office information.
- All social media behavior must comport with the Michigan Rules of Professional Conduct. Including but not limited to, MRPC 3.6 – Trial Publicity and MRPC 3.8 – Special Responsibilities of a Prosecutor.
- The highest level of professionalism is expected from prosecutors using social media. As with all public interactions, prosecutors must apply common sense. Posts should be appropriate, and contain respectful content. It is unacceptable to use ethnic slurs, personal insults, obscenity, or engage in conduct via social media that would reflect negatively on the prosecutor's office, and/or otherwise embarrass the County.
- Prosecutor staff should not utilize office logos and/or images, including those of staff members, unless authorized to do so.

- Posts should be honest, accurate, and express only personal opinions. Prosecutor staff should not represent themselves as a spokesperson for their office. All media inquiries should be forwarded to the appropriate supervisor or designated staff member. Posts should be clear that any views do not represent the views of the elected Prosecutor, the county, and/or fellow co-workers.

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Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION Canine Advocates

In *People v. Johnson*, 315 Mich App 163 (2016), the Michigan Court of Appeals held that courts possess the inherent authority to control their courtrooms, including whether a support animal can be used to assist a witness instead of a support person. In an effort to ensure the state of the law did not change, the legislature enacted PA 282 of 2018, which codified the *Johnson* ruling. As a result, canine advocates are now permitted in courts across the state for children and vulnerable adults who are testifying or being interviewed.

With the proliferation of canine advocates in prosecutor's offices across the state, prosecutors have an obligation to ensure that these canine advocates and their handlers are all meeting the same minimum standards for a proper canine advocate program. As such, the Prosecuting Attorneys Association of Michigan (PAAM) recommends:

- The canine advocate must be trained to meet the Assistance Dog International standards for guide or service work pursuant to PA 282 of 2018.
- The canine advocate must be covered under a liability insurance policy.
- Prosecutors should adopt office practices and procedures to assist in satisfying these standards.

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