7-1-2018

ETHICAL RULES GOVERNING THE CONDUCT OF FEDERAL PROSECUTORS IN THE UNITED STATES: A MULTI-TIERED APPROACH TO ENFORCE HIGH STANDARDS OF CONDUCT

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In the United States, federal prosecutors are subject to ethical rules and codes of professional conduct promulgated, interpreted, and enforced by three distinct governmental entities: State Supreme Courts, United States District Courts (USDC), and the United States Department of Justice (DOJ). The history and development of this multi-level system of ethical codes and enforcement mechanisms is beyond the scope of this article, but it is generally the result of both the American federalist system of government and the separation of powers doctrine enshrined in both the United States Constitution and the constitutions of the various states.

Historically, a state’s judiciary was accorded the role of establishing the criteria for and providing oversight of the practice of law within that state. On the other hand, the national executive branch is vested exclusively with the constitutional mandate to enforce the laws of the United States uniformly throughout the nation. One of the ways that the executive branch enforces the law is through its prosecutorial authority. And so, the national executive branch has a legitimate interest in establishing a single code of conduct for its prosecutors who enforce national laws and promote national policies. This divergence of interests between a state judiciary’s role in regulating the practice of law in its state and the national executive branch’s role in enforcing national laws in federal courts creates a tension inherent in the American system of federalism. Compounding this state-federal tension, is the constitutionally designed conflict — created by the separation of powers doctrine — between two co-equal branches of the national government: the judicial branch, with its interest in governing the conduct of lawyers practicing in its courts, and the executive branch, with its interest in exercising its constitutionally delegated authority and responsibility, free of encroachment by another branch. Thus, federal prosecutors hold a unique position in American government of being both officers of the judicial branch (as lawyers) and officers of the executive branch (as public prosecutors). They have responsibilities and obligations to society and to
the judicial system that other lawyers do not have. Moreover, their role in upholding constitutional guarantees and the rule of law is more direct and immediate than other executive branch public servants. Prosecutors in general, and federal prosecutors specifically, have a great deal of authority, largely because of their broad discretion in investigating and charging criminal offenses.5

Because history has shown that an overabundance of discretionary authority often leads to arbitrary, corrupt, and unjust decisions, ethical regulations are seen as an important component in protecting the governed from such actions. And so, rules establishing, governing, and adjudicating the professional conduct of prosecutors, apart from criminal and civil liability, are viewed as necessary to maintaining a fair and impartial administration of criminal justice. Furthermore, implicit in any system of fair and impartial decision making is the proposition that no one should be the judge of his own case. That is to say, any assessment of a prosecutor’s professional conduct should be made by, or at least be subject to review by, a disinterested regulatory body. It is within this framework that the rules and enforcement regimen governing the ethical and professional conduct of federal prosecutors has developed. I will now discuss briefly some of the provisions of those codes and the disciplinary mechanisms designed to assure compliance.

State Bar Rules of Professional Conduct

One of the requirements of every prosecutor in America, including federal prosecutors, is that the prosecutor must be admitted to practice law in at least one state.6 The requirements for admission to practice law in a particular state are established by the state supreme court in that state. In every state, a candidate for admission to practice law must have, among other things, earned an undergraduate degree (4-year degree — usually called a bachelor’s degree) from an accredited college or university, earned a law degree (3-year degree — usually called a juris doctor) from an approved law school, and passed a two-day (sometimes three-day) state bar examination. Additionally, to maintain bar membership, every lawyer, including prosecutors, must comply with mandatory continuing legal education (CLE) requirements established by the state supreme court and administered by the state bar association.7 And, finally, every lawyer, including prosecutors, must abide by the state’s rules of professional conduct.

Each of the 50 states and the District of Columbia have enacted Rules of Professional Conduct which govern the conduct of lawyers admitted to practice law in that state. Nearly all of the various state rules of professional conduct closely follow the provisions of the American Bar Association’s Model Rules of Professional Conduct (Model Rules). Because of that, in discussing particular rules, I will refer to the provisions of the Model Rules. The state rules of professional conduct are promulgated by the state supreme court and enforced by that court through a disciplinary board of the state bar association. Many of the rules deal with the manner in which lawyers engaged in the private practice of law must relate to and protect the interests of their clients. There are several rules, however, that are directed specifically to the conduct of prosecutors or which can directly impact the manner in which prosecutors may act in their official capacity.

Model Rule 3.8 applies only to prosecutors. Among other things, it prohibits a prosecutor from filing a charge that the prosecutor knows is not supported by probable cause; requires a prosecutor assure that an accused has been advised of his legal rights and been given a reasonable opportunity to obtain an attorney; requires a prosecutor to timely disclose to the defense all evidence or information known to the prosecutor and law enforcement agencies assisting on the case that tends to negate the guilt of the accused or mitigates the offense or punishment; prohibits a prosecutor from making any extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused (and requires the prosecutor to take reasonable care that law enforcement personnel assisting the prosecutor on the case not make any such comments); and requires a prosecutor who knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense for which he was convicted to disclose this evidence to the proper court or other authority, and to take or cause to be taken appropriate investigative or remedial action.

There are other rules which, although not directed solely to prosecutors, may affect the manner in which a prosecutor performs her/his official duties. Model Rule 4.2 generally prohibits a lawyer, including a prosecutor, from communicating with a person who is represented by a lawyer on the subject matter of the representation — either before or after charges have been filed — without consent of the other lawyer or the court. This may have implications in the manner in which undercover operations are conducted, since prosecutors are responsible for the actions of law enforcement agents acting under their direction. Model Rule 3.3 requires a lawyer, including a prosecutor, to disclose to the court any legal authority adverse to the position taken by the lawyer/prosecutor in the proceeding; forbids the lawyer/prosecutor from using false evidence or testimony (and requires immediate correction of any false testimony); and requires a lawyer/prosecutor to disclose in an ex parte proceeding all information which would enable the court to make an informed decision.
Model Rule 8.4 makes it an ethical violation for a lawyer/prosecutor to commit certain acts that violate some other rule or law. For example, it is an ethical violation for a lawyer/prosecutor to commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; to engage in conduct involving dishonesty, fraud, deceit or misrepresentation; to engage in conduct that is prejudicial to the administration of justice; to state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the rules of professional conduct or other law; to knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; and to engage in conduct that the lawyer/prosecutor knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

When a complaint or other allegation of prosecutorial misconduct is referred to a state bar,9 the applicable state supreme court (usually through a state bar association disciplinary board – although the supreme court is the final arbiter) interprets the rules of professional conduct, adjudicates whether the conduct in question violates the rules as interpreted, and metes out the punishment for the violation.10 A violation of the rules of professional conduct may result in an admonishment, a public censure, a suspension, or disbarment, depending on the rule violated and the egregiousness of the violation.11 Disbarment or suspension will likely result in a federal prosecutor’s loss of her/his job since bar membership is a requirement for being a federal prosecutor. Indeed, it also means that she/he would not be able to engage in the practice law at all.12 So clearly, disbarment, or even a temporary suspension of bar membership, is a significant penalty.

State courts are not the only entities that promulgate, interpret, and enforce ethical rules for lawyers. Every federal court has the authority (and has exercised that authority) to promulgate local rules governing the practice and conduct of lawyers, including federal prosecutors, who appear in that court. In addition to the particular procedural rules governing the conduct of attorneys in federal court, every USDC has adopted, as part of its local rules of court, the state rules of professional conduct for the state in which the district court is located. Thus, a federal prosecutor is subject to the interpretation and enforcement of the state rules of professional conduct by the state in which the prosecutor is admitted to practice, and by the district court in which the prosecutor appears. And since many prosecutors appear in district courts located in states different from the state in which the prosecutor holds bar membership, a prosecutor may be subject not only to interpretations of the same rules by different tribunals, but also to two sets of rules for the same conduct.13

Moreover, in 1998, the United States Congress passed a statute that states, “An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”14 That statute also required the Attorney General to make rules for DOJ assure compliance with the statutory mandate.15 So now, not only is a federal prosecutor required to comply with the rules of professional conduct in the state or states in which that prosecutor is admitted to practice, as interpreted and enforced by the state supreme court in that/those state(s), and to comply with the rules of professional conduct of the state where that prosecutor appears in court, (regardless of the state where the prosecutor is admitted), as interpreted and enforced by the USDC, but also must comply with the rules of professional conduct in effect in each state where the prosecutor engages in the prosecutor’s duties,16 as interpreted and enforced by DOJ.

If a USDC finds that a federal prosecutor engaged in conduct violative of the rules of professional conduct (which are part of the local rules of court), it may report such violation to the appropriate state bar and to DOJ. Additionally, the court may impose its own penalty against a prosecutor, including a public admonishment, a monetary fine, and temporary or permanent exclusion from practice before that court.17

Department of Justice Standards of Conduct

In addition to the rules of professional conduct, a federal prosecutor is also subject to additional ethical rules formulated, interpreted, and enforced by DOJ. Those rules include executive branch-wide standards of conduct promulgated by the Office of Government Ethics,18 as supplemented by DOJ specific rules, which generally address (1) financial, familial, and occupational conflicts of interest; (2) fraud, waste, and abuse of government resources; and (3) the fair, impartial, and ethical execution of official duties. These rules are premised on fourteen general principles enunciated in an executive order. Those principles are: 1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain; 2) Employees shall not hold financial interests that conflict with the conscientious performance of duty; 3) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such
information to further any private interest; 4) An employee shall not, except pursuant to such reasonable exceptions as are provided by regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee’s agency, or whose interests may be substantially affected by the performance or nonperformance of the employee’s duties; 5) Employees shall put forth honest effort in the performance of their duties; 6) Employees shall make no unauthorized commitments or promises of any kind purporting to bind the Government; 7) Employees shall not use public office for private gain; 8) Employees shall act impartially and not give preferential treatment to any private organization or individual; 9) Employees shall protect and conserve Federal property and shall not use it for other than authorized activities; 10) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities; 11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities; 12) Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those — such as Federal, State, or local taxes — that are imposed by law; 13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap; 14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order. 19 DOJ has also issued additional rules applicable to federal prosecutors which deal primarily with restrictions on engaging in certain political activities, post-government employment restrictions, restrictions in soliciting or seeking employment while in government service, and restrictions in engaging in outside employment and other activities. Those rules also require federal prosecutors to receive annual ethics training. A federal prosecutor is subject to disciplinary action by DOJ for violating the DOJ standards of conduct.

Department of Justice Enforcement/Disciplinary Mechanism

The DOJ Office of Inspector General (OIG) investigates any evidence or non-frivolous allegation of waste, fraud, abuse or other misconduct by federal prosecutors, other than evidence or allegations that relate to the exercise of their authority to investigate, litigate, or provide legal advice. Evidence or non-frivolous allegations of serious misconduct by federal prosecutors that relate to the exercise of their authority to investigate, litigate, or provide legal advice are reported to and investigated by DOJ Office of Professional Responsibility (OPR). 21 Allegations of misconduct may be reported by judges, opposing attorneys, other government personnel (including fellow prosecutors and law enforcement officers), litigants or other participants in judicial proceedings, and members of the public. OPR also regularly conducts searches of legal databases to identify opinions containing judicial findings of misconduct against federal prosecutors.

When OPR receives a complaint or allegation of professional misconduct by a federal prosecutor, it will conduct an immediate preliminary review. If a judge makes a finding of misconduct by a federal prosecutor or requests an inquiry by DOJ into possible misconduct, OPR will ordinarily conduct an expedited inquiry without awaiting further judicial or appellate proceedings.

If OPR concludes that further investigation is warranted, it will open an investigation. During the investigation process, interviews are ordinarily conducted by two OPR attorneys. The interview of the subject attorney is transcribed by a court reporter, and the interviews of other witnesses are digitally recorded. All federal prosecutors have an obligation to cooperate with OPR investigations and must respond to questions posed during the course of an investigation upon being informed that their statements will not be used to incriminate them in a criminal proceeding. Prosecutors who refuse to cooperate with OPR investigations may be subject to formal discipline, including removal from office.

At the conclusion of the investigation, OPR prepares a report of investigation in which it makes findings of fact and reaches conclusions as to whether the subject attorney committed professional misconduct. OPR may find the subject attorney committed professional misconduct by: (1) intentionally violating a clear and unambiguous obligation or standard imposed by law, applicable rule of professional conduct, or DOJ regulation or policy; or (2) recklessly disregarding his obligation to comply with that obligation or standard. OPR may also find that the attorney exercised poor judgment or made a mistake. A poor judgment finding may lead to disciplinary action; a mistake finding does not.

When OPR determines that a federal prosecutor has intentionally or recklessly committed professional misconduct, it reports those findings to both the appropriate state bar disciplinary board(s) and to DOJ Professional Misconduct Review Unit (PMRU). 22 The Attorney General created the PMRU in 2011 and vested it with the authority to review OPR’s findings and determine whether those findings are supported by the evidence and the applicable law. If the PMRU upholds the findings of OPR, it decides what discipline is appropriate. Any disciplinary action
more severe than a 14-day suspension (which is without pay), may be appealed by the prosecutor to the Merit Systems Protection Board (MSPB). Federal prosecutors do not have to navigate these seemingly complex and potentially conflicting rules alone. Each USAO and DOJ component office has a designated ethics officer (DEO) who can assist federal prosecutors in deciding whether a course of conduct implicates any ethical rules. Additionally, DOJ has a Professional Responsibility Advisory Office (PRAO). PRAO provides advice to government attorneys and the leadership at DOJ on issues relating to professional responsibility; provides coordination with the litigating components of DOJ to defend federal prosecutors in any disciplinary or other hearing where it is alleged that they failed to meet their professional responsibility obligations; serve as liaison with the state and federal bar associations in matters related to the implementation and interpretation of 28 U.S.C. 530B; and conduct training for federal prosecutors to provide them with the tools to make informed judgments about the circumstances that require their compliance with 28 U.S.C. 530B.

Conclusion

This is a brief overview of the ethical rules and standards of conduct that federal prosecutors must adhere to in executing their prosecutorial authority. While it may seem strange, and perhaps inefficient, that there is not a uniform code of conduct, promulgated, interpreted and enforced by a single regulatory body, such is the nature of the American system of government. Despite the apparent complexity and overlap of regulatory and disciplinary authority, this multi-level approach to defining and enforcing a prosecutor’s ethical obligations has thus far provided an effective system of insuring that the broad discretion of prosecutorial authority is exercised fairly, impartially, and in accordance with constitutional guarantees. It is against that standard that any code of prosecutorial ethics should be measured.

REFERENCES

1 In this article, I will use the term “federal prosecutor” to mean Assistant U.S. Attorneys (AUSAs) and attorneys in the Department of Justice (DOJ) who are assigned to the various divisions of the Department of Justice, e.g. Criminal Division, Tax Division, Anti-trust Division, and Environment and Natural Resources Division. AUSAs are employed in a United States Attorney’s Office (USAO) located in a federal judicial district, e.g. Central District of Illinois. Each federal judicial district is geographically contained within a single state. Some states have only one federal judicial district within its borders, others have more than one. AUSAs generally only bring cases in the United States District Court located in the judicial district in which their USAO is located. DOJ Division attorneys are usually assigned to offices located in Washington, D.C. They bring cases, either alone or in conjunction with a USAO, in numerous federal judicial districts. Both AUSAs and DOJ Division attorneys are employees of the United States Department of Justice, which is headed by the Attorney General of the United States, who reports directly to the President of the United States.

2 In this article I will refer to the highest court of the state as the state supreme court. Not every court of last resort in a state is called the Supreme Court, but most are, and they generally have the same authority under the applicable state constitution as the U.S. Supreme Court does under the U.S. Constitution.

3 In the United States, the terms “lawyer” and “attorney” are used interchangeably. Both terms refer to persons who are admitted to practice law in one or more states.

4 I use the term “public prosecutor” to refer to a lawyer employed by a governmental authority to represent the governmental authority in criminal cases. It does not have the meaning of public prosecutor in the Criminal Procedure Code of the Republic of Uzbekistan.

5 In United States v Armstrong, the U.S. Supreme Court observed: The Attorney General and United States Attorneys retain “broad discretion” to enforce the Nation’s criminal laws. They have this latitude because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to “take Care that the Laws be faithfully executed.” U.S. Const., Art. II, § 3; see 28 U.S.C. §§ 516, 547. As a result, “[t]he presumption of regularity supports” their prosecutorial decisions and, “in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.” In the ordinary case, “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”

6 State prosecutors must be admitted to practice law in the state in which they work. Federal prosecutors need only be admitted to practice law in one state, which does not necessarily have to be the state where they work. Many federal prosecutors are admitted to practice law in multiple states.

7 A state bar association is an association that represents or seeks to represent the attorneys practicing law in a particular state. Most bar associations derive their power from legislative statutes enacted by the state legislature and/or through the power of the state court system to regulate practice before it. Their functions often include administration of the state bar examination, regulation of Continuing Legal Education and other requirements, and discipline of attorneys for ethical or other violations. State bars typically provide services for members such as maintaining a directory of attorneys in the state, facilitating social events for attorneys, publishing a bar journal and providing classes to fulfill these CLE credits requirements.

8 An ex parte proceeding is one in which only one side of a legal action appears before the judge. For example, when a prosecutor makes an application to a court for the issuance of an arrest warrant, a search warrant, or a wiretap order, that is
an ex parte proceeding – only the prosecution, not the defense, appears before the judge.

8 Anyone can make a referral to a state bar alleging prosecutorial misconduct – another lawyer, a litigant or other participant of a judicial proceeding, a client, a court, a member of the public, and, in the case of a federal prosecutor, the Department of Justice.

9 Each state bar has adopted a disciplinary procedure which governs the receipt, investigation, and adjudication of allegations of ethical violations.

10 Suspension is the temporary loss of the admission to practice law. Disbarment is the permanent loss of the admission to practice law.

11 Because most state bar associations will recognize a suspension or disbarment of another state bar, a lawyer’s suspension or disbarment by one state bar will effectively result in a concomitant action by all other bar associations of which the disciplined lawyer is a member.

12 While most of the state rules of professional conduct are consistent with the Model Rules, and, therefore, are very similar, there are some important differences which can present a prosecutor with conflicting rules for the same conduct.

13 Title 28 United States Code, Section 530B (Note: All the statutes, rules and regulations cited in this article or in these endnotes are available on the internet as public source information.)

14 Those rules are codified in Title 28, Code of Federal Regulations, Sections 77.1 – 77.5

15 Since many federal investigations and cases involve criminal conduct that occurs in more than one federal judicial district, federal prosecutors often are involved in investigative actions in states and districts other than the district in which the case is charged. For instance, a crime charged in one district may involve the execution of a search warrant in a different state and district from the one where the defendant is ultimately charged.

16 Any penalty imposed by a USDC against a prosecutor for a violation of the local rules of court is subject to review on appeal.

17 The Office of Government Ethics (OGE) is an Executive Branch organization which provides leadership and oversight of the Executive Branch ethics program designed to prevent and resolve conflicts of interest. OGE is headed by a Director who is appointed to a five-year term by the President. According to its website, “OGE oversees the executive branch ethics program and works with a community of ethics practitioners made up of nearly 5,000 ethics officials in more than 130 agencies to implement that program. When government decisions are made free from conflicts of interest, the public can have greater confidence in the integrity of executive branch programs and operations. OGE’s mission is part of a system of institutional integrity in the executive branch.”

18 The principles were established by Executive Order 12731 of October 17, 1990. The Standards for Ethical Conduct for Employees of the Executive Branch issued by OGE to implement this executive order are codified in Title 5, Code of Federal Regulations, Part 2635 (effective January 1, 2017).

19 The DOJ OIG is a statutorily created independent entity whose mission is to detect and deter waste, fraud, abuse, and misconduct in DOJ programs and personnel, and to promote economy and efficiency in those programs. The OIG investigates alleged violations of criminal and civil laws by DOJ employees and also audits and inspects DOJ programs. The Inspector General, who is appointed by the President subject to Senate confirmation, reports to the Attorney General and Congress.

20 OPR was established by order of the Attorney General to ensure that DOJ attorneys and law enforcement personnel perform their duties in accordance with the highest professional standards expected of the nation’s principal law enforcement agency. Pursuant to 28 C.F.R. § 0.39a, the Counsel for OPR reports directly to the Attorney General and Deputy Attorney General. In addition to the Counsel, OPR is staffed by a Deputy Counsel, three Associate Counsels, and between 20-25 Assistant Counsels. While OIG and OPR have separate jurisdictional authority, OIG is required to notify OPR of the existence and results of any OIG investigation that reflects upon the professional ethics, competence or integrity of a DOJ attorney.

21 The PMRU is a component within the DOJ Office of the Deputy Attorney General (ODAG).

22 The MSPB is an independent quasi-judicial agency established by Congress in 1979 to protect federal civil service employees (which includes non-presidentially appointed federal prosecutors) against partisan political and other prohibited personnel practices and to ensure adequate protection for federal employees against abuses by agency management. It has jurisdiction to review certain personnel actions to determine whether the action is prohibited by the Civil Service Reform Act.

23 There has been a lively and ongoing debate among academics and practitioners on whether there should be single ethical code for federal prosecutors. See, e.g., Bradley T. Tennis, Uniform Ethical Regulation of Federal Prosecutors, Yale Law Journal, 120:144 (2010).