VIRGINIA ASSOCIATION OF COMMONWEALTH'S ATTORNEYS

"THE RIGHT THING - EVERY TIME"

ETHICAL GUIDELINES FOR VIRGINIA'S PROSECUTORS

Virginia Association of Commonwealth's Attorneys

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Dear Colleagues:

I consider it a privilege to distribute the first edition of the Virginia Association of Commonwealth's Attorneys' Ethics Handbook. This Handbook collects, in one place, the most significant cases and rules that govern and direct ethical behavior by prosecutors in the Commonwealth.

Elected Commonwealth's Attorneys have the weighty responsibility of instilling and maintaining a culture of adherence to the ethical rules and regulations of our profession within their individual offices. I sincerely believe that, as VACA president, I have a duty of instilling a culture of adherence to the ethical rules and regulations of our profession throughout the Commonwealth. It is my hope that this handbook is a significant step towards instilling that culture and that future VACA presidents will continue to distribute updated versions of it well after my term is completed.

The Ethics Handbook was developed and edited by Bryan Porter, Commonwealth's Attorney for the City of Alexandria in conjunction with VACA's Justice and Professionalism Committee, co-chaired by Commonwealth's Attorney Theo Stamos of Arlington/Falls Church and Richmond Commonwealth's Attorney Michael Herring. Their leadership served as the impetus for the creation of this booklet. This Ethics Handbook is a valuable contribution and I am pleased to recommend it to every prosecutor in the Commonwealth.

This handbook is designed to serve as a supplement to existing training that is conducted by the Commonwealth's Attorney's Services Council (CASC). New assistants are reminded that VACA and CASC are different entities. VACA is a private association of all Virginia prosecutors, while CASC is a state-funded agency responsible for the innovative training of Commonwealth's Attorneys. VACA is lucky to have a close relationship with CASC, an agency that is staffed by outstanding and dedicated public servants, and which has a nationwide reputation for excellence.

I am confident that this handbook will prove useful as both a quick reference guide and as a starting point for essential conversations about our ethical obligations and how we can best serve the citizenry of the Commonwealth.

Respectfully yours,

Eric Olsen
VACA President
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Introduction

On November 21, 1945, Robert H. Jackson rose to make his opening statement in the criminal trial of Nazi war criminals in Nuremburg, Germany. It would be difficult to conceive of a more grave criminal case - or a larger stage for a prosecutor - than one aimed at holding the authorities of the most evil regime in history accountable for their actions.

In our profession, Jackson is remembered primarily for a quote about the qualities of an outstanding prosecutor that comes from a speech he gave while serving as Attorney General of the United States. While the quote is quite memorable - a portion of it is cited later in this Handbook - Robert H. Jackson should be remembered for far more than one paragraph of one speech.

Jackson never went to law school. Instead, he read for the bar and worked as a self-proclaimed "country lawyer" in his upstate New York hometown. By the end of his career, however, on the strength of his own abilities, he had served as Solicitor General, Attorney General and later as a Supreme Court Justice. Given his reputation for fairness and integrity, President Roosevelt asked him to serve as the lead prosecutor for the Nuremburg Trials.

Never before had such a trial been attempted. Instead, in previous wars, the victorious side simply summarily executed the leaders of the vanquished foe. Jackson, however, thought it morally imperative that a trial be held - a trial that would temper the hand of vengeance and force the Allies to prove the culpability of the Nazis before administering punishment.

In the very first paragraph of his opening statement, Jackson said the following words:

> "The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish are so calculated, so malignant and so devastating that Civilization cannot tolerate their being ignored because it cannot survive them being repeated. That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of law is one of the most significant tributes that Power has ever paid to Reason."

In addition to being simple and powerful, the last words of this opening paragraph serve as the paradigm of what criminal prosecution is all about. In our criminal justice system, Power pays tribute to Reason. Although the police have the physical power to arrest someone and detain them indefinitely without charge, reason and the Constitution require due process protections such as a speedy and public trial and indictment by a Grand Jury. Although it may be expedient to presume the accused guilty and require him to prove his innocence, reason demands the converse: that the accused be presumed innocent, that he need not utter a single word in his own defense and that the prosecution prove every element of each charged offense beyond a reasonable doubt to the satisfaction of a unanimous jury of the defendant's peers.

As an Assistant Commonwealth's Attorney, you wield enormous power. That power, however, must always pay tribute to reason. For instance, you have the theoretical ability to conceal impeachment evidence in order to increase your chances of "winning" a case, but reason - and the rule of law - demand that you disclose such evidence in order to ensure a fair trial.

In the Nuremburg trials, 22 defendants were tried. 12 were convicted and sentenced to death. Seven defendants were convicted and sentenced to prison terms.

More telling is the fact that three defendants were acquitted entirely and set free. That three accused Nazi war criminals - people who could have easily been summarily hanged without any pretense of a trial - were instead acquitted is a shining example of the rule of law and power's submission to reason.

Robert H. Jackson always strove to do the right thing in every case.

You should follow that example.

The Right Thing - Every Time

> *"The difference in our roles as advocates derives from the degree of our authority and the disparity of our obligations. Defense counsel's legitimate and necessary goal is to achieve the best possible result for his client. His loyalty is to the individual client alone. The prosecutor, however, enters a courtroom to speak for the People - and not just some of the People. The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of 'The People' includes the defendant and his family and those who care about him. It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name."*

Lindsey v. Wyoming, 725 P.2d 649 (Wyo. 1986) (quoting *Commentary On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537–39 (1986)).

The daily decisions prosecutors make, such as whether to charge a citizen with a crime or how to dispose of a criminal case, carry with them serious consequences. Every day, Virginia's prosecutors are empowered to make important decisions that impact criminal defendants, victims of crime, witnesses and society at large. It is the sober responsibility of every Assistant Commonwealth's Attorney to diligently, competently and justly exercise the power entrusted to them by virtue of their office.

A defense attorney bears the responsibility of protecting one person: her client. The sole duty of a defense attorney is securing the best possible outcome in her client's criminal case, consistent with the law and the Rules of Professional Conduct. A judge protects the parties' rights and the public's right to the proper resolution of pending cases. A prosecutor, however, is responsible for seeking **the**

truth in every single case. In a very real sense, the prosecutor is the public defender.

By virtue of their office, prosecutors are uniquely situated to do the right thing - every time.

What does doing the right thing every time mean?

It means that you must always remember that you possess the power to alter the lives of many people. Criminal defendants, victims, and their families and friends, and the community at large are all impacted by your decision to bring or pursue a criminal charge. A criminal defendant is more than a name on an indictment; he is a flesh and blood person whose life will be inalterably changed by the initiation of a criminal charge against him. Therefore, you must never instigate or maintain a charge capriciously.

It means you must keep an open mind. Not every person who is suspected should be arrested, not every arrestee should be prosecuted, not every case should be tried and you need not win every trial. Your success will not be measured by "won-lost" records, the number of convictions you obtain or by the length of a sentence recommended by a jury. Instead, your success is judged by how just the outcome of a particular case is. In many cases, the just decision - the "right" decision - is for you to decline to charge a case or to decline to maintain a prosecution. The mark of success your profession is the elusive concept known as “justice.”

It means you have the freedom - and with it, the concomitant ethical duty - not to bring a case to trial unless you have diligently sought the truth and are convinced of the defendant's guilt. Even when you are convinced of guilt, you must remember that you are neither omniscient nor infallible. Throughout the pendency of a criminal matter, you should constantly question the evidence and your own assumptions, accounting for confirmation bias and other logical fallacies. Like all lawyers, you have an ethical duty to zealously advocate for your client. But, unlike other lawyers, the client you represent is the public, and your client's interests are not served by your winning every case that appears in your in-box. A conviction serves the public's interest only if the defendant is in fact guilty and has received due process.

It means you must see your job in the following light - you seek the truth, tell the truth and let the chips fall where they may in every single case to which you are assigned. When a prosecutor wins a trial, she can sleep at night because the outcome - with its awesome consequences - is the product of her best effort and the fairest system humans have ever devised. When she loses a trial, as long as she gave her best effort, she can still sleep soundly for the same reasons. A prosecutor succeeds just as much when an innocent person is exonerated as when a guilty person is held accountable.

It means you realize that you "build your brand" - that is, you create your professional reputation for fair-dealing - every day you report to work. You can spend years "building your brand" and establishing your professional reputation,

and then lose it entirely through a single act of unethical behavior. You must work every day towards building a reputation of trust, fairness and candor with the judiciary, the defense bar and the public.

It means that elected Commonwealth's Attorneys and their Chief Deputies set the tone. Elected prosecutors have the weighty responsibility of instilling and maintaining a culture of adherence to the ethical rules and regulations of our profession within their individual offices. Furthermore, elected prosecutors must ensure that their assistants adhere to the rules and regulations and receive regular training and instruction on prosecutorial ethics. Finally, elected Commonwealth's Attorneys, cognizant of the public trust inherent in their office, must be vigilant for and intolerant of unethical behavior by their assistants.

It means that, above all else, you must always remember that a dedication to the rule of law and the ethical rules of professional conduct is your prime directive.

Rules of Fairness and Ethical Conduct

The ethical rules and responsibilities that govern our profession derive from and are defined by many sources. These include, of course, the *Rules of Professional Conduct* promulgated by the Virginia State Bar. These mandatory rules are also construed by legal ethics opinions promulgated by the Bar's Standing Committee on Legal Ethics. Prosecutors are encouraged to view the *Rules* as a floor for ethical conduct, not a ceiling.

Our ethical obligations are shaped by a plethora of other authorities, including statutes and the Rules of the Supreme Court. Case law plays a significant role; the best examples of which are the interrelated United Supreme Court decisions in *Brady v. Maryland* and *Giglio v. United States,* with which you should be intimately familiar. These important cases, which must be read and re-read by all prosecutors, outline a defendant's constitutional rights to receive all exculpatory and impeachment evidence from the Commonwealth in a timely manner.

To be certain, not every mistake made by a prosecutor in applying these doctrines, and not every error in judgment, can fairly be deemed a breach of ethical obligations. However, deliberate violation of these rules of fairness, or willful ignorance of them, constitutes an ethical failure.

Rules of Professional Conduct

Effective November 1, 2012, the Virginia State Bar adopted a new, updated version of the Rules of Professional Conduct to bring Virginia's ethical rules more in line with the American Bar Association's *Model Rules of Professional*

Responsibility. Although all of the *Rules* apply to prosecutors, some have little relevance to criminal prosecution, because they regulate the private practice of law, fees and relationships with individual clients. The complete *Rules of Professional Conduct* can be accessed through the Virginia State Bar's website at: http://www.vsb.org/pro-guidelines/index.php/rules/preamble/.

In particular, prosecutors should be familiar with Rule 3.8, which is entitled *Additional Responsibilities of a Prosecutor*. Again, this rule sets the minimum requirements of ethical behavior for prosecutors and should not be read as a series of aspirational goals. This rule holds that a prosecutor shall:

1) Not file or maintain a charge that the prosecutor knows is not supported by probable cause;
2) Not take advantage of an unrepresented defendant;
3) Not instruct a person to withhold information from the defense after a party has been charged with an offense;
4) Make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment; and
5) Not direct or encourage… persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial statement that the prosecutor would be prohibited from making… .

In addition to the actual text of Rule 3.6, prosecutors should read and be familiar with the content of the Comments to the Rule. These Comments may be found immediately after the text of the Rule on the Virginia State Bar website.

For your day-to-day practice, however, most ethical principles underlying the *Rules* can be distilled to a few common-sense ideas of fairness and professionalism.

Be prepared. You must acquire the "legal knowledge, skill, thoroughness and preparation necessary" to professionally prosecute the cases to which you are assigned. (Rule 1.1).

Be on Time. You must "act with reasonable diligence and promptness." (Rule 1.3).

Tell the truth. You must be candid about the facts and the law with judges, opposing counsel and other people associated with the criminal justice system, such as victims, witnesses and court personnel. In representing the Commonwealth, you must not "knowingly make a false statement of fact or law to a tribunal" or "offer evidence you know is false." In addition to accurately stating the law that is applicable to a case, you have the further duty to disclose "controlling legal authority… adverse" to your position, although you may also make a good-faith argument for a change in the law. (Rule 3.3). You are never allowed to make a "false statement of fact or law" to any person, including opposing counsel. (Rule 4.1). When you are speaking with an unrepresented person, you must not misrepresent your role in the matter or state or imply that you are disinterested. (Rule 4.3).

Don't reveal confidential information. With certain exceptions, you must not reveal confidential information that "would be likely to be detrimental to the client…" (Rule 1.6). This rule is drafted with the private practitioner and client in mind, but maintaining confidentiality is even more important for prosecutors. Careless or unauthorized disclosure of the sensitive information prosecutors routinely acquire may compromise investigations, ruin reputations and, in extreme circumstances, even cost lives. Some unauthorized disclosures, such as disclosures related to the activities of an investigative grand jury, may result in criminal prosecution.

Don't prosecute without probable cause, As a prosecutor, you are specifically forbidden to "file or maintain a criminal charge that (you) know is not supported by probable cause." (Rule 3.8). Even if probable cause to charge exists, you may not "file… (or) initiate criminal charges… or take other action… when (you) know or when it is obvious that such action would serve merely to harass or maliciously injury another." (Rule 3.4). Finally, you must never "present or threaten to present criminal… charges solely to obtain advantage in a civil matter" regardless of whether probable cause exists. (Rule 3.4).

Don't make frivolous arguments. You must not "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous… ." (Rule 3.1).

Comply with procedural and evidentiary rules. When appearing before a tribunal, you must not "knowingly disobey or… disregard a standing rule or a ruling

of a tribunal made in the course of a proceeding" or "intentionally… violate any rule of procedure or of evidence… ." Furthermore, you may not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law" or "fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." Finally, at trial, you are not allowed to "allude to any matter that (you do) not reasonably believe is relevant or that will not be supported by admissible evidence… ." (Rule 3.4).

Be fair. For example, you may not: obstruct another party's access to evidence; advise a witness to hide or leave the jurisdiction to avoid testifying; knowingly use false testimony or evidence; pay or offer to pay compensation to a witness contingent on the content of the witness' testimony or the outcome of the case; or act as an unsworn witness in a proceeding and assert personal knowledge of facts at issue. (Rule 3.4).

Don't communicate with represented persons. You must not communicate about the subject of the representation with a person you know "to be represented by another lawyer in the matter." (Rule 4.2). Furthermore, you cannot request that your agent do what you ethically cannot. With regards to criminal prosecutions, you should consider law enforcement officers your agents.

Be courteous and respectful. When appearing in court proceedings, you "shall not engage in conduct intended to disrupt a tribunal." (Rule 3.5).

Protect the integrity of the court. You must not engage in unauthorized *ex parte* communications with a judge or her staff regarding the merits of a matter

before the court. During the pendency of a matter, whether or not you are a participant, you must not engage in, or cause another to engage in, prohibited communications with a sitting or prospective juror. Even after the matter has been concluded, you may not communicate with a juror if such communication is prohibited by a court order or if the juror has made known to you her desire not to communicate. You must promptly reveal to the court improper conduct by a member of the venire, a juror or a member of a juror's family. (Rule 3.5).

Try your case in the courtroom, not the media. Rule 3.6, entitled "Trial Publicity", is perhaps the rule most likely to cause trouble for the unwary prosecutor. The public's intense interest in crime, reflected in concurrent media attention to many of our cases and coupled with the propensity of some members of the defense bar to try their case in the press, may tempt you to make expansive and unethical comments to members of the media. The general rule is that an attorney participating in or associated with the investigation, prosecution or defense of a criminal matter "shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows, or should know, will have a substantial likelihood of interfering with the fairness of the trial by a jury." (Rule 3.6). Furthermore, you must not direct or encourage other persons, such as law enforcement officers, to make an extrajudicial statement that would be prohibited pursuant to Rule 3.6. (Rule 3.8).

Trust the truth. Lawyers who do not trust jurors to act reasonably, intelligently and justly, or don't trust their own ability to help jurors make sense of conflicting evidence, tend to make ethical errors. The truth, when presented in a calm, confident and engaging manner, has a compelling power of its own. Many of the ethical principles cited in this manual are aimed at restraining attorneys from substituting their own judgments about guilt or innocence or witness credibility for those of the fact finder. You should believe in your case and focus on the truth, landing hard but fair blows in the pursuit of justice.

Keep pursuing justice after a conviction. Your ethical duties do not end the moment the fact finder returns a guilty verdict. Prosecutors must act appropriately upon learning of new evidence indicating that an innocent person was convicted. Your duty to exonerate the innocent is just as important as your duty to convict the guilty. You must diligently pursue and investigate any credible post-conviction claim of innocence.

Obey the law. Attorneys are ethically bound to avoid deceit and misconduct in their personal and professional lives. You must not "commit a criminal or deliberately wrongful act that reflects adversely" on your honesty or fitness to practice law, including any "conduct involving dishonesty, fraud, deceit or misrepresentation." You should never state or imply that you have an ability to improperly influence a tribunal. Finally, the *Rules* make it clear that you may not "violate or attempt to violate" their mandates and strictures. (Rule 8.4).

When in doubt, reach out. The ethical principles outlined in this manual may, on occasion, prove difficult to apply in the myriad of complex factual circumstances you will confront as a prosecutor. You must always stay vigilant for ethical issues that may arise in unexpected or subtle ways. When in doubt about your ethical obligations, seek guidance from supervisors, colleagues, or the Legal Ethics Hotline maintained by the Virginia State Bar.

Brady and *Giglio:* A Prosecutor's Duty to Disclose Exculpatory and Impeachment Evidence

In the seminal case *Brady v. Maryland*, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to the accused… violates due process where the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution… A prosecution that withholds evidence… which, if made available, would tend to exculpate (the defendant) or reduce the penalty… (is cast) in the role of an architect of a proceeding that does not comport with standards of justice." 372 U.S. 83, 87-88 (1963).

Subsequently, in the case of *Giglio v. United States*, the Court held that "nondisclosure of evidence affecting (witness) credibility falls within the" *Brady* rule. 405 U.S. 150, 154 (1972). Additionally, the *Giglio* Court held that "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." *Id. Brady* and *Giglio* material must be disclosed to the defense even if

opposing counsel has not specifically requested it. Finally, as the Virginia Supreme Court held in *Bly v. Commonwealth*, a prosecutor "has a duty to learn of any favorable evidence known to others acting on the government's behalf…, including the police." 280 Va. 656, 662 (2010).

Therefore, you have an affirmative duty to seek and disclose all exculpatory and impeachment information from every member of the prosecution team in each case to which you are assigned. Members of the prosecution team include law enforcement officers, other prosecutors and other government officials participating in the investigation and prosecution of the matter. You must always remember that police officers and deputies are members of your prosecution team, and that the law imputes the knowledge of your team members to you. Your ignorance of exculpatory or impeachment evidence known by other members of your team - even if not willful - may undermine the integrity of a conviction.

All potential *Giglio* information known by or in the possession of the prosecution team must be gathered and reviewed with an eye as to disclosure. That information includes, but is not limited to:

1) Prior inconsistent statements made by the witness, whether or not the inconsistent statement was made to law enforcement;
2) Benefits provided to witnesses in exchange for their cooperation, including:
    a) Dropped or reduced charges;
    b) Use immunity or agreements not to prosecute;

c) An agreement to limit the Commonwealth's argument for sentence;

d) Considerations regarding the forfeiture of assets;

e) Stays of deportation or other immigration status consideration, such as an agreement to approve a U-Visa;

f) Any tangible or monetary benefit provided to the witness, to include, but not to be limited to:

i. Payments for information;

ii. Travel reimbursement;

iii. The provision of lodging or travel;

iv. The provision of any other pecuniary benefit, to include minor outlays such as "phone minutes" or "cigarette money".

g) Letters to other government officials setting forth the extent of a witness' assistance.

3) Other known conditions that could affect the witness's bias, to include, but not to be limited to:

a) Animosity towards the defendant;

b) Relationship with the victim;

c) Known but uncharged criminal conduct;

d) Known prejudice or animosity towards any group of which the defendant is a member.

4) Known physical, mental health or substance abuse issues that could reasonably affect the witness' ability to recall or perceive the events about which they will be testifying.
5) Prior criminal convictions for felonies or for crimes of moral turpitude.
6) For law-enforcement witnesses, sustained complaints involving allegations of dishonesty such as falsifying a police report.
7) Where self-defense might reasonably be raised by the accused, convictions of the victim for crimes of violence and any other information that is material to the victim's reputation for violence.

You should consider your duty to gather and disclose exculpatory and impeachment evidence your paramount ethical obligation. In most cases, if you are confronted with a "close call" as to whether evidence constitutes *Brady* or *Giglio* evidence, you should err on the side of caution and disclose the evidence to opposing counsel.

Moreover, *Brady* information must be disclosed early enough that it can be "effectively used at trial." *Commonwealth v. Tuma,* 285 Va. 629, 636 (2013). While the courts have not established a black-line rule as to when a prosecutor must disclose exculpatory evidence, you should not conceal the existence of such evidence to gain a trial advantage, and you should disclose such evidence as soon as practicable. Finally, you should be aware that your constitutional obligation to disclose extends to evidence that may mitigate a sentence.

The failure to disclose impeachment or exculpatory evidence can result in the reversal of a conviction or other sanctions, even if your failure was borne of ignorance or otherwise inadvertent. A knowing or willful failure to disclose such information is a violation of the *Rules of Professional Conduct* and could result in the Bar taking disciplinary action against you. For instance, Rule 3.8 clearly states that a prosecutor "shall make timely disclosure to counsel for the defendant… of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment… ."

The Virginia State Bar has determined that the obligation for "timely" disclosure under this rule means that exculpatory evidence should be disclosed "as soon as practicable" in light of the totality of the facts and circumstances of the case. *See* Virginia State Bar Legal Ethics Opinion 1862. In this opinion, the Bar opined that a prosecutor violates the *Rule*s when she intentionally delays disclosure without lawful justification or good cause.

Innumerable judicial decisions and scholarly articles have attempted to define what information is "material" within the means of *Brady* and *Giglio,* what constitutes "exculpatory evidence", at what juncture on the case disclosure must be made, how rigorously you must seek out exculpatory information, how damaging the impeachment information or important the prosecution witness must be to invoke *Giglio's* disclosure requirement, and what sanctions should be imposed for various failures to disclose. Obviously, particularized research and factual analysis are required to address the specifics of each case you prosecute.

Virginia Supreme Court Rules on Discovery

The Supreme Court of Virginia has promulgated rules that describe the evidence and materials you are required to disclose during the discovery process. Two discovery rules exist: Rule 3A:11 governs discovery in Circuit Court and Rule 7C:5 General District Court discovery. The materials outlined in these rules must be disclosed to opposing counsel, regardless of whether they inculpate or exculpate the defendant.

Rule 7C:5: Discovery in General District Court

Rule 7C:5 outlines your discovery obligations in misdemeanor cases and in cases pending preliminary hearing in General District Court. The rule states that, upon the written motion of the defendant made at least 10 days before the hearing or trial, you are required to provide the following information and material if it is to be offered against the defendant:

1) Any relevant written or recorded statements or confessions made by the defendant, or copies thereof and the substance of any oral statements and confessions made by the accused; and
2) Any criminal record of the accused. You should be aware, however, that the Virginia State Police prohibits the practice of providing photocopies of the defendant's NCIC/VCIN criminal history to opposing counsel. You may, however, allow counsel to inspect the criminal history and take notes.

The court granting the discovery motion "shall specify the time, place and manner of making the discovery." The court has the power to add such terms and conditions to the discovery order that it deems just. If you fail to provide the required information, the court may directly order you to provide the material and may grant a continuance to the defendant.

Rule 3A:11: Discovery in Circuit Court

Rule 3A:11 outlines your discovery obligations in felony cases and misdemeanor cases brought by direct indictment in Circuit Court. The rule states that, upon the written motion of the defendant made at least 10 days before the hearing or trial, you are required to provide, or to allow the defense to inspect, copy and photograph the following information and material regardless of whether you intend to introduce the evidence in the hearing or trial:

1) Written or recorded statements or confessions made by the defendant, or the substance of any oral statements or confessions made by the defendant to any law enforcement officer;
2) Written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports and written reports of a physical or mental examination of the accused or the alleged victim; and
3) Books, papers, documents, tangible objects, buildings or places that the court designates to be discovered after determining that they are material and that the request is reasonable. However, the Rule does not authorize the

discovery or inspection of statements made by the Commonwealth's witnesses or of police reports or other internal Commonwealth documents.

If the defense files a discovery motion, it is in your best interest to move the court to enter an order requiring the defendant to provide what is known as reciprocal discovery. Upon your motion, the court shall order the defense to provide the following information and material:

1) Written reports of autopsies, ballistic tests, fingerprint, blood, urine or breath analyses, and other scientific reports which the defendant intends to introduce as evidence;
2) Notice of whether the defendant intends to introduce evidence to establish an alibi and, if so, notice of the place at which he claims to have been at the time of the offense;
3) If the defendant intends to rely upon the insanity defense, copies of any written reports of a physical or mental examination of the defendant. However, no statements made by the defendant during the examination may be used in the Commonwealth's case-in-chief.

The court granting the discovery motion "shall specify the time, place and manner of making the discovery." The court has the power to add such terms and conditions to the discovery order that it deems just.

If you find it advisable, you may move the court to deny, restrict or defer discovery or impose any other terms on the discovery process that the court finds

appropriate. If necessary, you may move the court to allow you to provide your reasoning for the restrictions in writing for an *in camera* review.

The rule specifically notes that you have a continuing duty to provide discovery. If, after you have provided discovery to the defense, you come into the possession of additional evidence or information falling under the ambit of the discovery order, you must "promptly notify" opposing counsel of the existence of the additional material.

If either party fails to comply with the discovery order, the court may order any relief it deems appropriate. An intentional failure to comply with the discovery order may violate Rule 3.4 of the *Rules of Professional Conduct* and may result in disciplinary action by the Bar.

Conclusion

Ethical principles are the essence of criminal prosecution, not a burden upon it and a sense of fair play is one of the attributes of a successful prosecutor. Supreme Court Justice Robert H. Jackson described the qualities of an outstanding prosecutor in 1940, numbering among them:

> "A sensitiveness to fair play and sportsmanship (that) is perhaps the best protection against the abuse of power… (It) lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purpose, and who approaches his task with humility."

More recently, in *Bennett v. Commonwealth*, 236 Va. 448 (1988), the Virginia Supreme Court has reminded attorneys from both sides of the aisle that a trial is designed to be a search for truth, and that attempting to "sandbag" or "surprise" the other side is not a practice condoned by the law:

> "The aim of trials is to find the truth. Uncovering the truth is the paramount goal of the adversary system. All the rules of decorum, ethics, and procedure are meant to aid the truth-finding process. *Ambush, trickery, stealth, gamesmanship, one-upmanship, surprise have no legitimate role to play in a properly conducted trial*. This is so whether the gamesman is the defendant or the Commonwealth. We agree with what Justice White said…: 'The adversary system of trial is hardly an end in itself; it is not yet a poker game

in which players enjoy an absolute right always to conceal their cards until played.'"

You should read these words and remember them. They must always serve as a reminder to you that the ends of securing a conviction do not justify resorting to unethical means to secure it.

Compliance with the rules of ethics is not a blithely simple task. It requires that you constantly stay vigilant for possible ethical issues, that you fight the normal human urge to surprise opposing counsel, that you realize that you are not infallible, and that you always question your assumptions and remain open to input and advice from your peers. It requires you to remain abreast of developments in the rules and law of ethics.

Most importantly, it requires you to take your oath as an Assistant Commonwealth's Attorney seriously, to appreciate the huge responsibility you have assumed by taking the prosecutor's oath of office and that you strive to do the right thing, every time in every case.