



An Emphasis on Ethics: How New York’s District Attorneys are Getting it Right

“I didn’t know you were a lawyer,” said the Bee to the Mosquito.

*“Well, I was already a blood sucking parasite...
all I needed was a briefcase.”*

- The Bee Movie (2007)

Everybody has a lawyer joke – even the tenor of an exchange in a children’s animated movie (above) speaks to a common attitude about lawyers. The legal profession is arguably at the receiving end of more jokes about ethics -- or the perceived lack thereof – than any other.

This is troubling for any branch of the profession; it is critical for prosecutors.

There is perhaps no more important place in the legal system for attorneys to be held to the highest ethical standards than the prosecution. A prosecutor’s role in the criminal justice system is unique – they have broad responsibility to conduct thorough and fair investigations, to share certain information with the defense, to present a case to the grand jury only when there is sufficient evidence, and to consider not only actual innocence or guilt, but also procedural compliance, when evaluating cases. An ethical lapse on the part of a prosecutor can change the course of the lives of the victims, defendant, their families, and impacts even society as a whole.

Reconciling the critical role of the prosecutor in the criminal justice system with the adversarial nature of the trial system has been a driving force in New York State, particularly over the past several years.

Recent History:

Over the past decade, the discussion about ethics has, appropriately, taken center stage. The contemporary conversation was, perhaps, launched in 2008 when the New York State Bar Association proposed the new Rules of Professional Conduct (“the Rules”) to replace the old Code of Professional Responsibility. While prosecutors agreed that updating the Code for all attorneys was a good idea, the Bar Association’s draft proposal included several new and onerous rules that would have applied only to prosecutors, unfairly and unnecessarily hampering fair prosecution while bypassing the legislature and courts to create new rights for defendants. DAASNY’s then-president, Daniel Donovan (District Attorney, Staten Island), sent a letter to the Presiding Justices of the Appellate Division voicing prosecutors’ concerns, which persuaded the Presiding Justices to reject those portions of the proposed changes.

Revisiting the Rules set a series of events in motion that changed the way prosecutors approach ethics on a statewide level and how they train prosecutors on an office-by-office basis.

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Robyn Pangi | Executive Director, DAASNY



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In 2009, the New York Prosecutors Training Institute (NYPTI) asked Assistant District Attorney Phil Mueller (Schenectady) to write a short piece on ethical prosecution for the Empire State Prosecutor. The resulting article, "[Doing 'The Right Thing': Old and New Rules of Ethical Conduct,](#)" carried the germ, and some of the language, of what would become our ethics handbook.

At around that time, DAASNY created Committee on the Fair and Ethical Administration of Justice; the two main subcommittees were the Best Practices Committee and the Ethics Committee. Mueller volunteered to serve as vice chairman of the Ethics Committee (District Attorney Fitzpatrick, Onondaga County, served as Chair).

On January 29, 2010, DAASNY awarded the newly-minted "Morgenthau Award" for professional accomplishment and "commitment to the fair and ethical administration of justice," to be given to one prosecutor from each of the state's four judicial departments. Mueller was honored as the first recipient for the Third Judicial Department. "Having gotten the award," he explained, "I thought I should do something to earn it."

Mueller reached out to D.A. Fitzpatrick and his chief assistant Rick Trunfio (also a Morgenthau Award winner) proposing to draft a document called "[The Right Thing,](#)" essentially an ethics primer that could be given to every ADA in the state to serve as a training and quick reference tool.

Checking around, they discovered that nothing like this existed. Some offices distributed the Rules and all engaged in some form of training, but none had created a document that distilled the statutory and case law, along with broad ethics principals, in a simple and easy-to-read format.

"The lack of any example to follow was a good thing," mused Mueller, "because working from scratch freed me to use simple, straightforward language to express principles of fairness and personal responsibility that are the essence of being a prosecutor."

In 2011, after several iterations and careful vetting by senior appellate prosecutors from around the state, DAASNY's then-president Derek Champagne (Franklin County) ensured that the resources were invested to print the handbook and distribute enough copies to every office in the state to equip each prosecutor with a copy. In his forward, Champagne stated: "This Handbook collects in one place the most significant cases and rules that govern ethical behaviors by prosecutors in this state. It reflects our long-standing commitment to ethical prosecution and to the protection of the rights of victims, defendants, and the public."

The handbook is broken down into four basic parts:

- The Right Thing – Brief aspirational statements of the role of the prosecutor that emphasizes the obligation to pursue justice and not merely to seek convictions.

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Robyn Pangl | Executive Director, DAASNY



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- Consequences to Others -- The awesome consequences that unethical conduct has on the defendant, their families, their communities, the victim, and our criminal justice system.
- Consequences to the Prosecutor -- The tangible and intangible consequences that may befall a prosecutor who breaches his or her ethical duty, which including termination by the DA; suspension or censure by a disciplinary committee; loss of reputation and effectiveness; case sanctions such as dismissal, suppression, negative inference; criminal and monetary sanctions; and more.
- Rules of Fairness and Ethical Conduct – An amalgamation of disciplinary rules, nonbinding ethics opinions, constitutional law, statutory law, and case law.

The Evolution of How we Do Business

The publication of the handbook and the establishment of the Best Practices and Ethics Committees represented two important benchmarks in the evolution of how prosecutors operate in New York. But they weren't operating in isolation.

It was around this same time that senior prosecutors were taking a hard look at new ways to train not only their rookie class of assistant district attorneys, but also their seasoned veterans.

Tim Koller, Executive ADA from Staten Island, was a pioneer of the so-called "hypotheticals" approach to training. Until recently, Koller said, "ethics training was primarily decisional-law-based ethics training. All of the cases and citations were listed; major cases were reviewed in a lecture format." Pat Hynes, an ADA in Manhattan, is widely credited with providing the model for comprehensive decisional-law ethics training. Koller noted that while there was nothing wrong with that approach, which is integral to ethics training, he saw a way to build off of that in an engaging way while still presenting foundational and decision-based law.

Staten Island is one of the counties large enough to offer training in-house. Koller, a self-described "index card" man, started jotting down real-life, factual experiences either brought to him by ADAs or discussed "around the water cooler." Starting with 10 cards, he put together a Power Point presentation that helps teach case law and other ethical considerations by pushing participants to answer how they would approach the hypotheticals. Today, Koller has more than 80 scenarios that he works into trainings on issues as diverse as motor vehicle theft investigations to public corruption cases – all of which emphasizes the ethical dilemmas that arise in cases.

This concept has been on a long journey. The New York Prosecutors Training Institute (NYPTI) used hypotheticals as early as 2003, and incorporated them heavily into the annual Summer College training courses ten years after that. Part of the advantage of hypotheticals is that it forces a thoughtful conversation – and it pushes participants to research case law when they confront a dilemma. Since case law is constantly changing, they aren't left with a list of outdated information. The disadvantage, acknowledges NYPTI Executive Director Susan Valle, is that answers evolve and can change depending on minor variations in the hypothetical. And so while hypotheticals

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Robyn Pangli | Executive Director, DAASNY



have offered another option in ethics training, NYPTI also sends out to all the state's prosecutors quarterly updates to that summarize recent ethics decisions.

Another evolution in training is audience participation. Twenty years ago, training was, by necessity, a combination of printouts and lectures; Power Point wasn't even an existing option. Now, training in New York State at the annual NYTPI Summer College involves extensive interactive technology. Participants look at the progress of actual cases and talk through how they thought the court would rule; followed by a close look at the actual ruling so that they can clearly understand the logic of ethics decisions.

Technology means that anyone can participate in training any time, from anywhere. It also makes decisions from across the nation accessible at the click of a button, removing the need to do extensive paper research to get the most current ethics rules and decisions.

This continuum has made it easier for prosecutors to access needed tools. But prosecutors are only one part of the equation.

Spreading the Word

Since creating the Handbook, prosecutors have been cognizant that knowing "the right thing" to do with materials that must be turned over to the defense serves no purpose if those materials aren't in the prosecutor's possession. In other words, if a police officer doesn't have a firm understanding of *Brady* or *Giglio*, or the many other attendant discovery obligations, the process breaks down and the prosecutor cannot comply with their ethical obligations.

To reduce the likelihood of withholding information, prosecutors have worked with law enforcement on trainings at every level, including:

- Training police directly on discovery obligations;
- Ensuring that standard police training includes information on what constitutes *Brady*, and what qualifies as exculpatory material;
- Working with the state Division of Criminal Justice Services to include this information in their online training.

Staten Island's Koller, for instance, hasn't just trained his own attorneys, he has lectured at the Metro conference, statewide Summer College, other district attorneys' offices in New York State, and the Criminal Bar in Oregon.

A Model for Other States

While New York was busy looking at new ways to make ethical compliance second nature in all prosecutors, the rest of the nation was looking at New York.

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Robyn Pangl | Executive Director, DAASNY



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The training used in New York was distributed around the nation, in an effort to help all district attorneys work with their local and state law enforcement to promote a universal understanding of what the ethical obligations of police and prosecutors are in terms of turning over material to the defense. It is a massive undertaking, but one that has gained significant traction.

Part of the reason for the broad adaptation of New York's ethics and training model can be attributed to Kristine Hamann. Hamann, who was a prosecutor with the Office of Special Narcotics and the Manhattan District Attorney's Office, was the first Chair of the DAASNY Best Practices Committee – which, in turn, was the first of its kind in the nation. The group has met regularly since 2009 to exchange ideas, hear from guest speakers, and create protocols pulling from evidence-based practices. Hamann was offered a fellowship with the Department of Justice in 2013 to bring New York's innovations on ethics and best practices to the rest of the country. Now the Executive Director of the Prosecutor's Center for Excellence, she is helping to form best practices committees around the country. Prosecutors in twenty-one states have created Best Practices committees, many of which have adopted and adapted both the basic principles of New York's committee as well as the materials we have created. District Attorneys in Washington and Minneapolis use a version of the Handbook; Tennessee incorporates it in their training; and several other states have adopted the book and it has been distributed around the country.

Conclusion:

Mueller recalls that when writing the handbook, he “wanted to remind prosecutors that our ethical principles are to be celebrated and embraced, not feared or evaded.” The essence of the handbook is stated on the first page and reiterated on the last page:

“We prosecutors have the best job in the criminal justice system because we have more freedom than any other actor to do ‘the right thing[;]’”

“Ethical principles are the essence of criminal prosecution, not a burden upon it.”

Regardless of the training model used, the message is the same. And while ethics training isn't new, the emphasis on rigorous training and oversight has, without a doubt, improved the criminal justice system.

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Robyn Pangi | Executive Director, DAASNY