



THE SUPREME COURT of OHIO

PROFESSIONALISM DOs & DON'Ts:

CONDUCT OF PROSECUTORS AND DEFENSE ATTORNEYS

Issued by the Commission on Professionalism:

The integrity of our criminal justice system depends, in large part, upon the professionalism of the lawyers who prosecute criminal matters on behalf of the state and the defense attorneys who defend the accused. In a criminal matter, the rights of the victim, the protection of the public, and the liberty of the defendant are at stake. Considering the importance of these interests, perhaps nowhere in the practice of law is it more important for attorneys to act with professionalism and to serve our system of justice honorably. The Supreme Court of Ohio Commission on Professionalism, with the assistance of members of the Ohio Prosecuting Attorneys Association and the Ohio Association of Criminal Defense Lawyers, prepared this list of "dos and don'ts" to guide attorneys who practice criminal law. In creating this list, the Commission does not intend to regulate or provide additional bases for discipline, but rather to help promote professionalism among Ohio's lawyers.

for PROSECUTORS

DO

- Do remember your job is not to "win," but to help administer justice.
- Do go forward with a case only if you have a good-faith belief in the guilt of the defendant.
- Do remember that the power of the state is not personal to an individual prosecutor and that you should always use prosecutorial power judiciously, with personal humility.
- Do remain in control of your case and remember that you – not the police, not the investigator, and not the victim – are the person in charge, that your client is the government, and that your ultimate goal is the furtherance of justice.
- Do periodically and regularly review your case from the point of view of the defense. This practice will help you provide exculpatory evidence in a timely fashion.
- Do be realistic about the strengths and weaknesses of your case as it evolves and circumstances change. Be willing to adjust your position as justice requires.
- Do take any doubts about the sufficiency of the evidence supporting the government's case to your supervisor, and document the fact that you took that step.

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- Do provide discovery in a timely manner. Have discovery materials ready within a reasonable period of time after request, and promptly inform defense counsel of delays.
 - Do respond to communications from the victim and his or her family. Be attentive to their concerns and be mindful that they may not be familiar with court procedures or proceedings.

DON'T

- Don't forget that your role is the obtainment of justice, which does not always mean a conviction.
- Don't pursue a charge if the evidence is not there.
- Don't be rude to defense counsel, who is simply advocating for his or her client.
- Don't be vindictive or punitive to defendants who are exercising their rights. The mere filing of a motion to suppress, a request for search warrant affidavits, a discovery demand, or the exercise of a defendant's right to trial does not justify adding additional and unnecessary charges or recommending a harsher sentence.

for DEFENSE ATTORNEYS

DO

- Do advocate for your client, listen to your client, and treat your client with respect.
- Do advocate creatively, but reasonably. Remember that your credibility will affect this client and all of your clients, present and future.
- Do determine the type of fee agreement that is best for your client, i.e., hourly or flat fee. Do enter into a written fee agreement with your client as early as feasible.
- Do explain to your client, as early as feasible, your dual role as an adviser and as defender.
- Do respond to communications from the defendant's family, as long as the information sought is not protected by the attorney-client privilege. Be attentive to their concerns and be mindful that they may not be familiar with court procedures or proceedings.
- Do meet with your client regularly throughout the representation.
- Do contact the prosecutor with questions or concerns about discovery before filing a motion to compel or a motion for a continuance.
- Do promptly file a notice of appearance when taking over a case as retained counsel from appointed counsel, so that appointed counsel can file a motion to withdraw, and ask appointed counsel to provide you with all pleadings and all discovery materials and other case information he or she obtained.
- Do prepare accordingly when appearing in a court in which you haven't appeared before. Check the court's website, or with the court staff, and, if necessary, the judge, in order to familiarize yourself with local rules and the general practices of that court.

DON'T

- Don't suggest to your client that you can get a certain result or make promises to your client that you may not be able to keep.
- Don't represent that you have not received discovery materials from the prosecutor when such materials have been made available to you, or represent that you have not received a particular document when you have not asked the prosecutor for it.
- Don't file motions that are frivolous, or file certain motions only because you believe that such motions are usually filed, or file last-minute motions with respect to matters about which you have long been aware.
- Don't demean your client in conversations with the prosecutor and/or the judge.
- Don't enter a plea agreement on your client's behalf without first investigating all areas of potential defense.
- Don't ask for more time than is needed when requesting a continuance.
- Don't request last-minute continuances as a trial tactic, especially in cases where witnesses have to travel.

for PROSECUTORS & DEFENSE ATTORNEYS

DO

- Do review and consistently follow the Supreme Court of Ohio's *Professionalism Dos and Don'ts* concerning *Professionalism in the Courtroom and Working with Opposing Counsel and Other Attorneys*.
- Do be respectful of the time and resources of opposing counsel. Where discrepancies in resources exist, be reasonable.
- Do prepare clients, witnesses, family, and friends for the courtroom by explaining the rules and procedures of court to them.
- Do use third parties when possible to interview witnesses. If you must personally interview a witness, especially a witness who is likely to be called to testify for the opposing side, have a third person present during the interview to avoid the possibility of your having to testify at trial as to what the interviewee actually said.
- Do know and follow the rules of evidence and rules of procedure.
- Do treat opposing counsel with the utmost professionalism, even if you disagree.

DON'T

- Don't make statements to the court or the media concerning the strength of your case prior to evaluating discovery materials.
- Don't disparage or personally attack opposing counsel. Don't claim a prosecutor is "persecuting" your client. Don't treat a defense attorney as if he or she committed the alleged crime. Don't consider opposing counsel an enemy when opposing counsel is simply doing his or her respective job.
- Don't improperly suggest a judge or opposing counsel has a political agenda or bias. Think carefully about how such statements may affect a client, a victim, or the public's perception of the quality of justice.
- Don't refer to your own personal, political, or religious beliefs during a criminal proceeding.
- Don't misrepresent your status by telling a witness that you "work with the court so you have to talk to me," allow your investigator to make such a representation, or discourage a witness from talking to opposing counsel.
- Don't have ex parte communications with the judge about substantive issues or the merits of a case.
- Don't use inappropriate body language to try to persuade a jury. Examples include: fist pumping after a favorable ruling from the judge, rolling eyes during a defendant's or witness's testimony, uttering audible sighs, putting your head down on a table, nodding your head in agreement, or shaking your head in disagreement during court proceedings.
- Don't feign ignorance of rules of courts, rulings made by the judge, or of evidence that was disclosed to you. For example, during a trial or hearing, don't refer to evidence that has been excluded in limine or make comments about, or allude in questions to, evidence already held to be inadmissible.
- Don't hide evidence or fail to disclose witnesses. Don't wait until the morning of trial to disclose witnesses or evidence.
- Don't make unfair or derogatory references to opposing counsel during opening and closing statements. Trials are about facts and the arguments that fit them. Avoid any arguments or characterizations of opposing counsel's case that are not based on the evidence.
- Don't allow clients, witnesses, victims, or their family or friends, to act inappropriately in the courtroom or near the courtroom.
- Don't emulate bad behavior portrayed by lawyers in television shows or movies.

PROSECUTORS AND DEFENSE ATTORNEYS *are officers of the court and responsible for the administration of justice. Keeping this in mind, they must proceed at all times with the diligence, integrity, and courtesy such an important endeavor requires.*