

Prosecuting America's Dad



7 Tips for the Ethical, Aggressive Prosecutor

By Kathleen Nolan and Robert J. Peters

Introduction

In July 2021 the Pennsylvania Supreme Court vacated the conviction of William Henry Cosby for three counts of aggravated indecent assault for acts perpetrated against Andrea Constand in January 2004.¹ The case took a long and winding path through civil and criminal courts and involved decisions made by elected prosecutors, judges, civil attorneys, and multiple victims.

Andrea Constand made a report to police regarding her assault in 2005, and it quickly came to the attention of then-elected Montgomery County, Pennsylvania District Attorney Bruce Castor and his team. After an evaluation of the case by experienced prosecutors and investigators, Castor was of the opinion that a prosecution would be difficult to pursue and included the victim's delayed disclosure and insufficient corroborating evidence as reasons for that determination.² Castor's decision to decline prosecution was relied upon by Cosby and his legal team when making the decision to sit for four sworn depositions in a civil case. However, Andrea Constand and her attorneys were not advised of Castor's decision, nor was it ever reduced to writing or included in any stipulations in either the criminal investigation or the civil case.³

Cosby gave sworn testimony at the depositions and made a number of incriminating statements regarding his relationship with Constand—conversations regarding the allegations, pills, and medication he provided Constand at his residence, and sexual activity with other women while under the influence of quaaludes given to them by Cosby.⁴ The depositions were unsealed in 2015. Rissa Vetri Ferman was the Montgomery County District Attorney, and despite Castor's prior decision not to prosecute, Ferman reopened the criminal investigation into Constand's allegations. Almost a decade after the allegations were first brought to the attention of police and prosecutors, Cosby was charged with three counts of aggravated indecent assault. The first trial in June 2017 ended in a mistrial after the jurors could not reach a unanimous verdict. The second jury trial included testimony by victims other than Constand who were allowed to testify pursuant to pre-trial motions. The jury returned

¹ Commonwealth v. Cosby, 252 A.3d 1092 (Pa. 2021).

² *Id.* at 1099.

³ *Id.* at 1115-1116.

⁴ *Id.* at 1107.

verdicts of guilty on all three counts. Appeals of that conviction led to the 2021 Supreme Court Opinion.⁵

Upon hearing news of the reversal, mainstream media and legal commentators were quick to criticize the prosecution.⁶ The later condemnation of their decision notwithstanding, the prosecutors who pursued the criminal case, resulting in the now-vacated conviction, made a difficult but necessary decision to pursue justice—both for the victims who testified and the many others who bravely came forward to share their experiences.⁷ Every day, prosecutors are required to make complex decisions that carefully balance law, advocacy, and ethics. The decisions made have a ripple effect on the case in question as well as other similarly situated cases, victims, and families. An aggressive prosecution can give other victims the strength to come forward. On the other hand, failure to act can create the assumption for victims that their case will endure a similar fate.

A review of the 79-page decision provides a detailed and lengthy account of the exhaustive pre-trial proceedings that took place in this case before a single juror was seated. The Supreme Court's decision to vacate the conviction ultimately hinged on whether a promise not to prosecute had been made to Cosby by a prior District Attorney.⁸ The issue was thoroughly and extensively litigated at the trial court level over a two-day period in February of 2016, and the trial court found "the only conclusion that was apparent from the record was that no agreement or promise not to prosecute ever existed, only the exercise of prosecutorial discretion."⁹ Cosby's attempts at that point to have a higher court review the decision or to stall the proceedings were rejected by the Superior Court and the Supreme Court.¹⁰

After the rulings, the prosecutors faced a tough decision. The path had been cleared to bring Cosby to trial, but it would be a rocky journey. If the Superior or Supreme Court disagreed with the trial court at a later date, the conviction would be in jeopardy. Unfortunately, prosecutors are not issued a crystal ball and cannot predict the future. The decision to proceed was aggressive and ethical, and in doing so allowed the women who were victimized by Cosby to have their day in court. In an interview after the Supreme Court decision, special prosecutor Kristen Gibbons Feden stated, "He was found to have sexually assaulted Andrea Constand. Yet he does not sit before you as a guilty man. He does, however, sit before you as a sexual predator."¹¹

⁵ *Id.* at 1099.

⁶ Erwin Chemerinsky, *The Pennsylvania Court Got It Right in Overturning Bill Cosby's Conviction*, MILFORD DAILY NEWS (July 2, 2021), <https://www.milforddailynews.com/story/opinion/2021/07/02/pennsylvania-supreme-court-right-reverse-bill-cosbys-conviction/7823528002>. See also Jeremy Roebuck, *Pa.'s Top Judge Called Charging Bill Cosby 'Reprehensible.' Now the Prosecutor Is Firing Back*, PITTSBURGH POST GAZETTE (July 12, 2021), <https://www.post-gazette.com/news/crime-courts/2021/07/12/bill-cosby-release-max-baer-kevin-steele-bruce-castor/stories/202107130098>.

⁷ *Commonwealth v. Cosby*, 252 A.3d 1092 (Pa. 2021) (The Commonwealth filed a Motion to Introduce Evidence of Other Bad Acts of the Defendant" on September 6, 2016. The motion sought to introduce testimony from other women who alleged that Cosby sexually assaulted them. The trial court granted the motion as to one victim, and that woman was allowed to testify at Cosby's first trial in 2017, which ended in a hung jury. Ahead of the second trial, the Commonwealth filed a motion seeking to introduce testimony from a number of additional victims. Following argument, the trial court granted the motion in part, increasing the number of prior bad act witnesses allowable at trial from one to five. The selection of the five witnesses from a pool of at least 19 women was left to the discretion of the Commonwealth.)

⁸ *Id.*

⁹ *Id.* at 1126.

¹⁰ *Id.*

¹¹ Elisha Fieldstadt, *Cosby Prosecutor Says She Was Shocked When Court Overturned Assault Conviction*, NBC NEWS (July 1, 2021), <https://www.nbcnews.com/news/us-news/cosby-prosecutor-says-she-was-shocked-when-court-overturned-comedian-n1272880>.

Prosecutors cannot advocate anything they know to be inconsistent with the truth. Every day, prosecutors across America balance their duties as both an officer of the court and advocate while in pursuit of truth. This article provides seven tips for prosecutors to zealously advocate for victims while maintaining the highest ethical standards. Although the Cosby case involved the sexual assault of an adult, these tips would also apply to high-profile crimes against children.

1. Understand the human factors behind the fact pattern.

The zealous prosecution of an accused sex offender begins, counterintuitively, with a compassionate, trauma-informed approach. Victims of intimate violent crimes frequently act in ways that may seem counterintuitive under traditional “reasonableness” standards but that are consistent with the effects and experience of trauma. Prosecutors may believe that victim behaviors compromise an accuser’s credibility, and hesitate to prosecute based on concerns over how an accuser may testify.

In *Commonwealth v. Cosby*, for instance:¹²

- Accuser Andrea Constand “kept the January 2004 incident to herself for nearly a year, until one night in January 2005.” Following her disclosure to her mother, Constand contacted the Durham Regional Police Department in Ontario, Canada, and attempted to retain legal counsel in the United States.
- During the 12 months prior, Constand continued her relationship with Cosby, talking with him on the phone, attending dinner with him, and visiting his residence.
- Constand contacted civil attorneys in Philadelphia before she reported the incident to law enforcement.
- Both before and after reporting the incident to the police, Constand hoped to confront Cosby about what had happened. Each time he refused to answer her questions.
- Following her police report, Constand recorded additional calls between her and Cosby.
- Later, offered an invitation to a performance of Cosby’s in Miami, Florida, along with an offer to set up a trust fund for her education, Constand refused to cooperate with Cosby’s aides trying to make the arrangements.
- During her initial conversations with investigators, Constand was nervous, later relating that she was uncomfortable talking about the incident owing to its personal nature.

To D.A. Castor, Constand’s delay in filing her complaint “diminished the reliability of any recollections and undermined the investigators’ efforts to collect forensic evidence.”¹³ Perhaps to that end, Castor also was concerned about inconsistencies in Constand’s various statements to investigators. One such interview had been conducted following a search of Cosby’s home, in which police found no

¹² *Commonwealth v. Cosby*, 252 A.3d 1092 (Pa. 2021).

¹³ *Commonwealth v. Cosby*, 252 A.3d 1092, 1099 (Pa. 2021).

evidence to support Constand's claim. Castor also viewed Constand's continued interactions with Cosby to be "atypical," the opinion noted. Further, while Castor had reviewed statements from Constand's mother and other alleged victims supporting Constand's account, no previous reports had been made to law enforcement about Cosby's prior conduct. Finally, Castor believed that the recordings Constand made of her calls with Cosby "likely were illegal and included discussions that could be interpreted as attempts by Constand and her mother to get Cosby to pay Constand so that she would not contact the authorities."¹⁴

More than a decade later, many of these assumptions were proven wrong. At the criminal trial, the prosecution team pursuing the conviction called as its first witness Dr. Barbara Ziv, an expert in sexual assault "who testified that significant statistical evidence has shown that most sexual assault victims respond differently to attacks than victims of other crimes."¹⁵

2. Communicate early, consistently, and candidly with victims.

Prosecutors have an ethical and professional obligation to communicate with victims as soon as a case is charged,¹⁶ but the approach has practical benefits as well.¹⁷ By arranging for in-person or virtual meetings to discuss the charges, possible penalties, and what to expect as the case moves through the court system, a prosecutor can gauge the cooperation level of the involved parties as well as start the conversation around testimony and what court preparation will look like. In this way, prosecutors can build rapport with victims and their families and work to mitigate negative impacts of the process.¹⁸

Andrea Constand only learned of Castor's decision not to prosecute when a reporter showed up at the office of one of her civil attorneys.¹⁹ Not only had Castor opted not to communicate his decision either to the victim or her legal team, the Supreme Court noted in its opinion, but Castor also never even met personally with Constand. This fact may have contributed to his decision not to seek judicial intervention for a grant of immunity, as required by Pennsylvania statute; the Court would have asked whether he had discussed the application with the victim.²⁰

"Most states have amended their constitutions to guarantee certain fundamental rights for crime victims."²¹ Typically those include the right to be notified of all court proceedings related to the

¹⁴ *Id.*

¹⁵ Chris Francescani, *Bill Cosby's Defense Team's "Vicious" Strategy Backfired, Analysis Shows*, ABC NEWS (April 28, 2018, at 6:07), <https://abcnews.go.com/US/bill-cosbys-defense-teams-vicious-strategy-backfired-analysis/story?id=54784938>.

¹⁶ ATTORNEY GENERAL'S GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (Washington, DC, Office for Victims of Crime, U.S. Department of Justice, 2012), https://www.justice.gov/sites/default/files/olp/docs/ag_guidelines2012.pdf.

¹⁷ Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 Lewis & Clark L. Rev. (2005), <https://law.lclark.edu/live/files/9686-gershmanpdf>.

¹⁸ BEST PRACTICES FOR PROSECUTION: LESSONS LEARNED FROM THE HANDLING OF SEXUAL VIOLENCE CASES (National Sexual Violence Resource Center, 2018), <https://www.nsvrc.org/sites/default/files/publications/2018-09/Best%20Practices%20for%20Prosecution.pdf>. *Reprinted from* WISCONSIN ADULT SEXUAL ASSAULT RESPONSE TEAM PROTOCOL (Wisconsin Coalition Against Sexual Assault, 2011).

¹⁹ *Commonwealth v. Cosby*, 2021 Pa. LEXIS at 13.

²⁰ David Louis Cohen & Robert J. Masters, *Hard Cases Make Bad Law: The Tortured History of the Bill Cosby Prosecution*, NEW YORK STATE BAR ASSOCIATION (August 3, 2021), <https://nysba.org/hard-cases-make-bad-law-the-tortured-history-of-the-bill-cosby-prosecution>.

²¹ Office for Victims of Crime, *What You Can Do If You Are a Victim of Crime* (Washington, DC, U.S. Department of Justice, 2010), https://ovc.ojp.gov/sites/g/files/xyckuh226/files/publications/infores/whatyoucando_2010/WhatUCanDo_508.pdf.

offense, the right to be reasonably protected from the accused offender, the right to have input at sentencing, and the right to information about the conviction, sentencing, imprisonment, and release of the offender.²² Moreover, a prosecutor can be expected to maintain effective communication with the victim. That includes promptly responding to calls and emails, being punctual to meetings, and reporting both positive and negative case updates.²³ Ongoing communication is a part of adequate representation, and victims that are more informed will be more comfortable with the process and more likely to trust the prosecution.²⁴

A prosecutor with an aggressive plan needs to ensure that the key players are on board with that plan. Early conversations and meetings will ensure victims and families understand the high level of participation that will be required if the case needs to proceed to trial. This includes preparing the victim for the chances of undergoing secondary trauma. Victims should be ready to re-disclose traumatic information and navigate the possibility of media involvement. Ultimately, it is the prosecutor's job to take proactive measures that give the victim insight into their litigation process.²⁵

Evaluating a case for strengths and weaknesses is a necessary component of every prosecution, and walking through these evaluations provides prosecutors an opportunity to discuss any anticipated issues of problematic evidence.²⁶ For example, Rule 3.8(a) of the American Bar Association (ABA) Model Rules of Professional Conduct requires prosecutors to refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.²⁷ Similarly, the National Prosecution Standards state that "a prosecutor should file charges that [they believe] adequately encompass the accused's criminal activity and which [they believe] can be substantiated by admissible evidence at trial."²⁸ Building on that ethical obligation, prosecutors must be cautious not to overcharge a case as it can create unattainable expectations for the victim. If a charge is supported by probable cause but the evidence is insufficient to support that charge with an elevated penalty, it can be devastating to a victim who expects a certain level of punishment. A 2003 report found that two out of five factors impacting victim satisfaction with criminal justice in a model court setting related to the gap between victim preferences and expectations and the realities of the criminal justice system.²⁹

Honest interaction and earnest communication at these early stages will lay the foundation for the process and progress of the case. The conversations may not be easy and may involve exploring difficult topics and uncomfortable realities, but this is a vital step to an ethical and aggressive prosecution. Victims and families have the right to be informed and deserve to have that information relayed to them accurately.

²² ATTORNEY GENERAL'S GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (Washington, DC, Office for Victims of Crime, U.S. Department of Justice, 2012), https://www.justice.gov/sites/default/files/olp/docs/ag_guidelines2012.pdf.

²³ American Bar Association, *The Top Ten Malpractice Traps and How to Avoid Them*, Desk Guide Legal Malpractice, https://www.americanbar.org/content/dam/aba/administrative/lawyers_professional_liability/downloads/ten.pdf.

²⁴ Gershman, *supra*.

²⁵ NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, BEST PRACTICES FOR PROSECUTION: LESSONS LEARNED FROM THE HANDLING OF SEXUAL VIOLENCE CASES 3-4 (2018), <https://www.nsvrc.org/sites/default/files/publications/2018-09/Best%20Practices%20for%20Prosecution.pdf>.

²⁶ *Id.*

²⁷ Model R. Prof. Conduct 3.8(a) (ABA 2020).

²⁸ National District Attorneys Association, *National Prosecution Standards* (Third Edition), 4-2.2.

²⁹ Gerald Hotaling & Eve Buzawa, *Victim Satisfaction with Criminal Justice Case Processing in a Model Court Setting* (Office of Justice Programs, 2003), <https://www.ojp.gov/pdffiles1/nij/grants/195668.pdf>.

3. Trust, but litigate.

Complicated issues often require complex legal arguments and extensive hearings. Even if you are successful at the trial court level, that is not the end of the analysis. It is not uncommon for appeals on sexual assault and child abuse cases to take years to be resolved. It is up to the prosecutor at the trial court level to make as solid and complete a record as possible. This record includes filing, responding to, and arguing pre-trial motions.

Castor was succeeded as District Attorney by his former first assistant, Risa Vetri Ferman, to whom he had delegated the investigation of allegations made by other women against Cosby as part of the 2005 case. Ferman reopened the criminal investigation once the civil records were released. Prosecutors met with Constand in her native Canada to secure her cooperation, "even though she had specifically agreed not to do so as part of the civil settlement."³⁰ Perhaps more importantly, "Investigators also began to identify, locate, and interview other women [who] had claimed to have been assaulted by Cosby."³¹

The decision to vacate Cosby's conviction involved an analysis of a promise, or lack thereof, to prosecute Cosby. Whether or not certain statements made by Castor constituted a formalized immunity agreement was a recognized issue from the start of the case. The issue was litigated through a number of pre-trial motions and responsive pleadings filed in the form of a petition for *habeas corpus*, a motion to dismiss, and a "Motion to Suppress the Contents of his Deposition Testimony and Any Evidence Derived therefrom on the Basis that the District Attorney's Promise not to Prosecute Him Induced Him to Waive his Fifth Amendment Right Against Self-Incrimination."³²

The trial court presided over the *habeas corpus* petition, viewing and hearing the witnesses and testimony firsthand. Cosby's team of lawyers argued in their petition for *habeas corpus* and at the hearing that Cosby's charges should be dismissed based on a promise not to prosecute allegedly made by former D.A. Castor. That promise was made on behalf of the Commonwealth of Pennsylvania and therefore still binding.³³ At that time, the trial court determined that, as a matter of fact, D.A. Castor had not extended a formal promise to Cosby never to prosecute, let alone entered into a formal non-prosecution agreement with Cosby.³⁴ On appeal, the Superior Court agreed with the trial court's decision, finding: "it is clear on the face of the record that the trial court did not abuse its discretion in determining that there was no enforceable non-prosecution agreement in this case."³⁵

The prosecutors on the Cosby case knew the non-prosecution agreement would be a hotly contested issue. They also knew the defendant would challenge the testimony of other victims or 404(b) evidence. The Superior Court addressed that issue on appeal as well and agreed with the trial court's decision.³⁶ Anticipating issues that may present themselves in a case is essential to a prosecutor's ability to successfully secure a conviction.

³⁰ Commonwealth v. Cosby, 252 A.3d 1092, 1110 (Pa. 2021).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Commonwealth v. Cosby, 224 A.3d 372 (Pa. Super. Ct. 2019).

Unfortunately, in this case the work of the prosecution was undone by an opinion filed four years after the jury issued its guilty verdict. However, the prosecution did everything possible to litigate the issue and preserve the record. This is an essential approach for an aggressive and ethical prosecution.

4. The best offense is a good offense.

The adage "if you find yourself in a fair fight, your tactics suck" is commonly attributed to John Steinbeck though its true origins remain unclear. The aggressive, ethical prosecutor can embrace this mindset in a very simple way: Be better. Be better prepared. Be better versed in the law. Be better at presenting your arguments. Be the best advocate for your victim. Being better does not mean withholding evidence or surprising witnesses. The ethical prosecutor complies with the rules of professional responsibility, including rules regarding discovery.³⁷

The additional statements by other women proved to be crucial to the prosecution under Pennsylvania's "Doctrine of Chances," an exception to the overall prohibition on prior bad acts evidence similar to Rule 404(b) of the Federal Rules of Evidence.³⁸ Investigators had interviewed 19 women who agreed to provide their testimony. The trial court allowed prosecutors to choose five from this pool to testify as to Cosby's prior bad acts,³⁹ establishing a pattern of behavior that supported Constand's accusation—"proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."⁴⁰

A good offense starts from the earliest stages of the case and extends into charging decisions. The ethical, aggressive prosecutor should be tenacious from the beginning when evaluating a case for the appropriate charges. Jurisdictional rules can dictate intervening indictments when the issue is not new evidence or new information. But more pointedly, if you have serious acts that merit serious charges, why wait? Holding off on higher charges in the hope to use that as leverage against a defendant will often result in a prosecutor negotiating against themselves. If the charges are severe with severe penalties, the victim deserves for their case to be pursued in an aggressive manner from the start.

It is worth noting that the *likelihood* of inadmissibility of evidence is never a given, even if, as Castor determined, a statement appears to be "too remote in time to be considered legally relevant."⁴¹ Inadmissibility is only determined by a judge through pre-trial hearings. In fact, as one analysis speculated, "Had the original district attorney engaged in a more thorough, extensive investigation of

³⁷ Model R. Prof. Conduct 3.8(d) (ABA 2020).

³⁸ Sara Lupi, *The Molineux Rule: How This Exception to the Rules of Evidence Could Impact the Harvey Weinstein Trial*, SYRACUSE L. REV. (June 21, 2018), <https://lawreview.syr.edu/the-molineux-rule-how-this-exception-to-the-rules-of-evidence-could-impact-the-harvey-weinstein-trial>.

³⁹ David Louis Cohen & Robert J. Masters, *Hard Cases Make Bad Law: The Tortured History of the Bill Cosby Prosecution*. (New York, New York State Bar Association, August 3, 2021), <https://nysba.org/hard-cases-make-bad-law-the-tortured-history-of-the-bill-cosby-prosecution>. ("A dissenting supreme court judge found that the questionable practice did not result in a due process violation. However, he did indicate that he was deeply troubled by the trial court's abuse of discretion in permitting such extensive Molineaux-type evidence and would have reversed the conviction on this alternative ground, which was otherwise unaddressed by the court owing to it being rendered moot by the majority holding.").

⁴⁰ *Id.*

⁴¹ *Id.*

the original charges in 2005 and found some of the *Molineaux*-type evidence subsequently adduced more than a decade later and elected to provide a crime victim her day in court, rather than so quickly opting to pursue an alternative path after only three weeks of review, might things have ended differently?"⁴²

A wise maxim for prosecutors when evaluating their case for trial is: "Look at the weaknesses in your case. That is what the defense will be." A good offense begins with knowing the issues with your case. Early recognition of these issues can help mitigate problems prior to trial. If a case is weak on physical evidence, brainstorm with detectives on ways to corroborate the victim's statement through photographs and digital evidence.⁴³ In fact, as the Pennsylvania Supreme Court noted, "Telephone records, financial records and travel histories provided powerful support for the details of [Constand's] accusation, certainly proving that a significant opportunity and means for the crimes existed."⁴⁴ If a victim is struggling, work with your team to ensure their mental health needs are being met. Evaluate the existing evidence to determine if expert witness testimony will assist the jury in understanding the facts. This analysis should begin immediately. If a prosecutor is waiting until the week before trial to tackle these issues, they will end up being on defense and not offense.

5. Maintain ethical integrity, regardless of pressure or context.



*"Compromise where you can. Where you can't, don't. Even if everyone is telling you that something wrong is something right. Even if the whole world is telling you to move, it is your duty to plant yourself like a tree, look them in the eye, and say 'No, you move.'"*⁴⁵

The prosecutor must approach ethical considerations with a clear focus on the potential trial; any improper actions or unethical behavior will inevitably be exposed. The minimal gain on the front end is not worth the explosion at the end, nor is it worth one's reputation and integrity. There will always be another case with another victim. If a prosecutor sacrifices integrity to win one, they may not survive to fight another.

Cosby's defense team pursued what one media outlet characterized as "a vicious defense strategy that sought to exploit race, gender, age and social activism...launching stunning, mostly unfounded broadsides against the judge, the prosecutor, the witnesses and the jurors—and openly mocking] the widely accepted scholarship of [Ziv],"⁴⁶ whom prosecutors called "to give some measure of

⁴² *Id.*

⁴³ VICTOR VIETH, *Picture This: Photographing a Child Sexual Abuse Crime Scene*, 1(5) CENTERPIECE (2009); VICTOR VIETH, *When the Child Has Spoken: Corroborating the Forensic Interview*, 2(5) CENTERPIECE (2010); available at www.zeroabuseproject.org.

⁴⁴ David Louis Cohen & Robert J. Masters, *Hard Cases Make Bad Law: The Tortured History of the Bill Cosby Prosecution*, New York State Bar Association, <https://nysba.org/hard-cases-make-bad-law-the-tortured-history-of-the-bill-cosby-prosecution>.

⁴⁵ Captain America: Civil War (Marvel Studios 2016) (based on J. Michael Straczynski, *Amazing Spider-Man #537* (Marvel Comics 2007), and a quotation attributed to Mark Twain).

⁴⁶ "Bill Cosby's defense team's 'vicious' strategy backfired, analysis shows," ABC News, April 2018, <https://abcnews.go.com/US/bill-cosbys-defense-teams-vicious-strategy-backfired-analysis/story?id=54784938>.

protection to the succession of six women who would follow [her testimony], each testifying that Cosby drugged and sexually violated them."⁴⁷

Additionally, defense counsel failed to challenge the lack of a formal agreement not to prosecute, which "appears to have been driven by strategies to achieve a long-term victory in the court of public opinion, rather than a permanent solution to his increasing criminal exposure." That exposure could have included new evidence, new accusations, or other legal action from outside Montgomery County and therefore not bound by Castor's decision.⁴⁸

The ABA's *Model Rules for Professional Conduct* includes "Rule 3.8: Special Responsibilities of a Prosecutor."⁴⁹ There is no equivalent Model Rule for Professional Conduct for "Special Responsibilities of a Defense Attorney." Prosecutors are held to a higher standard and should be. Prosecutors should not cut corners, hide witnesses, obscure the truth or present misleading arguments. Yet a prosecutor may find themselves in a scenario where a defense attorney is employing one or more of these tactics, or violating numerous ethical and professional rules.

Maintaining ethical integrity is a fundamental component of building trust with both victims and the jury. Failing to do so can undermine victims' and jurors' confidence not just in the prosecutor but in the case itself. Consider the Brady rule, which requires prosecutors to disclose material exculpatory evidence in the government's possession to the defense.⁵⁰ If a defendant successfully proves that the undisclosed evidence was both material and favorable, victims would likely be forced to endure a second trial.⁵¹ Behaving ethically is also essential for ensuring that cases that go to trial are not dragged through retrials based on the conduct of the prosecutor.

6. Harness the power of the Freedom of the Press.

A savvy prosecutor knows when a case is going to garner media attention. Cases involving extreme or disturbing facts, cases involving children, and cases involving female perpetrators often grab the attention of state, local, and national media. With the celebrity of "America's Dad" as well as one of the victims who testified, former model and reality TV star Janice Dickinson, media attention was virtually guaranteed for the Cosby prosecution. Both defense attorneys and prosecutors made appearances in TV and print media.

Prosecutors can look to their state and local rules to govern prosecutorial conduct. There are also national standards and rules that most states model when drafting their own guidelines. The American Bar Association (ABA) and the National District Attorneys Association (NDAA) National

⁴⁷ *Id.*

⁴⁸ David Louis Cohen & Robert J. Masters, *Hard Cases Make Bad Law: The Tortured History of the Bill Cosby Prosecution*. (New York, New York State Bar Association, August 3, 2021), <https://nysba.org/hard-cases-make-bad-law-the-tortured-history-of-the-bill-cosby-prosecution>.

⁴⁹ Model R. Prof. Conduct 3.8 (ABA 2020).

⁵⁰ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁵¹ *People v. Dimambro*, 897 N.W.2d 233 (2016) (Defendant's motion for a new trial was granted following his convictions of first-degree felony murder and first-degree child abuse, after it was found that the prosecution failed to learn of and disclose additional autopsy photographs in possession of a medical examiner which were both favorable and material).

Prosecution Standards offer comprehensive policies on all aspects of prosecutor conduct, including media contact.

Pleadings and motions delivered information to the public that could not have been commented on by prosecutors. Prosecutors filed a "Motion to Introduce Evidence of Other Bad Acts of Defendant" which outlined the request to introduce evidence and testimony from other women who alleged Cosby sexually assaulted them but whose claims fell outside of the applicable statutes of limitation.⁵² Before the second trial, the Commonwealth supplemented the prior motion seeking to introduce the testimony of several additional women. The trial court ultimately allowed five witnesses to be selected from the pool of 19 women who came forward.⁵³ Ethically, the prosecutors could not have commented or discussed with the media the accounts and claims of the other accusers. However, the motions and pleadings regarding the allegations were public record. Constand, the original accuser, did not stand alone, and official court pleadings now supported that.

The ABA's *Model Rules for Professional Conduct* 3.8(f) addresses a prosecutor's communication with the press:⁵⁴

Except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6⁵⁵

While examining Rule 3.6, there are several exceptions made to the prohibition of lawyer statements, including releasing information regarding the offense charged and the identity of the accused as well as any information contained in a public record.⁵⁶

In media-driven cases, a prosecutor should be conscious of the documents and filings relevant to the case that are considered public record and draft those documents accordingly. In many states, search warrant affidavits become public record after being returned and filed with the court. Charging documents are public record. An aggressive prosecutor can use language effectively in the drafting of these documents while maintaining ethical standards by complying with the Model Rules. If the information is going to be released into the public arena, ensure the information reflects the

⁵² Commonwealth v. Cosby, 252 A.3d 1092, 1119 (Pa. 2021).

⁵³ *Id.*

⁵⁴ Model R. Prof. Conduct 3.8(f) (ABA 2020). See also NDAA National Prosecution Standards 2-14.1-2-14.8 (3rd Edition). (Rule 2-14.2 states: "The prosecutor may provide sufficient information to the public so that citizens may be aware that the alleged perpetrator of a crime has been arrested and that there exists sufficient competent evidence with which to proceed with prosecution. Subject to Standard 2-14.4 and applicable rules of ethical conduct, information may be released by the prosecution if such release will aid the law enforcement process, promote public safety, dispel widespread concern or unrest, or promote confidence in the criminal justice system. The prosecutor should refrain from making extrajudicial comments before or during trial that promote no legitimate law enforcement purpose and that serve solely to heighten public condemnation of the accused.")

⁵⁵ For the full text of ABA Rule 3.6, see the *Model Rules of Professional Conduct*, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.

⁵⁶ Model R. Prof. Conduct 3.6(b)(1) and (2) (ABA 2020).

strength of your case. Prosecutors should harness the free press while not violating National Prosecution Standard 5-4.5, which states that prosecutors should not discuss plea deals or the possibility of the same with media. The plea negotiations should remain between judicial parties/parties to the case. Disclosing information ethically should be a balancing act for prosecutors.

7. Resist pressure to back down.

Elected prosecutors may exert pressure or incentives to make a plea deal, or they may decline to prosecute. Although not all cases or defendants will be as prominent, offenders often enjoy some degree of prestige or esteem in their communities. Pressure can come from other sources: Victims may refuse to cooperate due to multiple complex and understandable reasons.⁵⁷ Public opinion, particularly influenced by media, can also contribute to this pressure.⁵⁸

The Pennsylvania Supreme Court's decision details the email exchange between Castor and his successor, Risa Ferman. After learning that Ferman had reopened the case, Castor emailed her "just in case you might have forgotten what we did with Cosby back in 2005." Stating that he "never made an important decision without discussing it with you during your tenure as First Assistant," Castor reminded Ferman of what he viewed as weaknesses in the case, challenged her to make a case without Cosby's deposition—which he viewed as inadmissible—and even suggested that both the county and Ferman herself could be held civilly liable for her decision to move forward. In a follow-up email, Castor went into considerable detail regarding the logic of his strategy, which Ferman subsequently disregarded.⁵⁹ For prosecutors reporting to their electorate, of course, resisting pressure can threaten job security. In a study seeking to understand how direct elections affect prosecutors' choices, empirical evidence was consistent with the prediction that, when election pressures are strong, prosecutors increase the number of cases taken to trial and plea bargain less.⁶⁰ This reflects the influence public perception can have on job retention for elected prosecutors. Electeds might even face a recall in the face of significant public pressure.⁶¹

Risa Ferman's leadership stands as an example of taking the risk that an aggressive prosecution will succeed. Operating in an office led by an elected official carries many burdens. Prosecutors can find themselves faced with requests to make decisions contrary to the pursuit of justice but consistent with the wishes of the elected. The ethical, aggressive prosecutor that finds themselves in this position must continue to follow the rules of conduct that require them to refrain from advocating on behalf of a position they know to be false or facts they know to be untrue. That position must remain consistent even if the court of public opinion voices dissent. The consequences for violating

⁵⁷ National District Attorneys Association Women Prosecutors Section, *National Domestic Violence Prosecution Best Practices Guide*, (July 17, 2017), <https://ndaa.org/wp-content/uploads/NDAA-DV-White-Paper-FINAL-revised-July-17-2017-1.pdf>.

⁵⁸ Anita Chabria & James Queally, *With Push for Progressive D.A.s, Elected Prosecutors Feel the Pressure of a Changing Profession*, LOS ANGELES TIMES (October 31, 2020), <https://www.latimes.com/california/story/2020-10-31/with-push-for-progressive-district-attorneys-elected-prosecutors-are-feeling-the-pressure>.

⁵⁹ *Commonwealth v. Cosby*, *supra*.

⁶⁰ Siddharta Bandyopadhyay & Bryan C. McCannon, *The Effect of the Election of Prosecutors on Criminal Trials*, 161 PUB. CHOICE 141-156 (October 2014), <https://www.jstor.org/stable/24507520>.

⁶¹ Bidar, Musadiq, *San Francisco Votes Overwhelmingly to Recall Progressive DA Chesa Boudin*, CBS NEWS (June 8, 2022) <https://www.cbsnews.com/news/chesa-boudin-san-francisco-da-recalled>.

ethical duties, regardless of the reasons, are faced by the name that signs the order, not necessarily the name on the door.

Conclusion

The indictment filed against William Henry Cosby alleging acts of sexual assault came as a shock to many Americans. But to the many women who had come forward over the years and those in the entertainment industry who had been hearing those complaints for years, it was a refreshing affirmation.⁶² What followed was a complex path that left victims confused and prosecutors frustrated. While the outcome did not result in justice for the victims, the pursuit of the truth was a fight all advocates should aspire to.

Prosecutors have to strike a difficult balance between ethics, aggression, and equity.⁶³ Almost every courthouse across the country has some depiction or reference to the scales of justice, which serve as a constant reminder of the precarious symmetry. There is no formula. No manual. No checklist to follow. Experience and ethics are the supports a prosecutor needs to develop the skills necessary to maintain that balance. The path is difficult and unpopular, and can even lead to the appellate court and back. By combining a trauma-informed approach to victims' rights with aggressive advocacy—while simultaneously safeguarding the fundamental principles underlying our criminal justice system—the ethical and assertive prosecutor can effectively navigate the path to success.

⁶² Elahe Izadi, *Hannibal Buress Unwittingly Reignited the Bill Cosby Firestorm. Here's How He Dealt with the Aftermath*, WASH. POST (April 26, 2018), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/04/26/hannibal-buress-unwittingly-reignited-the-bill-cosby-firestorm-heres-how-he-dealt-with-the-aftermath>. See also Samantha Grossman, *Did 30 Rock Call Out Bill Cosby for Sexual Assault Five Years Ago?* TIME MAGAZINE (December 3, 2014), <https://time.com/3615987/bill-cosby-sexual-assault-allegations-30-rock>.

⁶³ MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.5, (American Bar Association, 2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence.

