

**Excerpts from the Department of Justice Justice Manual,
American Bar Association Criminal Justice Standards, and
National District Attorneys Association National Prosecution Standards**

**U.S. Department of Justice
Justice Manual – Relevant Sections on
Initiating and Declining Prosecution**
(updated February 2018)

9-27.200 - Initiating and Declining Prosecution—Probable Cause Requirement

If the attorney for the government concludes that there is probable cause to believe that a person has committed a federal offense within his/her jurisdiction, he/she should consider whether to:

1. Request or conduct further investigation;
2. Commence or recommend prosecution;
3. Decline prosecution and refer the matter for prosecutorial consideration in another jurisdiction;
4. Decline prosecution and commence or recommend pretrial diversion or other non-criminal disposition; or
5. Decline prosecution without taking other action.

Comment. JM 9-27.200 sets forth the courses of action available to the attorney for the government once he/she concludes that there is probable cause to believe that a person has committed a federal offense within his/her jurisdiction. The probable cause standard is the same standard required for the issuance of an arrest warrant or a summons upon a complaint (see Fed. R. Crim. P. 4(a)), and for a magistrate's decision to hold a defendant to answer in the district court (see Fed. R. Crim. P. 5.1(a)), and is the minimal requirement for indictment by a grand jury. See *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972). This is, of course, a threshold consideration only. Merely because this requirement can be met in a given case does not automatically warrant prosecution; further investigation may instead be warranted, and the prosecutor should still take into account all relevant considerations, including those described in the following provisions, in deciding upon his/her course of action. On the other hand, failure to meet the minimal requirement of probable cause is an absolute bar to initiating a federal prosecution, and in some circumstances may preclude reference to other prosecuting authorities or recourse to non-criminal sanctions or other measures as well.

9-27.220 - Grounds for Commencing or Declining Prosecution

The attorney for the government should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless (1) the prosecution would serve no substantial federal interest; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution.

Comment. Evidence sufficient to sustain a conviction is required under Rule 29(a) of the Federal Rules of Criminal Procedure, to avoid a judgment of acquittal. Moreover, both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the attorney for the government believes that the admissible evidence is sufficient to obtain and sustain a guilty verdict by an unbiased trier of fact. In this connection, it should be noted that, when deciding whether to prosecute, the government attorney need not have in hand, at that time, all of the evidence upon which he/she intends to rely at trial, if he/she has a reasonable and good faith belief that such evidence will be available and admissible at the time of trial. Thus, for example, it would be proper to commence or recommend a prosecution even though a key witness may be out of the country, so long as there is a good faith basis to believe that the witness's presence at trial could reasonably be expected.

Where the law and the facts create a sound, prosecutable case, the likelihood of an acquittal due to unpopularity of some aspect of the prosecution or because of the overwhelming popularity of the defendant or his/her cause is not a factor prohibiting prosecution. For example, in a civil rights case or a case involving an extremely popular political figure, it might be clear that the evidence of guilt—viewed objectively by an unbiased factfinder—would be sufficient to obtain and sustain a conviction, yet the prosecutor might reasonably doubt, based on the circumstances, that the jury would convict. In such a case, despite his/her negative assessment of the likelihood of a guilty verdict (based on factors extraneous to an objective view of the law and the facts), the prosecutor may properly conclude that it is necessary and appropriate to commence or recommend prosecution and allow the criminal process to operate in accordance with the principles set forth here.

However, the attorney for the government's belief that a person's conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction is not sufficient standing by itself to commence or recommend prosecution. The prosecution must also serve a substantial federal interest, and the prosecutor must assess whether, in his/her judgment, the person is subject to effective prosecution in another jurisdiction; and whether there exists an adequate non-criminal alternative to prosecution. It is left to the judgment of the attorney for the government to determine whether these circumstances exist. In exercising that judgment, the attorney for the government should consult JM 9-27.230, 9-27.240, 9-27.250, and 9-27.260.

9-27.230 - Initiating and Declining Charges—Substantial Federal Interest

In determining whether a prosecution would serve a substantial federal interest, the attorney for the government should weigh all relevant considerations, including:

1. Federal law enforcement priorities, including any federal law enforcement initiatives or operations aimed at accomplishing those priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;

5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others;
7. The person's personal circumstances;
8. The interests of any victims; and
9. The probable sentence or other consequences if the person is convicted.

Comment. The list of relevant considerations is not intended to be all-inclusive. Moreover, not all of the factors will be applicable to every case, and in any particular case one factor may deserve more weight than it might in another case.

1. **Federal Law Enforcement Priorities.** Federal law enforcement resources are not sufficient to permit prosecution of every alleged offense over which federal jurisdiction exists. Accordingly, in the interest of allocating its limited resources so as to achieve an effective nationwide law enforcement program, from time to time the Attorney General may establish national investigative and prosecutorial priorities. These priorities are designed to focus federal law enforcement efforts on those matters within the federal jurisdiction that are most deserving of federal attention and are most likely to be handled effectively at the federal level, rather than state or local level. As just one example, prosecution of offenses within the exclusive territorial jurisdiction of the United States, where no other avenue of prosecution exists, serves a particular and important federal interest. In addition, individual United States Attorneys are required to establish their own priorities (in consultation with law enforcement authorities), within the national priorities, in order to concentrate their resources on problems of particular local or regional significance. The Attorney General and individual United States Attorneys may implement specific federal law enforcement initiatives and operations designed at accomplishing those priorities. In weighing the federal interest in a particular prosecution, the attorney for the government should give careful consideration to the extent to which prosecution would accord with these national and local priorities, as well as federal law enforcement initiatives or operations designed to accomplish them, whether on a national level or by important impact on local law enforcement needs. The fact that a particular prosecution is part of a larger federal law enforcement initiative that serves a substantial federal interest is an appropriate and relevant consideration in determining whether that individual prosecution also serves such a federal interest.
2. **Nature and Seriousness of Offense.** It is important that limited federal resources not be wasted in prosecuting inconsequential cases or cases in which the violation is only technical. Thus, in determining whether a substantial federal interest exists that requires prosecution, the attorney for the government should consider the nature and seriousness of the offense involved. A number of factors may be relevant to this consideration. One factor that is obviously of primary importance is the actual or potential impact of the offense on the community and on the victim(s). The nature and seriousness of the offense may also include a consideration of national security interests.

The impact of an offense on the community in which it is committed can be measured in several ways: in terms of economic harm done to community interests; in terms of physical danger to the citizens or damage to public property; and in terms of erosion of the inhabitants' peace of mind and sense of security. In assessing the seriousness of the offense in these terms, the prosecutor may properly weigh such questions as whether the violation is technical or relatively inconsequential in nature and what the public attitude may be toward prosecution under the

circumstances of the case. The public may be indifferent, or even opposed, to enforcement of the controlling statute whether on substantive grounds, or because of a history of nonenforcement, or because the offense involves essentially a minor matter of private concern and the victim is not interested in having it pursued. On the other hand, the nature and circumstances of the offense, the identity of the offender or the victim, or the attendant publicity, may be such as to create strong public sentiment in favor of prosecution. While public interest, or lack thereof, deserves the prosecutor's careful attention, it should not be used to justify a decision to prosecute, or to take other action, that is not supported on other grounds. Public and professional responsibility sometimes will require the choosing of a particularly unpopular course.

3. **Deterrent Effect of Prosecution.** Deterrence of criminal conduct, whether it be criminal activity generally or a specific type of criminal conduct, is one of the primary goals of the criminal law. This purpose should be kept in mind, particularly when deciding whether a prosecution is warranted for an offense that appears to be relatively minor; some offenses, although seemingly not of great importance by themselves, if commonly committed would have a substantial cumulative impact on the community.
4. **The Person's Culpability.** Although a prosecutor may have sufficient evidence of guilt, it is nevertheless appropriate for him/her to give consideration to the degree of the person's culpability in connection with the offense, both in the abstract and in comparison with any others involved in the offense. If, for example, the person was a relatively minor participant in a criminal enterprise conducted by others, or his/her motive was non-criminal, and no other factors require prosecution, the prosecutor might reasonably conclude that some course other than prosecution would be appropriate.
5. **The Person's Criminal History.** If a person is known to have a prior conviction or is reasonably believed to have engaged in criminal activity at an earlier time, this should be considered in determining whether to commence or recommend federal prosecution. In this connection particular attention should be given to the nature of the person's prior criminal involvement, when it occurred, its relationship, if any, to the present offense, and whether he/she previously avoided prosecution as a result of an agreement not to prosecute in return for cooperation or as a result of an order compelling his/her testimony. By the same token, a person's lack of prior criminal involvement or his/her previous cooperation with the law enforcement officials should be given due consideration in appropriate cases.
6. **The Person's Willingness to Cooperate.** A person's willingness to cooperate in the investigation or prosecution of others is another appropriate consideration in the determination whether a federal prosecution should be undertaken. Generally speaking, a willingness to cooperate should not by itself relieve a person of criminal liability. There may be some cases, however, in which the value of a person's cooperation clearly outweighs the federal interest in prosecuting him/her. These matters are discussed more fully below, in connection with plea agreements and non-prosecution agreements in return for cooperation.
7. **The Person's Personal Circumstances.** In some cases, the personal circumstances of an accused may be relevant in determining whether to prosecute or to take other action. Some circumstances particular to the accused, such as extreme youth, advanced age, or mental or physical impairment, may suggest that prosecution is not the most appropriate response to his/her offense; other circumstances, such as the fact that the accused

occupied a position of trust or responsibility which he/she violated in committing the offense, might weigh in favor of prosecution.

8. **The Interests of Any Victims.** It is also important to consider the economic, physical, and psychological impact of the offense, and subsequent prosecution, on any victims. In this connection, it is appropriate for the prosecutor to take into account such matters as the seriousness of the harm inflicted and the victim's desire for prosecution. Prosecutors may solicit the victim's views on the filing of charges through a general conversation without reference to any particular defendant or charges. For more information regarding the Department's obligations to victims, see the Crime Victims' Rights Act, 18 U.S.C. § 3771, the Victims' Rights and Restitution Act, 34 U.S.C. § 20141, and the Attorney General Guidelines for Victim and Witness Assistance.
9. **The Probable Sentence or Other Consequence.** In assessing the strength of the federal interest in prosecution, the attorney for the government should consider the sentence, or other consequence, that is likely to be imposed if prosecution is successful, and whether such a sentence or other consequence would justify the time and effort of prosecution. If the offender is already subject to a substantial sentence, or is already incarcerated, as a result of a conviction for another offense, the prosecutor should weigh the likelihood that another conviction will result in a meaningful addition to his/her sentence, might otherwise have a deterrent effect, or is necessary to ensure that the offender's record accurately reflects the extent of his/her criminal conduct. For example, it might be desirable to commence a bail-jumping prosecution against a person who already has been convicted of another offense so that law enforcement personnel and judicial officers who encounter him/her in the future will be aware of the risk of releasing him/her on bail. On the other hand, if the person is on probation or parole as a result of an earlier conviction, the prosecutor should consider whether the public interest might better be served by instituting a proceeding for violation of probation or revocation of parole, than by commencing a new prosecution. The prosecutor should also be alert to the desirability of instituting prosecution to prevent the running of the statute of limitations and to preserve the availability of a basis for an adequate sentence if there appears to be a chance that an offender's prior conviction may be reversed on appeal or collateral attack. Finally, if a person previously has been prosecuted in another jurisdiction for the same offense or a closely related offense, the attorney for the government should consult existing departmental policy statements on the subject of "successive prosecution" or "dual prosecution," depending on whether the earlier prosecution was federal or nonfederal. See [JM 9-2.031](#) (Petite Policy).

There are also considerations that deserve no weight and should not influence the decision, such as the time and resources already expended in federal investigation of the case. No amount of investigative effort warrants commencing a federal prosecution that is not fully justified on other grounds.

9-27.260 - Initiating and Declining Charges—Impermissible Considerations

In determining whether to commence or recommend prosecution or take other action against a person, the attorney for the government should not be influenced by:

1. The person's race, religion, gender, ethnicity, national origin, sexual orientation, or political association, activities, or beliefs;
2. The attorney's own personal feelings concerning the person, the person's associates, or the victim; or
3. The possible effect of the decision on the attorney's own professional or personal circumstances.

Comment. [JM 9-27.260](#) sets forth various matters that plainly should not influence the determination whether to commence or recommend prosecution or to take other action. They are listed here not because it is anticipated that any attorney for the government might allow them to affect his/her judgment, but in order to make clear that federal prosecutors will not be influenced by such improper considerations. Of course, in a case in which a particular characteristic listed in subparagraph (1) is pertinent to the offense (for example, in an immigration case the fact that the offender is not a United States national, in a terrorism case the fact that the individual is part of a terrorist organization that uses violence in part for political ends, or in a civil rights case the fact that the victim and the offender are of different races), the provision would not prohibit the prosecutor from considering such a characteristic for the purpose intended by the Congress.

9-27.270 – Records of Prosecutions Declined

Whenever an attorney for the government declines to commence or recommend federal prosecution, he/she should ensure that his/her decision and the reasons therefore are communicated to the investigating agency involved and to any other interested agency, and are also reflected in the office files to ensure an adequate record of disposition of matters that are brought to the attention of the government attorney for possible criminal prosecution, but that do not result in federal prosecution. When prosecution is declined in serious cases on the understanding that action will be taken by other authorities, appropriate steps should be taken to ensure that the matter receives their attention.

The American Bar Association
Criminal Justice Standards for the Prosecution Function
(Fourth Edition 2017)

Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges

(a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.

(b) After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.

(c) If a prosecutor has significant doubt about the guilt of the accused or the quality, truthfulness, or sufficiency of the evidence in any criminal case assigned to the prosecutor, the prosecutor should disclose those doubts to supervisory staff. The prosecutor's office should then determine whether it is appropriate to proceed with the case.

(d) A prosecutor's office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence.

Standard 3-4.4 Discretion in Filing, Declining, Maintaining, and Dismissing Criminal Charges

(a) In order to fully implement the prosecutor's functions and duties, including the obligation to enforce the law while exercising sound discretion, the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support. Among the factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge, even though it meets the requirements of Standard 3-4.3, are:

- (i) the strength of the case;
- (ii) the prosecutor's doubt that the accused is in fact guilty;
- (iii) the extent or absence of harm caused by the offense;
- (iv) the impact of prosecution or non-prosecution on the public welfare;
- (v) the background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation;
- (vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;
- (vii) the views and motives of the victim or complainant;
- (viii) any improper conduct by law enforcement;
- (ix) unwarranted disparate treatment of similarly situated persons;
- (x) potential collateral impact on third parties, including witnesses or victims;
- (xi) cooperation of the offender in the apprehension or conviction of others;

(xii) the possible influence of any cultural, ethnic, socioeconomic or other improper biases;
(xiii) changes in law or policy;
(xiv) the fair and efficient distribution of limited prosecutorial resources;
(xv) the likelihood of prosecution by another jurisdiction; and
(xvi) whether the public's interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.

(b) In exercising discretion to file and maintain charges, the prosecutor should not consider:

- (i) partisan or other improper political or personal considerations;
- (ii) hostility or personal animus towards a potential subject, or any other improper motive of the prosecutor; or
- (iii) the impermissible criteria described in Standard 1.6 above.

(c) A prosecutor may file and maintain charges even if juries in the jurisdiction have tended to acquit persons accused of the particular kind of criminal act in question.

(d) The prosecutor should not file or maintain charges greater in number or degree than can reasonably be supported with evidence at trial and are necessary to fairly reflect the gravity of the offense or deter similar conduct.

(e) A prosecutor may condition a dismissal of charges, *nolle prosequi*, or similar action on the accused's relinquishment of a right to seek civil redress only if the accused has given informed consent, and such consent is disclosed to the court. A prosecutor should not use a civil waiver to avoid a bona fide claim of improper law enforcement actions, and a decision not to file criminal charges should be made on its merits and not for the purpose of obtaining a civil waiver.

(f) The prosecutor should consider the possibility of a noncriminal disposition, formal or informal, or a deferred prosecution or other diversionary disposition, when deciding whether to initiate or prosecute criminal charges. The prosecutor should be familiar with the services and resources of other agencies, public or private, that might assist in the evaluation of cases for diversion or deferral from the criminal process.

National District Attorneys Association
National Prosecution Standards
(Third Edition)

1. Screening

4-1.2 Prosecutorial Discretion

The chief prosecutor should recognize and emphasize the importance of the initial charging decision and should provide appropriate training and guidance to prosecutors regarding the exercise of their discretion.

4-1.3 Factors to Consider

Prosecutors should screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest. Factors that may be considered in this decision include:

- a. Doubt about the accused's guilt;
- b. Insufficiency of admissible evidence to support a conviction;
- c. The negative impact of a prosecution on a victim;
- d. The availability of adequate civil remedies;
- e. The availability of suitable diversion and rehabilitative programs;
- f. Provisions for restitution;
- g. Likelihood of prosecution by another criminal justice authority;
- h. Whether non-prosecution would assist in achieving other legitimate goals, such as the investigation or prosecution of more serious offenses;
- i. The charging decisions made for similarly-situated defendants;
- j. The attitude and mental status of the accused;
- k. Undue hardship that would be caused to the accused by the prosecution;
- l. A history of non-enforcement of the applicable law;
- m. Failure of law enforcement to perform necessary duties or investigations;
- n. The expressed desire of an accused to release potential civil claims against victims, witnesses, law enforcement agencies and their personnel, or the prosecutor and his personnel, where such desire is expressed after having the opportunity to obtain advice of counsel and is knowing and voluntary;
- o. Whether the alleged crime represents a substantial departure from the accused's history of living a law-abiding life;
- p. Whether the accused has already suffered substantial loss in connection with the alleged crime;
- q. Whether the size of the loss or the extent of the harm caused by the alleged crime is too small to warrant a criminal sanction

4-1.4 Factors Not to Consider

Factors that should not be considered in the screening decision include the following:

- a. The prosecutor's individual or the prosecutor's office rate of conviction;
- b. Personal advantages or disadvantages that a prosecution might bring to the prosecutor or others in the prosecutor's office;
- c. Political advantages or disadvantages that a prosecution might bring to the prosecutor;
- d. Characteristics of the accused that have been recognized as the basis for invidious discrimination, insofar as those factors are not pertinent to the elements or motive of the crime;
- e. The impact of any potential asset forfeiture to the extent described in Standard 4-7.4.

4-1.7. Record of Declinations

Where permitted by law, a prosecutor's office should retain a record of the reasons for declining a prosecution.

2. Charging

4-2.2 Propriety of Charges

A prosecutor should file charges that he or she believes adequately encompass the accused's criminal activity and which he or she reasonably believes can be substantiated by admissible evidence at trial.

4-2.4 Factors to Consider

The prosecutor should only file those charges that are consistent with the interests of justice. Factors that may be relevant to this decision include:

- a. The nature of the offense, including whether the crime involves violence or bodily injury;
- b. The probability of conviction;
- c. The characteristics of the accused that are relevant to his or her blameworthiness or responsibility, including the accused's criminal history;
- d. Potential deterrent value of a prosecution to the offender and to society at large;
- e. The value to society of incapacitating the accused in the event of a conviction;
- f. The willingness of the offender to cooperate with law enforcement;
- g. The defendant's relative level of culpability in the criminal activity;
- h. The status of the victim, including the victim's age or special vulnerability;
- i. Whether the accused held a position of trust at the time of the offense;
- j. Excessive costs of prosecution in relation to the seriousness of the offense;
- k. Recommendation of the involved law enforcement personnel;
- l. The impact of the crime on the community;
- m. Any other aggravating or mitigating circumstances.

Commentary

In making a charging decision, the prosecutor should keep in mind the power he or she is exercising at that point in time. The prosecutor is making a decision that will have a profound effect on the lives of the person being charged, the person's family, the victim, the victim's family, and the community as a whole. The magnitude of the charging decision does not dictate that it be made timidly, but it does dictate that it should be made wisely with the exercise of sound professional judgment.

There will be times when information not known at the time of charging will influence future actions in a case. While it is advisable to gather all information possible prior to charging, that is simply an unrealistic expectation. The prosecutor must balance the importance of gathering information and the importance of public safety interests when determining when he or she has sufficient information to make a charging decision.

While commencing a prosecution is permitted by most ethical standards upon a determination that probable cause exists to believe that a crime has been committed and that the defendant has committed it, the standard prescribes a higher standard for filing a criminal charge. To suggest that the charging standard should be the prosecutor's reasonable belief that the charges can be substantiated by admissible evidence at trial is recognition of the powerful effects of the initiation of criminal charges. Pursuant to the prosecution's duty to seek justice, the protection of the rights of all (even the prospective defendant) is required.
