Improving the Ethical Guidelines for Assistant United States Attorneys Who Are Considering the Declination of a Law Enforcement Agent's Recommendation toProsecute

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IMPROVING THE ETHICAL GUIDELINES FOR ASSISTANT UNITED STATES ATTORNEYS WHO ARE CONSIDERING THE DECLINATION OF A LAW ENFORCEMENT AGENT’S RECOMMENDATION TO PROSECUTE

by Elhrick Joseph Cerdan

I. Introduction

Imagine an eastbound interstate highway somewhere in the American Midwest on a warm summer evening. As a seasoned federal agent with several years of investigative experience, the local sheriff has contacted you for assistance with the interview of a male subject. The local sheriff’s deputy pulled over the young man during a routine traffic stop, which led to the discovery of multiple pounds of high quality methamphetamine and several thousand dollars hidden within the vehicle. You introduce yourself to the young man, show him your credentials, and ask him if he is willing to waive his rights as per Miranda. He agrees, and you conduct a consensual interview.

After the interview is completed, you determine that the young man was acting as a trusted deliveryman for a foreign drug trafficking organization. He admitted to you that he knew what he was transporting across the United States and that the money was his payment for services rendered. Based on your training and experience, you conclude that you have probable cause that at least one federal crime has been committed. Prior to conducting a warrantless arrest and preparing a criminal complaint, you call the duty (or on-call) Assistant United States Attorney to confirm that federal prosecution will be accepted by the local United States Attorney’s Office.

The Assistant United States Attorney listens to your facts, but despite your recommendation, declines the case on the spot. He states that the weight of methamphetamine and the amount of money does not reach his office’s required minimum threshold for prosecution. You then decide to call the local county district attorney’s office and refer the case to them. They accept prosecution on similar state charges, and the case is successfully prosecuted. However, the defendant receives a lesser sentence than he would have received in the federal system.

Unfortunately, instances like this occur across the United States far too often. They involve different federal law enforcement agencies, United States Attorneys’ Offices, and investigations, but the result is the same: federal prosecutions that would lead to convictions are needlessly turned down. These declinations result from an unaddressed need for ethical guidance for Assistant United States Attorneys who make the important decision to decline or accept a case for federal prosecution. The current ethical guidelines are inadequate. The guidelines either address only the ethical standards for accepting a case for prosecution, or they are silent as to any ethical standards for appropriate declinations. There is no black letter rule that federal prosecutors can look to for guidance in these situations.

II. Overview

As in the above-mentioned vignette, when a federal law enforcement agent is pre-
paring to make a warrantless arrest, the agent must contact the local United States Attorney’s Office (USAO) to confirm that federal prosecution will be accepted. However, agents can contact the local USAO to present cases at earlier and more convenient times during an investigation. Perhaps the need for a search warrant, a subpoena, or simply some legal advice may prompt the agent to present a case earlier than at the critical time of a warrantless arrest.

How an agent presents a case depends on which district he is contacting. Each USAO has its own unique procedure on how to accept or decline a case. For example, some USAOs have a “duty” Assistant United States Attorney (AUSA), who has been provided with a “duty” or “on-call” cellular phone. The duty AUSA is required to answer phone calls 24 hours a day for a certain period of time, ranging from one day to one week. The agents in the area are then given that phone number and have specific instructions to contact that number to present a case. Other USAOs allow agents to contact any USAO at that USAO and present any case to them directly. Agents will contact AUSAs that they have worked with in the past successfully, or they may “shop” around for one that is held in high regard by law enforcement. In addition, other USAOs only allow agents to contact a supervisory AUSA and present the case to them. Which supervisor is contacted would depend on the facts and type of the case (narcotics, white collar crimes, immigration enforcement, etc.).

If the case is accepted, then the agent is assigned an AUSA to work within the investigation. In the vignette above, the agent would proceed with the warrantless arrest with the guidance of the assigned AUSA. However, should the case be declined, the agent has several options available. The agent can make the decision to close the investigation due to the declination of federal prosecution. This could result in agency-specific reports, explaining why the investigation was closed without an arrest, indictment, conviction, etc. If time and resources permit, the agent can continue to work the investigation, gathering more facts and/or evidence of a federal crime, and attempt to re-present the case to the local USAO later. Finally, the agent can contact the state or local prosecutor’s office and present the case to them. However, this is contingent on there being an applicable state charge which the local office would be able to prosecute based on their office’s limited resources.

Regardless of which option the agent chooses, the declination of the case by the local USAO has consequences affecting parties throughout the criminal justice system. The burden on the state or local prosecutor’s offices increases as more cases are added to their already large caseload. State prosecutors in large cities throughout the United States often have hundreds of cases assigned to them, while federal prosecutors enjoy much lower caseloads. Those cases are then prosecuted with lesser state charges when compared to the potential federal charges. The state charges usually carry lesser sentences than their federal equivalents. In addition, due to overcrowding in state penal institutions, oftentimes the defendant will not serve the entire sentence, or the sentence may be deferred altogether (comparatively, there is no deferred sentencing or opportunities for parole for the defendant in the federal criminal justice system). As the defendants get their sentences deferred, word
spreads throughout the criminal underworld. Just like legitimate businesses, these criminal organizations make strategic decisions on where to set up their networks. The organizations decide which states, or jurisdictions, to travel through when conducting their business, depending on the aggressiveness of the federal and/or state prosecutors within that jurisdiction. Instead of deterring crime through effective prosecutions, less aggressive USAOs may be encouraging criminal activity through their case declinations.

Likewise, the case declinations also affect the federal law enforcement agencies and their personnel in the district. Agents may feel resentment towards their USAOs or that their investigative work is inadequate or unappreciated. Agencies may survive on successful state prosecutions alone, depending on whether their statistics differentiate between a state and federal prosecution. However, federal law enforcement agencies have specific federal statutory authority, which allows them to achieve complex and far reaching federal prosecutions. If the agencies continue to rely on state prosecutions, each agency and its personnel may not be achieving the most effective results based on their original federal statutory authority.

Each USAO and its individual personnel are also affected by the case declinations. When management turns down potential prosecutions, they are denying career-oriented attorneys experience on quality cases. Federal criminal investigations can be complex, involving multiple defendants and charges, ranging from conspiracy to more sophisticated charges such as racketeering. Attorneys lose the opportunity to prosecute these complex cases, hone their litigation skills, and increase their overall experience. A lower caseload would also reflect on the USAOs annual performance statistics.

III. Background

A. The United States Attorney’s Offices

The U.S. Attorney is considered the chief federal law enforcement officer within his or her jurisdiction. There is one appointed U.S. Attorney for each of the nation’s ninety-four judicial districts (Guam and the Northern Mariana Islands are served by a single U.S. Attorney). They are appointed by the President of the United States for a term of four years and may continue to serve until a successor is appointed. Each appointment is subject to the confirmation of the United States Senate. Once confirmed, each U.S. Attorney is subject to removal by the President at any time before the expiration of their term. Interim, or acting, U.S. Attorneys are appointed by the Attorney General of the United States. The Attorney General is the highest-ranking official and head of the U.S. Department of Justice, which is the nation’s federal executive department responsible for the enforcement of federal law and administration of justice.

The U.S. Attorney position is the equivalent of an Assistant Attorney General in the U.S. Department of Justice’s organizational hierarchy. This is significant because each U.S. Attorney reports directly to the Deputy Attorney General’s Office, who is the second highest-ranking official within the Department. As such, the position carries great prestige, authority, and autonomy. Each U.S. Attorney effectively has carte blanche on how to structure and manage his or her USAO.

Every U.S. Attorney has the ability to organize his or her USAO in a unique configuration, depending on factors such as the size of the district, the types of cases common in the district, or the district’s history. However, there are certain common features within

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3 Id. at 541(b).
4 Id. at 541(c).
5 Id. at 546(a).
each USAO. Each U.S. Attorney will likely have a First Assistant, or Deputy U.S. Attorney, who acts as the second highest ranking official in that USAO. USAOs will generally have a separate criminal division and civil division, each managed by a division chief (who in turn may have his or her own deputies). Some USAOs may further divide their divisions into units that specialize in particular cases, and supervised by unit chiefs. The larger districts will have divisions divided geographically. For example, the Southern District of Texas has its principal office in Houston, Texas, with six smaller, divisional offices spread throughout the District. The day-to-day responsibilities for handling prosecutions and working with law enforcement personnel within the USAO are handled by the AUSAs. AUSAs are appointed, and subject to removal, by the Attorney General.

As the “workhorses” of each USAO, the AUSAs are at times faced with the decision whether to proceed with prosecution. The ability of any law enforcement agent (including prosecutors) to decide whether to investigate and proceed with the prosecution of a case is known as prosecutorial discretion. As stated by the U.S. Bureau of Justice Statistics, “the decision to prosecute a suspect in a criminal matter depends on many factors, including the Attorney General’s priorities, U.S. Attorney priorities and resources, laws governing each type of offense, and the strength of evidence in each case.” Among the factors that AUSAs consider when applying prosecutorial discretion are the ethical guidelines that all American lawyers follow. The guidelines have evolved throughout history to the current codes that modern lawyers are tested on prior to their admission to the bar, and practice by afterwards.

B. Sources of Ethical Guidance

The earliest codified American ethical guidelines for lawyers were developed in Alabama in the late 1800s. The Alabama State Bar Association adopted a code of ethics in 1887 (Alabama Code), written by the 28th Governor of Alabama and U.S. District Court Judge, Thomas Goode Jones. Judge Jones based the Alabama Code on two earlier sources: the lectures of Pennsylvania Supreme Court Chief Justice George Sharswood, which were published in 1854 under the title of \textit{Professional Ethics}, and the fifty resolutions found in David Hoffman’s \textit{A Course of Legal Study} (2d ed. 1836), one of the first written American law school texts. The Alabama Code was later adopted by eleven states and led to the development of the American Bar Association’s (ABA) Canons of Professional Ethics, the first set of ethical guidelines for lawyers nationwide by the ABA.

The Alabama Code consisted of fifty-six generalized rules that were adopted for the guidance of the Alabama State Bar Association’s members. Rule 12 of the Alabama Code addressed “the Defense and Prosecution of Criminal Cases” stating,

“an attorney appearing or continuing as private counsel in the prosecution for a crime of which he believes the accused innocent, for swears himself. The State’s attorney is criminal, if he presses for a conviction, when upon the evidence he believes the prisoner innocent. If the evidence is not plain enough to justify a nolle proso, a public prosecutor should submit the case, with such comments as are pertinent, accompanied by a candid statement of his own doubts.”

The rule does not specifically address the acceptance of a case for prosecution. However, it does set the first minimum standard for prosecution: if the prosecutor pursues a conviction when the evidence shows the defendant is innocent, then the prosecutor could be criminally liable.

Following the Alabama Code, the next milestone in American legal ethics took place in August of 1908 in Seattle, Washington. At the annual ABA meeting, the Canons of Professional Ethics were adopted for nationwide use by the legal community. They consisted of thirty-two individual canons, as well as a sample lawyer “oath of admission” for states to consider when crafting their own oaths. Of all the canons, only the fifth canon, titled “The Defense or Prosecution of Those Accused of Crime,” specifically addressed prosecutorial conduct. Yet, it did not significantly improve upon the Alabama Code’s minimum prosecutorial standard. It specified that the primary duty of a prosecutor was not to achieve a criminal conviction, but to ensure that justice was executed. This served a noteworthy purpose: to give prosecutors across the nation a broad, uniform mission statement, regardless of their employer. This mission statement was vague, however, and did not address case acceptance.

By the middle of the twentieth century, the legal community determined that the ABA’s Canons were in need of an update. The Canons did not provide sufficient guidance on many situations and were not designed for disciplinary action. In August 1969, after months of committee meetings, the ABA House of Delegates approved a Model Code of Professional Conduct (Model Code). The Model Code consisted of nine Canons, each containing Ethical Considerations, and Disciplinary Rules. The Canons and Ethical Considerations were designed to be aspirational, guiding lawyers in their daily professional lives. The Disciplinary Rules were designed to be mandatory, setting a minimum standard by which all lawyers could be judged by the bar and the public. However, just as the earlier Canons, the Model Code did not carry the force of law.13

Prosecutors in particular were guided and bound by the Model Code’s Canon 7: “A Lawyer Should Represent A Client Zealously Within the Bounds of the Law.” Ethical Consideration (EC) 7-13 specifically addressed the special duties of a prosecutor.14 It restated the 1908 Canon’s goal of achieving justice rather than conviction. The special duties exist, as EC 7-13 states, because “the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute.” The EC also stated principles of discovery, such as revealing damaging evidence, despite its detrimental effect on the prosecutor’s case. Although vague, EC-7-13 addresses case selection by prosecutors and the “restraint” that they should use in their exercise of prosecutorial discretion. The EC builds upon the Alabama Code’s minimum prosecutorial standard by adding the term “restraint,” rather than suggesting that the prosecutor is “criminal” if the standard is not met.

Within Canon 7, Disciplinary Rule (DR) 7-103 sets a mandatory standard when seeking prosecution and providing discovery. DR 7-103 was based on Canon 5 from the 1908 Canons. Section (a) states that a prosecutor should not proceed with a prosecution if he knows that there is not sufficient probable cause. Section (b) restates the disclosure of harmful evidence during discovery as found in EC 7-13. Just as in the 1908 Canons, this only addressed the threshold for case acceptance, but was silent as to when declinations are appropriate.

Shortly after adoption, the Model Code began to draw criticism from the legal community.15 In fact, even the Model Code’s Pref-

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14 Id.
ace admitted that there were at least four areas that would need revision in the future.\textsuperscript{66} When compared to the ABA Canons, the structure of the Model Code was complicated. \textsuperscript{5} “Some critics described the three part structure as irrational and unworkable.” \textsuperscript{7} There were criticisms that some of the Ethical Considerations were in conflict with their matching Disciplinary Rules.\textsuperscript{8} Also, the nine Canons and their Ethical Considerations did not carry any disciplinary ramifications. Rather than enumerate black letter rules, the consistent vagueness throughout the Model Code merely created an “ethical mood,” subject to interpretation by the local bars.\textsuperscript{20}

In response to the criticism of the Model Code, as well as the negative perception of lawyers following the “Watergate” scandal, the ABA created a commission to revise the Model Code.\textsuperscript{21} Known as the Kutak Commission, after the commission chair Robert Kutak, this committee published the first draft of the Model Rules of Professional Conduct (Model Rules) in 1980.\textsuperscript{22} These Model Rules were styled after the American Law Institute’s (ALI) Restatements of the Law, which are black letter rules covering various legal subjects.\textsuperscript{23} The Model Rules provide a body of ethical principles that a lawyer could look to for guidance in different situations.\textsuperscript{24} The Kutak Commission eliminated the confusing distinctions between Ethical Considerations and Disciplinary Rules; each Model Rule, as well as its Comments, would be the sole starting point for any given situation. As with the prior ethical guidelines, the Model Rules were not binding and did not have the force of law.

Addressing both state and federal prosecutors, MRPC 3.8 “Special Responsibilities of a Prosecutor” provided an expanded set of rules to follow when compared to previous ethical guidelines. MRPC 3.8 included detailed rules for pre-trial activity, discovery, and public release of information. As with prior ethical sources, section (a) set the minimum standard for proceeding with prosecution: if not supported by probable cause, prosecution should not proceed. However, MRPC 3.8 did not include a minimum standard for declination.

In the years following the adoption of the Model Rules, several amendments were proposed. As recently as 2009, when the ABA created the Commission on Ethics 20/20, lawyers proposed changes to many of the Model Rules. However, since its adoption, there has been no adopted amendment to MRPC 3.8. This could be attributed to the fact the MRPC 3.8 only affects prosecutors, a small portion of the nation’s legal community.

C. Other Sources of Guidance

Outside of the ethical sources discussed, the USAOs have other sources that they look to for guidance. The \textit{U.S. Attorney’s Manual} is a point of reference for U.S. Attorneys and USAAs, providing general policies and procedures for the daily operation of USAOs.\textsuperscript{25} As such, it is not a legally binding document and only serves as internal guidance for USAO personnel.\textsuperscript{26} Section 9-2.020
provides AUSAs guidance on declining prosecution. It states that a U.S. Attorney has the final decision on declining prosecution, unless there is a statutory limitation that requires the acceptance of prosecution. In practice, case declination authority is delegated to AUSAs, as it is not practical for the U.S. Attorney to be involved in the daily case intake process.

Several other Sections provide additional guidance on case declination. Section 9-2.111 expands on the statutory limitation mentioned in Section 9-2.020, stating that prosecutions can be declined in certain situations if it is determined that “the ends of public justice do not require investigation or prosecution.” Section 9-27.220 provides three factors, in addition to the probable cause requirement, for AUSAs to weigh when deciding to decline prosecution. First, prosecution should be declined if no substantial federal interest would be served by the prosecution. Second, prosecution should be declined if the suspect would be subject to prosecution in another jurisdiction. Finally, if there are non-criminal alternatives to prosecution, prosecution should be declined. The Comment to Section 9-27.220 also adds an additional consideration: that there be admissible evidence sufficient to obtain and sustain a conviction. These sections effectively raise the minimum standard of probable cause found in the aforementioned ethical sources. It seems that in practice, AUSAs require probable cause plus the three Section 9-27.220 factors to accept prosecution, unless the “ends of public justice” (from Section 9-2.020) justify declination.

Another source of guidance for USAOs is the ABA Standards for Criminal Justice Prosecution Function and Defense Function (ABA Standards). The ABA Standards, first adopted in 1971, provide reliable guidance through the discussion of “prevailing norms of practice” and assist in determining what is reasonable criminal justice attorney performance. The primary source for the ABA Standards was the Model Rules, but it also aims to discuss subjects not directly covered by the Model Rules. As with the previous ethical sources, the ABA Standards have no force of law, but their process of development has successfully yielded standards that fairly reflect widely shared professional views.

The ABA Standards have three Standards that address case acceptance. Standard 3-1.2 restates the historical duty of the prosecutor to seek justice with discretion and not to merely seek convictions. Standard 3-2.9 addresses the prompt disposition of charges once they are accepted and states that a prosecutor should avoid any delay throughout the process. Standard 3-3.4 resembles the U.S. Attorney’s Manual by placing the decision to charge “initially and primarily” with the prosecutor. The Comments for Standard 3-3.4, state that a prosecutor’s office should have a screening process for cases, to prevent a high acquittal rate. This is comparable to the U.S. Attorney’s Manual’s Comment to Section 9-27.220, where the avoidance of acquittal is an implied principle. In Section 9-2.101, the U.S. Attorney’s Manual recommends that all AUSAs become familiar with the ABA Standards since the federal courts consider them.
during appropriate cases. As with the Model Rules, the ABA Standards are silent as to when case declination is appropriate or not.

D. Published Concerns

In 1978, a highly publicized report by the U.S. General Accountability Office (GAO), the audit, evaluation, and investigative arm of the U.S. Congress, described the high levels of case declination by the USAOs. The report stated that the USAOs declined to prosecute 62% of the criminal complaints available for prosecution during fiscal years 1970-76. Of the 62%, the report explained that only 37% were not prosecutable because of legitimate reasons, such as legal deficiencies. There were no explanations for the other declinations. In response to the report, the U.S. Department of Justice issued the Principles of Federal Prosecution. The Principles were intended to promote effective prosecutorial discretion by AUSAs, and led to revisions within the U.S. Attorney’s Manual, such as the inclusion of the three factors in Section 9-27.220.

In 2010, the GAO again published a similar report. However, this report addressed the high level of case declinations occurring in Indian Country (a term for the self-governing Native American communities within the U.S.). The report stated that through fiscal years 2005-09, 50% of cases presented for prosecution were declined. Of the cases declined, 72% were declined for appropriate reasons, such as weak evidence or issues with witnesses.

IV. Sociological and Political Forces

Inappropriate case declinations at USB- AOs across the country are partially a result of the lack of ethical guidance. However, there are other outside forces that can affect the decision to accept federal prosecution. For each prosecutorial decision, an AUSA weighs factors such as office resources, case strengths, and subject’s culpability. However, the personalities, motivations, and objectives of the individual AUSA frame the final decision. As an organizational entity, each USAO sets its unique policies on prosecutorial discretion.

The policies are based on internal reporting requirements, minimum thresholds, and other organizational strategies. These forces, outside of the legal ethics framework, affect the US- AOs ability to effectively accept cases.

The individual AUSA ideally has a mutual goal with law enforcement agents of crime control though effective prosecutions. The manner in which they reach their acceptable level of crime control varies, depending on their personal interests, such as an interest in a specific area of federal criminal law. At one end of the spectrum, some AUSAs will achieve this level by maximizing the amount of charges applied to the largest number of defendants. These AUSAs will aggressively accept many cases, some of which could warrant declination, with the result of attaining as many convictions as possible. They will assist their agents with “stacking” additional charges against the defendants, encouraging them to reach a plea agreement, avoid trial, and reach a quick resolution, thus freeing the AUSA to work on the next case. These AUSAs are likely younger, risk-seeking, and interested in forming a strong reputation with the law enforcement community and the local bar. Through the large number of cases prosecuted, they get the opportunity to showcase or improve their litigation skills.

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32 Id. at 8.
33 Wright, Supra note 27.
34 Id.
36 Id. at 3.
37 Id.
38 Ronald F. Wright & Rodney L. Engen, Charge Movement and Theories of Prosecutors, 91 Marq. L. Rev. 9, 29 (2007).
39 Id. at 31.
the risk of creating a caseload that becomes unmanageable, leading to increased stress among other problems resulting from being overworked. However, they may continue to aggressively accept cases until they are promoted, leave to work at a different firm with solid work experience, or begin to decline cases more often to bring down their caseloads to manageable levels.

Most AUSAs will focus on specific crimes, as they have likely been assigned to a division by their management. In addition to their assigned case type, they create a personal set of priorities on which crimes to pursue prosecution. These priorities could be based on factors such as the seriousness of the crime or the defendant’s criminal history. For example, an AUSA will likely decline federal prosecution on an illegal alien with no criminal history under 8 U.S.C. 1325 (improper entry by alien). The AUSA will explain that an administrative action, such as a deportation from the United States, would be a better alternative and more effective use of federal resources. However, that same AUSA would be more likely to accept prosecution when an agent presents an illegal alien, who is a gang member with a substantial criminal history, for prosecution. In addition to charging 8 U.S.C. 1325, the AUSA would be able to seek a ten year sentencing enhancement for being a documented gang member under 18 U.S.C. 521 (criminal street gangs). This illustrates how some AUSAs will only accept cases that could result in their prioritized charges, maximizing those convictions while declining cases that involve non-priority, or lesser charges. Perhaps they will be frank with the agent, providing advice on what investigative steps should be followed to achieve sufficient probable cause for the prioritized charges. On the other hand, the AUSA may simply decline the case, legitimately citing USAO priorities, or that a state charge may be the appropriate action instead. The vast majority of AUSAs could be classified in the middle of the spectrum.

At the other end of the spectrum are the AUSAs who only accept cases that are likely to be resolved through a plea agreement due to the amount of evidence against the defendant. These AUSAs only accept cases that seem to be guaranteed convictions. They are extremely risk-averse, and as such, decline most cases because of the fear of participating and losing in a trial. They accept cases because they are winnable or there is no legitimate excuse to decline. Rather than using the constitutionally required probable cause standard, they use the higher criminal trial standard of “beyond a reasonable doubt.” These are AUSAs who are considered “retired on duty” by their peers. They are likely near the end of their careers, trying to do the required minimum to stay employed until they retire. These AUSAs continue to make satisfactory performance evaluations because they may be judged on their conviction rates, regardless of the total number of cases prosecuted. For example, one of these risk-averse AUSAs may have a 90% conviction rate for one year. This would seem highly successful at first glance, but prosecution was only sought in ten cases while another forty cases were declined. Those cases that could result in trial may also be avoided because a high trial rate could be interpreted as a sign of overzealousness or ineffective negotiating skills. Finally, these AUSAs may simply increase their leisure time by resolving more cases through guilty pleas and having high declination rates.

Aside from the individual AUSA, each USAO affects its level of case declination through its organizational strategies and policies. The *U.S. Attorney’s Manual* requires a report when a case is closed without prosecution. This reporting requirement encourages case declination, as cases are declined before an AUSA risks opening a USAO case and having to report case closure. When a case is declined before opening a USAO case, there is

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40 *Id.* at 29-30.

41 *Id.* at 31.

42 *Id.*

no reporting requirement. Without any report, there is no statistic or measure to provide to the U.S. Bureau of Justice Statistics (BJS), which is responsible for measuring activity at all stages of the criminal justice system. Among all the statistical reports provided, the BJS also provides measures of successful prosecutions for each USAO. However, the BJS cannot accurately measure the actual number of case declinations if no report is filed. prevent improper or insignificant investigations from going forward.

As part of the case intake process, each USAO has its own informal or unwritten policies that guide case acceptance. These policies prioritize which case types are aggressively enforced and conversely, which case types are occasionally enforced. These policies are based on the interest, and which USAO is proceeding differently depending on which USAO is proceeding with prosecution, thus showing disparities in case declination rates.

V. Possible Explanations

As stated by the BJS, the primary reasons USAOs cite for case declinations are ease of enforcement and other legal deficiencies. The BJS also recognizes many other legitimate reasons, including lack of resources, minimal federal interest, alternative resolutions available, etc. These reasons demonstrate how the USAO case intake process acts as a filtering device, preventing improper prosecutions from going forward while preserving a manageable case load. This screening process is the same as the screening process performed by law enforcement agents when deciding to initiate or continue with an investigation. Agents decide whether to initiate or proceed with an investigation depending on the same factors the AUSAs weigh, such as agency resources and manpower, the strengths of the case, or priority. Agents, as well as their management teams, screen cases to

THE INTEGRATION OF A LAW ENFORCEMENT AGENT IN AN ADVISORY CAPACITY AT THE CASE INTAKE POINT COULD ADDRESS THE ISSUE OF IMPROPER DECLINATIONS BY ADDING A FRESH VIEWPOINT TO THE DECISION.

higher number of cases referred for prosecution, than in the USAO for District of Idaho. Those cases that do not meet the minimum threshold could be best handled by a state or local prosecutor’s office instead, freeing the AUSAs to focus on more important investigations. With these unique policies, the same federal crimes will be prosecuted differently, depending on which USAO is proceeding with prosecution, thus showing disparities in case declination rates.

VI. Comparative Perspective

To better understand case declinations in the U.S. federal criminal justice system, one may look to other countries’ criminal justice systems. In the U.S., the criminal justice system is classified as an adversarial one, where the court acts as an impartial mediator between the prosecution and the defense. The court rules on issues of law, and leaves questions of fact for the jury to decide. In comparison, France’s criminal justice system is classified as an inquisitorial one. In an inquisi-
torial system, the courts are actively involved in some portion of an investigation.\textsuperscript{50} An inquisitorial judge may question witnesses, defendants, or perform other fact-finding tasks, while the lawyers on each side of a prosecution argue on behalf of the state or defendant.

The French criminal justice system is organized in the Ministry of Justice (comparable to the U.S. Department of Justice), which is headed by the Minister of Justice (the American equivalent would be the Attorney General).\textsuperscript{51} All French prosecutors serve in the Ministry’s bureaucratic hierarchy, and all are subject to an entrance exam before being hired by the Ministry.\textsuperscript{52} Instead of the American system that includes state and local prosecutor’s offices, the French system is centralized in a single, unified national system. As such, the French prosecutor’s offices follow the same uniform policies nationwide, whereas a U.S. Attorney exercises some freedom in setting individual policies in his USAO. With a national system, all decisions by French prosecutors are subject to review or possible correction by their non-politically appointed management.\textsuperscript{53} Therefore, the French model of prosecutorial discretion is customarily carried out at the supervisory ranks. Additionally, French prosecutors are not as conviction-driven as their American counterparts.\textsuperscript{54} They are instructed to determine a just solution to problems, which does not always necessarily mean seeking prosecutions.

French law enforcement agents have a unique relationship with their prosecutors. French law enforcement agents are instructed to notify prosecutors “without delay” upon the discovery of an offense, and “immediately” if it is a “flagrant” offense.\textsuperscript{55} This early involvement of prosecutors allows them to act as a check on the police, sometimes directing how the investigation should proceed, or preventing the use of questionable investigative methods.\textsuperscript{56} In fact, French prosecutors are known to arrive at the scene of an offense with the police, or shortly thereafter.\textsuperscript{57} Despite the early prosecutorial involvement in criminal cases, French declination rates are comparable to those by the USAOs.\textsuperscript{58}

Not all of the features of the French inquisitorial system would be applicable in the American adversarial system. However, the USAOs throughout the country could limit improper case declination by following some of the French features. Law enforcement agents should attempt to increase AUSA participation in the early stages of investigations, similar to their French counterparts. Likewise, USAOs should allow and encourage the increased participation, and not require that a USAO case be officially opened to avoid the reporting requirement. Perhaps creating a general USAO case, where each AUSA could document the early exploratory activities in potential cases, would be suitable for USAO accountability. Early participation by AUSAs, without the necessary commitment to accept the case, could decrease improper case declination.

VII. Recommendations for Change

As discussed, there is a necessity for a level of ethical guidance for prosecutors when declining law enforcement agent’s potential


\textsuperscript{52} Id.


\textsuperscript{54} Yue Ma, A Comparative View of Judicial Supervision of Prosecutorial Discretion, 44 No. 1 Crim. Law Bulletin Art. III (2008).


\textsuperscript{56} Id.

\textsuperscript{57} Id.

\textsuperscript{58} Id. at 615.
cases. However, this absence of ethical standards is correctable. There are several recommendations that would address this need directly and indirectly. Each potential solution carries with it distinctive strengths and weaknesses to consider when implementing them.

The most direct approach to rectify the lack of ethical guidance is by adding a new ethical guideline to the current set. A modification to MRPC 3.8 could include a section on declining cases. For example, an additional section could be worded as: “the prosecutor in a criminal case shall refrain from declining a charge that the prosecutor knows is supported by probable cause” (this is a purposely, closely-worded companion to MRPC 3.8 (a)). It is conceivable that this word choice could undermine the practice of prosecutorial discretion, making prosecutors accept all cases supported by probable cause. Perhaps adding a supplementary phrase after the aforementioned section would create a more flexible rule, such as “... unless there is a valid or legitimate reason for the declination.” This would provide some room for appropriate declinations based on factors such as office and judicial resources, while emphasizing that declinations should be made carefully. The proposed section could also be modified by replacing the words “refrain from” with “make reasonable efforts to avoid,” thus making the rule more permissive while still addressing declinations in the MRPC. If an additional section is not feasible, then at least an additional comment to MRPC 3.8 could explain the same ethical theory.

The ABA has an existing amendment process for the addition or modification of a Model Rule. Recently, the 2009 ABA Commission on Ethics 20/20 was created to perform a thorough three-year review of the Model Rules and the American system of lawyer regulation. A modified MRPC 3.8 could fit in the Commission’s transparent review and amendment process, leading to a rule that has been discussed, changed, and adopted by the ABA. Once adopted, the newly modified MRPC 3.8 would next have to be adopted by each state’s judiciary. This additional review step would ideally provide an improved rule, better suited to the needs of each individual state. When the new MRPC 3.8 is finally adopted by the states, it would not only provide guidance to the USAOs, but also to the state and local prosecutor’s offices as well.

A modified MRPC 3.8 would also be a cost-effective alternative. The ABA, and each state, would spend the initial time and effort in the adoption process. However, if an adoption process were already under way, such as the present Ethics 20/20 process, then one additional Model Rule modification would actually lower the cost expended per Model Rule modified or adopted. The time expended in publishing and promoting the new Model Rule would be relatively small because of the Internet. The ABA’s website, as well as other free legal academic/research websites, could publish the new Model Rule quickly. As the new Model Rule spreads, it would have an immediate impact. It would likely be taught in ABA accredited law schools throughout the nation within the semester, as law students take their legal ethics class and prepare for their nationwide ethics examination. As the new Model Rule is taught and accepted, it can become a new reference point for updating other instructional sources, such as the U.S. Attorney’s Manual and the ABA Standards.

The adoption of a new MRPC 3.8 would not come without some dilemmas. MRPC 3.8 only affects prosecutors, a relatively small portion of the legal profession, so it would not be a priority for review by the ABA. Even if the modification was proposed in an ABA meeting, there would be expected backlash from prosecutors. Federal and state prosecutors have a legitimate argument that the modified MRPC 3.8 would reduce their ability to apply prosecutorial discretion effectively. They would explain that they already have high caseloads despite limited office resources, particularly in the state prosecutors’ offices. A larger caseload would limit their time spent per case and could lead to lower conviction.
rates. Another foreseeable cost would be the development and deployment of Continuing Legal Education (CLE). Federal and state prosecutors would have to spend at least a few hours away from work to learn about the new MRPC 3.8. This cost may be picked up by the local bar association or the prosecutor’s office. If these costs make the adoption of a new MRPC 3.8 impossible to achieve, then perhaps providing guidance, from a different viewpoint, directly within the USAO could provide change quickly.

As explained previously, each USAO has its own distinctive case intake process. The integration of a law enforcement agent in an advisory capacity at the case intake point could address the issue of improper declinations by adding a fresh viewpoint to the decision. An experienced law enforcement agent, who is not directly related to the case being referred to the agency presenting the case, would be able to provide valuable insight to the USAO making the decision. The wealth of knowledge and education in the federal agent ranks should be used in the intake process. Although not a universal requirement, the vast majority of federal agents possess an undergraduate degree, coupled with years of investigative experience. There are also many agents who have Juris Doctors, or were practicing attorneys before joining the law enforcement profession (some federal agencies, such as the Federal Bureau of Investigation (FBI) have entry programs that recruit directly from American law schools). The agent should be detached, perhaps being from an agency outside of the U.S. Department of Justice, to avoid any foreseeable bias. If necessary, the U.S. Department of Justice has two agencies that investigate allegations of misconduct within the Department (Office of Inspector General) and the USAOs (Office of Professional Responsibility). These agencies have law enforcement agents that could participate in, or assist in the oversight, of the USAO intake process.

The embedded agent could be from a state or local law enforcement agency. This would increase communication between their agency and the USAO, providing the “locals” with a better understanding of how a USAO operates and how they can work together. Case referrals from the state and local agencies would increase, providing them another alternative for prosecution.

With an embedded agent in the case intake process, the decision would ideally become a collaborative discussion. The agent would explain his opinion on whether the probable cause threshold was reached, whether there are further investigative steps that should be pursued, or whether the case should be declined. With the agent’s experience, the actual feasibility or futility of potential investigative steps would be debated, compared to the USAO’s theoretical suggestions.

Placing an agent at the USAO does pose some understandable difficulties. The agent would require office space and equipment. This could be lessened by having the agent be at the USAO’s office on a part-time basis, or perhaps have him be subject to a callout as needed. A conference call including the referring agent, the USAO, and the intake agent, could achieve the same benefits while limiting the office costs.

Another issue with agent placement in
the USAO would be the increased time spent during case intake. A decision that may have taken a few minutes before the placement could become more time-consuming. The discussion, although beneficial, would prolong the decision, particularly if the case referred is a difficult one. This would take time away from the AUSA’s other daily duties, whether it be case work or case intake. A possible resolution could be a predetermined time limit for case intake to be used in those situations where the discussion is prolonged. Regardless, the final decision to accept a case for prosecution rests with the AUSA. If a discussion takes too much time, the AUSA can end it by making the decision.

The human factor could also become a problem with the agent placement. The federal government has over eighty federal agencies that have law enforcement personnel. Since many of the agencies share investigative authorities, cases will occasionally overlap. For example, the Drug Enforcement Administration (DEA) investigates drug crimes as found in Title 21 of the United States Code. However, the FBI and Homeland Security Investigations (HSI) also have concurrent Title 21 jurisdiction with DEA. Natural investigative overlaps such as these have led to tense rivalries between agencies. If the embedded agent participates in a case referral from an agency that he does not care for, there is a risk that he may sabotage the case and improperly advocate for case declination. The opposite is also true: an agent could zealously push for prosecution in one of his agency’s cases, despite there being reasons for declination. Similarly, if an agent knows that the embedded agent is from a rival agency, the case may never reach the USAO and instead be presented to the state or local prosecutor’s office.

Another solution would be the creation of a multi-person review board at the USAO’s case intake point. The board would consist of a combination of the original intake AUSA personnel, law enforcement agents, and state or local prosecutors. Much like the single agent placement, the board would encourage discussion and increase transparency. However, because of time constraints, this board may not be practical for situations where a warrantless arrest is imminent. This board could act as a review committee for longer-term investigations that are presented for prosecution. If declination is appropriate, a state or local prosecutor would be present to assist the agent with presenting the case to their office.

VIII. Conclusion

After review of various ethical sources, both past and present, as well as other factors affecting case declination, it is apparent that there is a need for ethical guidance for AUSAs when making the important decision to decline a law enforcement agent’s case for prosecution. There is presently a lack of guidance in the ethical sources, specifically the Model Rules, which can guide AUSAs when deciding to decline cases. A proposed amendment to the Model Rules, providing factors such as those found in the U.S. Attorney’s Manual to consider when declining a case, would be a direct and cost effective improvement to the status quo.
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