

Horizontal Facility for Western Balkans and Turkey



Action against Economic Crime in Montenegro (AEC-MNE)

Training Handbook, Ethics Training Program and Conflict of Interest for Prosecutors in Montenegro

Applied Prosecutorial Ethics and Conflict of Interest

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Abbreviations:

APC	Agency for Prevention of Corruption
AEC - MNE	Action against Economic Crime in Montenegro
GRECO	Group of States against Corruption
GET	Greco Evaluation Team
LPC	Law on Prevention of Corruption
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development

Table of Contents

1	Executive summary	6
2	Fundamental principles and arguments of applied prosecutorial ethics	8
	2.1 Applied ethics as a professional deontology of prosecutors – GRECO doctrinaire recommendation.....	9
3	Applied ethics and binding nature of law	10
	3.1. Testing applied ethics of judiciary officials in ECHR practice- Vidaković v.	10
	Montenegro no. 27524/06	10
4	Ethical blindness and practical incompetence of normative rules	12
5	Ethical dilemmas and risk for the conflict of interest	13
	5.1 Traceability of conflicts of interest in preparing and adopting legislation: Legislative footprint.....	13
6	Uncertain conditions and acting “in good conscience”	15
7	Normative integration, moral identity, and integrity of personality	16
8	Ethical judgement and context of decision- making- Standards of proof	17
9	Inclusive public space and deliberative communication	19
	9.1 The principle of being public.....	19
10	European standards of prosecutorial ethics and the practice of ECHR- The case of Guja v. Moldova	21
11	Applied prosecutorial ethics and the social context of criminal prosecution	22
	11.1 Compliance and integrity in the function of the rule of law- Practice from the Constitutional Court of Montenegro	24
	11.2 Ethical infrastructure	25
	11.3 Holistic support for implementation and efficiency of Guidelines	25
	11.3.1 Integration of Guidelines in the control environment and plan for integrity ...	26
	11.3.2 Protection of human dignity at the workplace and in the external environment	26
	11.3.3 Protection of whistleblowers	27
	11.3.4 Protection of confidential material, personal, and other proprietary data	28
	11.3.5 Protection of confidential material, personal and other proprietary data in whistleblower cases	29
	11.3.6 Enabling access to data of public nature.....	30
	11.4 Purpose and goals of Guidelines in the Legislative Field	30
12	Applied ethics and professional virtues- Integrity of a good prosecutor	32
	12.1 Integrity of the state prosecutor and acting “in good conscience”	33

12.2 Integrity of the prosecutor between normative rules and actual circumstances	34
12.3 Human rights.....	35
12.3.1 Relation to the victim: Between the public interests of criminal procedure and private interests	35
12.3.2 Relation to the accused persons	35
12.4 Due care in relation to courts and other state authorities	36
12.5 Ethics of the public word	36
12.6 Prosecutorial discretion and the standard of proof.....	37
13 Concluding remarks	39
14 Appendix: Ethics training program for prosecutors in Montenegro, 29. November 2017	40
Appendix II GUIDELINES AND PROFESSIONAL VALUES	42

1 EXECUTIVE SUMMARY

Program for the Ethics Training and Prevention of Conflict of Interest for Prosecutors in Montenegro (hereinafter: training materials) was made in accordance with “Guidelines on Ethics and Prevention of Conflict of Interest for Prosecutors in Montenegro” (ECCD-HF-AEC-MNE-TP2/2017) (hereinafter: Guidelines).

Drawing from the purpose and goals to encourage practical knowledge and applied prosecutorial ethics on the individual and organizational levels, training materials fully respect legal and other regulations, ethical standards, and recommendations from international organizations to which the Guidelines refer to. For encouragement and transfer of implicit, cognitive knowledge, values and virtues of the prosecution function among participants, training materials summarize the practice of the Constitutional Court of Montenegro and the European Court of Human Rights (ECHR), along with practical examples from the Guidelines and practice of the State Prosecution Office. Consequently, practical realization of Guidelines is embedded in the wider framework of international, convention-based standards and obligations in the process of rapprochement to the European legal system and common European values.

In methodological sense, training materials are designed as an integrated model of applied prosecutorial ethics with basic elements and functions of ethical infrastructure, which supports the realization of Guidelines on all levels of the prosecutorial organization. On the individual level, *iura novit curia* indicates that prosecutors, generally speaking, do not have an issue with interpretation of normative rules, ethical code, or the Guidelines. Active participation in the interactive program of this training will guarantee that participants also make the acquaintance with basics of applied prosecutorial ethics and ethical infrastructure of the State Prosecution Office. This, in turn, ensures a deeper investigation into the ethical nature of the prosecutorial organization and the social context of the prosecution function, in compliance with the purpose and goals of the Guidelines.

Training materials, in combination with an interactive program, encourage participants to use the Guidelines independently, as a guide in preventing disciplinary offenses and conflicts of interest which can be met in many forms and on all levels of the prosecutorial organization. Integrative model of applied prosecutorial ethics aids them in the efforts towards a long-term development of organizational knowledge and ethical competencies on all levels of the prosecutorial organization.

Training materials, complimented with the reasonable explanation of the Guidelines, have even wider practical value. For example, in order to develop applied ethics and ethical infrastructure in law enforcement, defense and intelligence- security areas, as well as for other institutions and offices of the public sector. Likewise, training materials can be of use in enhancing communicational ethics, inclusive public space, not to mention the media, civil society and civil control over the management of public affairs on all levels.

Training materials are a practical accessory, aimed at supporting the implementation of Guidelines and intended for state prosecutors, educated people and thinking practitioners by their profession. To ensure effective training, practical examples are available in the Handbook. Among them are also those, mentioned in the Guidelines. In order to ensure solving of practical examples, it is essential to encourage implicit, empirical knowledge which leads to ethical actions in accordance with legislation. In this respect, the Handbook is different from classical teaching of theoretical normative ethics.

While classical teaching is mainly focused on attaining normative knowledge, it is more important for practice to encourage empirical knowledge and professional virtues or integrity of the state prosecutor. In this respect, the Handbook abides by GRECO findings that normative knowledge and values change in time and space. The constant of these changes is what determines that a state prosecutor as a thinking practitioner looks for the best possible solutions, with continued attention and practical wisdom (competency).

Practical examples do not enforce normative theories upon training participants, since it is assumed that they have sufficient amount of such knowledge *iura novit curia*. They are merely thought constructs with generalized or modified real-life examples from practice which participants diligently study in the context of their everyday work duties. During evaluation, they abide by fundamental principles and values of the domestic legal system, Constitution, and laws. With the described approach of applied prosecutorial ethics, it is ensured that training participants attain the following goals:

The purpose of this document is to:

- Familiarise the reader (trainee) with the general principles of applied ethics, the reader would by the end of this session have an understanding of the basic notions of the issue and to assess.
- Continued development of applied knowledge and experience- competency so that readers (trainees) in their prosecution function always act in good conscience, as well as with diligent respect for the law and with the sense of moral-ethical responsibility for human rights of the participants in the criminal procedure, personal integrity and institutional reputation of the state prosecutor.
- Avoid any actions where a prosecutor might breach the Code of Ethics and find himself/herself in the conflict of interests; While ensuring autonomy of the criminal prosecution function, trainees adequately react to those phenomena in inter-personal

relations and the internal environment of the State Prosecution Office which address the issue of state responsibility as an employer to ensure protection of state prosecutors from illicit influences and pressures, including the protection of whistleblowers.

2 FUNDAMENTAL PRINCIPLES AND ARGUMENTS OF APPLIED PROSECUTORIAL ETHICS

Ethics, or moral philosophy, is widely believed to express our internal strive towards goodness and righteousness. Applied ethics, as a practical sub-discipline of moral philosophy, was developed to intertwine, compliment and develop theory and practice when it comes to the most difficult moral issues in public or private life, one case at a time. The beginnings of applied ethics can be traced back to the 1960s when scientists and practitioners from various fields studied and examined a number of real-life examples, concluding that only a holistic approach and interdisciplinary exchange of knowledge and experience can ensure common solutions to complex issues and moral dilemmas, such as biomedicine, cloning, euthanasia, suicide, death penalty, abortion, sexism, racism, xenophobia, world poverty, hunger, environmental and spatial issues, inequality and exclusion or discrimination, migrant and refugee crisis, violent extremism and terrorism, armament and wars.¹

By the same token that is to focus on and resolve actual issues and ethical dilemmas, applied ethics has established itself in (criminal) law and other legal areas. While its theoretical framework continues to be moral philosophy, contemporary applied ethics has been integrated into practice in different fields and institutions in the public and private sectors.²

With the mission of a practical discipline, applied ethics takes into account that each area or environment has its own specifics and needs, values, and normative rules. As such, it also emphasizes the need for establishing an adequate ethical infrastructure.³ The latter supports the transfer of knowledge from normative rules into the actual environment (normative integration⁴) with its constituents and functions, with consideration for its specifics, values, and expectations. Accordingly, people are able to internalize normative rules and values, identify with them, and see them as a moral commitment, ethical goal and a motivational factor.⁵

Without the adequate ethical infrastructure, there is high probability that normative rules will remain a dead letter, “a silent witness to the ethical blindness” and moral haz-

¹ Beauchamp, L. T. (2003). »The Nature of Applied Ethics.«; In: Frey G. R. and Wellman C.H. (eds.), *A Companion to Applied Ethics*. Oxford: Blackwell, pp. 1-15.

² Tillman, J.J. (2014): *An Integrative Model of Moral Deliberation*, pp. 3, 11, 149;

³ *Infra*, chapter 11.2.

⁴ *Infra*, chapter 7.

⁵ *Infra*, chapter 12- 12.1.

ard. Experiences show that worst cases of corporate crime, financial fraud, tax evasion and corruption with ethical blindness and moral hazard had been witnessed in normatively much regulated environments. Their organizational culture, mission, ethical codes and normatively declared commitment for social responsibility were full of grand words on ethics and morals. In the end, their integrity as well as business reputation accompanied them on their death bed.⁶

2.1 Applied ethics as a professional deontology of prosecutors – GRECO doctrinaire recommendation

At this point, the concept of *doctrinaire recommendation* has been used to summarize the essence of what GRECO concludes on prosecutorial ethics for Montenegro in its 2015 report.⁷ It is the essential though which connects various principle of ethical actions so that the efforts of people can be holistically managed to lead towards desired goals. In connection to this, applied prosecutorial ethics also takes into account what GRECO states in the report when acknowledging the need for professional deontology.⁸

Example 1

GRECO ([MNE/GRECO/jun2015](#))

124. [...] The GET has already explained throughout this report its reasons to believe that the issues of professional deontology and the prevention of conflicts of interest, in the particular context of Montenegro, merit further discussion and the development of more targeted preventive actions.

- *In the context of the above statement, consider the possible role of the Commission for the Code of Ethics.*

Professional deontology is known for its requirement to act in due care and in accordance with rules. This, however, does not mean blind obedience to rules. In Crito, Plato demonstrates how Socrates paid obedience to the rules of his state- *polis* with his life. Accordingly, professional deontology also argues that values and normative rules change in time and space, a fact also emphasized in the GRECO report. The constant of these changes, in due respect for normative rules, creates ever new challenges, ethical dilemmas and issues. Their solving, on the other hand, requires continued attention,

⁶ Macey, J.R (2013): *The Death of Corporate Reputation: How Integrity Has Been destroyed on Wall Street*, Pearson Education, Inc., New Jersey. The author analyzes examples of moral hazard which caused the financial breakdown of the “titans” of the word banking industry. Their demise due to corruption and organized crime was simultaneous to the start of the economic and political crisis of global proportions, still felt to this day.

⁷ GRECO, Evaluation report Montenegro, 15-19 June 2015, Strasbourg; <https://rm.coe.int/16806c983a> (20.11.2017).

⁸ *Ibidem*, no. 124.

practical wisdom (competence) and professional courage- integrity for good and right decisions.⁹

3 APPLIED ETHICS AND BINDING NATURE OF LAW

In the process of identifying (diagnosing) real-life examples, issues or ethical dilemmas, applied ethics relies on modern theories of cognition and moral virtues, as well as practical wisdom.¹⁰ In this respect, there is no major difference between its theoretical approach when compared to the practical (operational) one in the field of law.¹¹

In both areas, applied ethics and law, essential cognitive and moral virtues, as well as the competence of the person utilizing normative guidelines, are pivotal when resolving actual cases or issues. The actual state of affairs needs to be diligently studied in each and every case. Findings should be simultaneously compared to normative rules as this process provides the basis for deciding which is the good and right activity, action or measure in every single case. This process is seen as the way of experiencing the self and the world around us on a cognitive level. Cognition, as a result of physical and mental activities, inner connections and dialogues, with a more or less intensive exchange of information between the internal (mental) and the external environments, gives the sense of reality. Moral virtues, on the other hand, are the basis for evaluation, ethical disposition, or the measure of internal duty, which materializes as a moral and legally responsible action.¹²

3.1. Testing applied ethics of judiciary officials in ECHR practice- Vidaković v.

Montenegro no. 27524/06

The essence of what was concluded about fundamental principles of applied ethics with the aid of GRECO report are concrete challenges, and duty of the state prosecutor to respond to them with continued attention and competency. Below summary of ECHR practice shows what exactly this implies with an actual example.¹³ From the description, we can see substantial and numerous changes in time and space where the stated example took place, the factor also summarized from the GRECO findings. ECHR argues that

⁹ Ibidem.

¹⁰ Ibid.

¹¹ Distinction between “good” and “evil” in law is a typical question of ethics. On the other hand, applied knowledge or cognition about those issues is the question of epistemology of law; see Pavčnik, M. (2007): *Teorija prava* (Theory of Law), GV Založba, Ljubljana, p. 74.

¹² Kečanović, B. (2017-a) *Uporabna etika in prostorska problematika* (Applied Ethics and Spatial Planning Issues), In: Ude, L. (ed.): *Pravni letopis 2017*, Pravna fakulteta univerze v Ljubljani – in publishing.

¹³ The European Court of Human Rights - ECHR: [https://hudoc.echr.coe.int/eng#{"fulltext":\["CASE OF Vidaković v. Montenegro"\],"itemid":\["001-164000"\]}](https://hudoc.echr.coe.int/eng#{) (20.11.2017)

state prosecutors and courts on all levels are required to give numerous answers of normative and actual, cognitive and moral nature.¹⁴

The stated ECHR findings also imply that judicial authorities in Montenegro diligently respected convention-based rules, domestic law and actual state of affairs on all levels; not only when the appellant expected such conduct. Judicial authorities also adequately responded when they themselves evaluated that the applicable law and professional integrity demand it. ECHR assessed that their actions and decisions were in compliance with convention-based rules and applicable law in every respect. As such, they meet the high standards utilized in applied ethics when balancing *good* and *right* actions. This is the conduct which is expected from state prosecutors by professional deontology and integrity of judiciary officials. At the same time, this is also an example of good practice which is worth coming back to in the realization of the purpose and goals of the Guidelines.

Example 2

Example 2, ECHR: Duško Vidaković v. Montenegro, no. 27524/06 paragraph 51, 59-61

51. In view of the above, the Court considers that the domestic courts not only provided a specific and express reply to the applicant's submission, but have done so consistently and on several occasions[...]

56. The Court has acknowledged in its case-law that however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice[...] The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain occasions[...]

59. [...] The Court also notes that the Conclusion is consistently applied in the Montenegrin case-law, as it was applied not only in the applicant's case but also in a recent case where the same issue arose[...]

60. In addition, the State Prosecutor relied thereon when he dismissed the applicant's allegation that the criminal prosecution had become time-barred, and so did the civil courts when ruling on the applicant's compensation claim (see paragraphs 18 and 20-21 above).

61. In view of the above the Court considers that the applicant's complaint in this regard is also manifestly ill-founded and must be rejected[...]

- *In your opinion, what is crucial for realization of the purpose and goals of the Guidelines in the above findings from the ECHR? Evaluate in terms of risk for disciplinary offenses, as well as opportunity to improve applied prosecutorial ethics.*

¹⁴ Ibid.

4 ETHICAL BLINDNESS AND PRACTICAL INCOMPETENCE OF NORMATIVE RULES

Normative rules, with a general and abstract way of arranging social relations, gravitate towards ideals of good and right, or just actions. However, human actions are never ideal. People have a different view on what is good for them, others, and the community. Consequently, there is always some level of uncertainty between normative rules and the actual state of affairs, a fertile ground for development of ethical dilemmas and issues, including the conflict of interest. If we connect this to the social context, we can understand why different social environments have their own specific expectations, normative rules, values, and goals. The abyss between the normative and the actual also explains why the same type of conflicts emerge between public and private interests on different levels of the social organization.

Even though normative rules define desired behavior, values, and goals, they remain “blind” for personal distress and every-day hardships of people due to their general and abstract nature. By the same token, they do not have the competence to resolve social issues and ethical dilemmas, for example democratic deficit and social exclusion, poverty and discrimination, conflict of interest and corruption, or illegal lobbying and other illicit influences in managing matters of joint ownership in public and private sectors. Rules which are not efficient in practice can be part of law and ethics in a normative sense. However, in actuality, they are neither good nor right. Insisting on such an inefficient way of dealing with the most complicated social issues and ethical dilemmas is an example of ethical blindness, forcing the wrong approach with a completely “blind” disregard for consequences.

5 ETHICAL DILEMMAS AND RISK FOR THE CONFLICT OF INTEREST

Ethical dilemmas are a consequence of uncertain conditions in the external and the internal worlds when, no matter the amount of available normative rules, cognition, and personal convictions, we fail to identify the right solution. Difficulty in making a legal and moral choice, decision-making and behavior in uncertain conditions are all factors which further enhance the risk and existence of conflict of two or more interests, benefits, or duties.¹⁵

Ethical dilemmas are of normative and actual origin. From the viewpoint of the person being tasked with their solving, they can be of both cognitive and moral nature. Focusing on the initial distinction, ethical dilemmas of normative origin are usually the consequence of poor rules, for example poor legal provisions, public policies, or ethical codes. Uncertain conditions, as well as personal characteristics, are among the reasons for ethical dilemmas of actual nature. In this respect, the distinction between cognitive and moral dilemmas might prove to be more useful. By questioning the quality of cognition and moral judgement, discussion on ethical dilemmas with cognitive and moral theories enters the theoretical framework and interdisciplinary approach of applied ethics.

In practical terms, normative and actual intertwine and work together. When it comes to ethical dilemmas, the difficulty of issues and their potential implications are that more significant. The need for interdisciplinary resolving of issues is thus even more pivotal. This supports our initial assessment that the need for interdisciplinary approach is in itself the basis for creation, development, and purpose of applied ethics.¹⁶

5.1 Traceability of conflicts of interest in preparing and adopting legislation: Legislative footprint

The issue of poor regulations has already been mentioned while discussing ethical dilemmas of normative nature. The former is also the most common factor of systemic risk and structural issues when it comes to managing public affairs. In the process of preparing and adopting legislation, conflicts of interest are accompanied by phenomena like illegal lobbying and other illicit influences. In addition to corruption, the latter are responsible for encouraging the spread of democratic deficit, social exclusion, discrimination as well as distrust towards institutions and normative rules, legal and ethical alike.¹⁷

Poor regulations are actually a systemic issue on local and state levels. Effective prevention and mitigation of systemic issues is even more important from the standpoint of ap-

¹⁵ Pollock, M. J. (2012): *Ethical Dilemmas and Decisions in Criminal Justice*, Wadsworth, Belmont, pp. 14–15.

¹⁶ See: *supra*, chapter: 1. Introduction to the concept and development of applied ethics.

¹⁷ Igličar, A. Kečanović, B. Ribičič, C. (2017): *Zakonodajna sled: sledljivost vplivov v postopku priprave in sprejemanja občinskih splošnih aktov (Legislative footprint: Traceability of influence in the process of preparation and adoption of municipal general acts)*, Inštitut za ustavno pravo, Ljubljana; <http://ustava.si/wp-content/uploads/2017/09/Zakonodajna-sled.pdf> (10.11.2017).

plied ethics. In this sense, practice developed systemic tools and measures that support solving ethical dilemmas and issues of poor regulations, including prevention of the conflict of interests and managing the risk of corruption. Among them, the institute of legislative footprint has proven increasingly useful. Due to transparency of the process and stakeholder background, it enhances the responsibility and integrity in the field of normative (legislative) activity. On the other hand, it also enhances the efficiency of prevention of conflicts of interest, illegal lobbying and other illicit influences in preparation, adoption and implementation of regulations and public policy.¹⁸ In this respect, the legislative footprint has established itself in the EU institutions.¹⁹

Example 3

Demonstration below encompasses some of the risk factors that are generated by a myriad of conflicts of interest on the state and local levels. It warns of how the quality of normative rules actually starts with those that cooperate in their preparation and adoption²⁰.

Example 3: Conflict of interest and risks during preparation and adoption of regulations

- Legislative procedure is not transparent: the need for the introduction of legislative footprint standard has not been met;
- Conditions for the participation or inclusion of citizens, civil society and the public in the legislative procedure have not been met;
- Transparency measures in the work and funding of political parties are inadequate;
- Measures of lobbying control are outdated and not harmonized with the legal provisions, or their application is in conflict with the lobbying-related provisions and ethics standards;
- Other direct and indirect influences (e.g. grassroots lobbying) in legislative procedure are not being monitored/ are not transparent

- *Evaluate whether or not the outlined is able to affect applied ethics and professional integrity of the state prosecutor from the viewpoint of the prosecution function and your experience with the quality of certain regional material regulations.*

¹⁸ Ibid.

¹⁹ European Parliament's resolution from the 14th of September 2017 on transparency, accountability and integrity in the EU institutions, Strasbourg; <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0358+0+DOC+XML+V0//EN> (10.11.2017).

²⁰ More on this, *Supra*: Igličar, Kečanović, Ribičič.

6 UNCERTAIN CONDITIONS AND ACTING “IN GOOD CONSCIENCE”

In addition to quality regulations and other normative rules, solving ethical dilemmas and issues in practice requires evaluation of the actual state of affairs and potential risks and damages, as accurate as possible. These are the essential conditions for a good and right solution, which would be selected by every rational human being and a person with integrity. However, there are times when conditions are so uncertain that the only option left is to depend on intuition, or our *inner voice*, and thus *act in good conscience*. Acting (or doing) is deemed as right, if under the same circumstances a virtuous person- a person with integrity- would act in the same manner, despite the underlying difficulty.²¹

²¹ Hursthouse, R. (1999): *On Virtue Ethics*, New York, Oxford University Press, 1999, p. 28; summarized from: Logar, T. (2010), *Etika vrlin, moralne dileme in abortus* (Virtue Ethics, Moral Dilemmas, and Abortion), In: *Ethics and the Quality of Life. Selected Issues in Medicine, Sports, and Law*. Revus, Ljubljana, pp. 25-39; <https://revus.revues.org/1234> (10.11.2017).

7 NORMATIVE INTEGRATION, MORAL IDENTITY, AND INTEGRITY OF PERSONALITY

Normative integration is a thought construct which helps to understand how the transfer of normative rules from the abstract level to the actual one works and affects. Theoretically, this is a process of institutionalization and socialization. By institutionalization, we mean the development of social practices which maintain and enhance social values, as well as support institutionalized satisfaction of social needs. Through socialization, the individual becomes involved with the social practice, accepts normative rules, and identifies oneself with the fundamental principles, values, and moral convictions of a certain society, institutions of public or private sector, occupation, and profession. With socialization, individual also accepts the implicit, applied knowledge which is otherwise difficult to describe and transfer in this form.²² In the role as an individual, as well as a member of a certain community, normative rules, fundamental principles, values and moral convictions “internalize (integrate) into a coordinated, holistic personality- personality with moral identity and integrity.”²³

²² Integrated models of training with mentorship, action research, brainstorming, and other teaching methods support the normative integration with the transfer of implicit, cognitive knowledge among individuals. By the same token, the methodology of the Guidelines – Training Handbook and Ethics Training Program for Prosecutors in Montenegro – takes into account the international recommendations for training of ethics and corruption prevention in the public sector, for example: OECD and SIGMA (2013): Ethics Training for Public Officials: Policy recommendations; [https://www.oecd.org/corruption/_acn/resources/EthicsTrainingforPublicOfficialsBrochure EN.pdf](https://www.oecd.org/corruption/_acn/resources/EthicsTrainingforPublicOfficialsBrochure_EN.pdf) (10.11.2017).

²³ Igličar, Kečanović, Ribičić, p. 8, pp.32-33.

8 ETHICAL JUDGEMENT AND CONTEXT OF DECISION- MAKING- STANDARDS OF PROOF

Personality with moral identity and integrity is the focal concept of applied ethics. Entangled in the world of moral philosophy, meta-ethics and theories of normative ethics on the one hand, while focusing on actual social issues and ethical dilemmas on the other, applied ethics bets on the practical approach with the assumption about a personality with moral identity and integrity. Similar to law, it makes use of the practical explanation of normative rules in decision-making and actions. With the aid of standards of proof, it also judges the quality and consistency of the actual state of affairs with normative rules.²⁴ Acting (or doing) is accurate if, and only if, a virtuous person would have acted in the same way in identical circumstances.²⁵

Moral judgement and acting “in good conscience” is of pivotal importance for practical solving of ethical dilemmas and issues, especially in uncertain conditions. The fundamental purpose of applied ethics which is to focus on practical application and thus seek the best possible solution, also determines obligation towards reasonable doubt. As such, moral judgement must take into account the referential framework of standards of proof, which are the criteria used to measure the quality of the truth. Truth has the highest cognitive value. Accordingly, it also acts as the moral commitment and motivational factor for the person with integrity. The latter strives towards the best possible decision through inner dialogue. With responsibility towards the truth, the person with integrity also communicates with the external world in order to receive validation, and evaluates the quality of the internal decision with standards of proof. Applied ethics can assist in this process by answering questions such as what is “right”, “wrong”, “good”, “evil”, etc. in each respective case.²⁶

Theory of law concludes that quality of the truth, in accordance to standards of proof, is evaluated in the relationship which juxtaposes normative and actual (even designed) basis. In this relationship, the interpretation is not only a reconstruction of thought which is normatively distinguished in law or ethical codes, but also a value construct, build on the actual case, issue, or (ethical) dilemma. Regardless of the interpreter, the decisive factor is the practical example itself, which is always entangled in the environmental context of the interpreter and the interpretation.²⁷ The contrast in the realm of “internal-external” which used to be considered as a measure for distinction between ethics and law, has been overcome. The connection between both areas is largely build on the universal principle that ethics is the purpose of law and the basis for its binding validity.

²⁴ About the practical (operational) explanation in law, see Pavčnik, p. 479.

²⁵ *Supra*, Hursthouse, footnote, no. 21.

²⁶ *Supra*, footnote, no.12.

²⁷ Pavčnik, p. 481.

Binding power of law can only be justified with ethics.²⁸ Ethics argue for the “inner” obligation of law, while law creates opportunities for applied ethics and fulfillment of moral duties by ensuring rights.²⁹

²⁸ Dreier, R., Paulson, L. S. (eds.) (2007): Gustav Radbruch, *Filozofija prava (Philosophy of Law)*, GV Založba, Ljubljana, pp. 70-79.

²⁹ *Ibid.*, p. 308

9 INCLUSIVE PUBLIC SPACE AND DELIBERATIVE COMMUNICATION

We usually examine the quality of internal decisions in the external world through interpersonal connections with others. The harder the decision, the bigger the need for interdisciplinary cooperation and exchange of information. Communication is of course the strongest and most common type of exchanging information, knowledge, and experience. Applied ethics, with inclusive public space and deliberative communication or deliberation, determines equal and fair opportunities, even in the access to applied knowledge and information. By doing so, applied ethics calls for a reflection on a just and good society which focuses public space on the principle of public inclusion, communicational ethics, and deliberative discussion, ensuring an impartial and just process through equal opportunities.³⁰

Example 4

Guidelines, Example 9 – The press campaign

The media do not like an indictment and criticize the prosecutor. In some newspapers, some of the readers nearly call him an Idiot. They accuse him being too weak. The prosecutor is very angry and feels that his honour is insulted. Is he entitled to justify his decision on the social media or in the newspapers?

- *Evaluate the example in terms of professional integrity of the state prosecutor and freedom of the press. What can the State Prosecution Office do in such circumstances with regards to the principle of being public and its role as an employer?*

9.1 The principle of being public

Inclusive public space, communicational ethics, and deliberative discussion are the conditions for guaranteeing the principle of being public as the supreme ethical and organizational principle, superior even to right to property and freedom of the press.³¹ In the ancient *polis* states, citizens used a comparable method for managing common affairs dubbed *isegoria*.³² Contemporaries renamed it *deliberative*, consultative democracy. Even though the concept has been linked to Besset who started using it for discussions in the American Congress, it means much more than that. Consultative democracy is a way of thinking about politics as a practical wisdom which enables public exchange of opinion

³⁰ *Supra*, footnote, no. 12.

³¹ Splicahl, S. (ed.) (2017): *Zagovor javnosti: med svobodo izražanja in sovražnim govorom* (Defence of the Public: Between the freedom of expression and hate speech) SAZU, Ljubljana.

³² Boniolo, G. (2012), *The Art of Deliberating Democracy, Deliberation and the Life Sciences between History and Theory*; In: Magnani, L. (ed.): *Studies in Applied Philosophy, Epistemology and Rational Ethics*, Springer-Verlag Berlin Heidelberg.

among equal citizens, and does not merely focus on counting the votes or political representation.³³

Inclusive public space and deliberative democracy are the response to topical conditions where the politics of representative (parliamentary) democracy and public institutions suffer from a decreasing level of public support. This, in turn, translates into democratic deficit, political pathology and (il)legitimacy.³⁴

³³ Parkinson, J. (2005). *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy*, Oxford University Press, New York.

³⁴ *Supra*, footnote, no. 12.

10 EUROPEAN STANDARDS OF PROSECUTORIAL ETHICS AND THE PRACTICE OF ECHR- THE CASE OF GUJA V. MOLDOVA

The practice of ECHR in *Guja v. Moldova* often emphasizes that freedom of expression and public control are crucial for institutional reputation and autonomy of the State Prosecution Office, as well as professional integrity and protection of prosecutors from illicit influences or pressures. By doing so, the ECHR refers to convention-based standards of the UN and the Council of Europe.³⁵

With the authority of a high judicial forum and power of arguments, the ruling of ECHR in *Guja v. Moldova* is a precedence for the development of applied prosecutorial ethics and professional integrity of prosecutors. Accordingly, summaries from *Guja v. Moldova* are available in the Guidelines, with the purpose of meeting their goals, as the:

- Real-life examples where active participation in the training supports the transfer of knowledge and experience, how can prosecutors act in good conscience, how can prosecutors respect the prosecution function in the legal, as well as morally-ethical view, in order to protect the personal integrity and institutional reputation of the state prosecutor from illicit influences or pressures.
- Real-life examples where a prosecutor might breach the Code of Ethics or find himself/herself in the conflict of interests
- Real-life examples which address the issue of the state as the employer and its responsibility to protect the state prosecutor and other personnel in the State Prosecution Office from illicit influences and pressures, including the protection of whistleblowers.

³⁵ ECHR, *Guja v. Moldova*, No. 14277/04; [https://hudoc.echr.coe.int/eng#{"itemid":\["001-85016"\]}](https://hudoc.echr.coe.int/eng#{).

11 APPLIED PROSECUTORIAL ETHICS AND THE SOCIAL CONTEXT OF CRIMINAL PROSECUTION

The criminal prosecution function requires prosecutors to deal with the worst social issues, criminal offenses and other types of criminal conduct on a daily basis. In doing so, due to *iura novit curia* they usually do not have issues with understanding normative rules. However, if regulations are poor, or if they have been written under the influence of poor intentions and illicit interests, even the best explanation and best intentions of a prosecutor cannot ensure effective prosecution.³⁶

The same is applicable when good regulations are the subject of abuse and illicit interests. In connection to that, prosecutors and other personnel at the State Prosecution Office generally need to have a high level of personal ethics, knowledge, virtues, and personal characteristics. These are the persons that the society entrusts with one of the most responsible functions of the state; that is to utilize the prosecution function to ensure the safety of people and fundamental values from the worst types of crime, criminal offenses, and other types of criminal conduct. Likewise, applied prosecutorial ethics needs to be upheld on the same level of excellence, once highlighted by Aristotle who continues to be seen as the father of ethical virtues and applied ethics. In this context, both imply practical wisdom as well as acting with good intentions and nobility. In Nicomachean ethics, one of the arguments Aristotle makes is that virtues are a measure of excellence in people in various roles. Among other things, he also states that virtues are not given by nature, instead human nature enables us to reach excellence with our virtues. We can visualize this assertion further with the metaphor of a good knife which is able to cut valuable bread into pieces, yet this same knife can become a dangerous weapon in hands of someone with wicked intentions. No decision and no action in any area, including criminal prosecution, cannot be good and right without the wisdom (knowledge) and (moral) virtues. Virtue determines the purpose or goal of a certain action, while wisdom aids in the selection of proper means to attain the stated goal.³⁷ The integrated model of applied prosecutorial ethics, which serves to realize the purpose and goals of the Guidelines, implies the inseparable connection of cognitive (knowledge) and moral virtues in a whole personality – professional integrity of the state prosecutor.³⁸

Applied prosecutorial ethics serves the professional work of a prosecutor which either directs or actively works with good intention and excellence, so that criminal prosecution is being carried out in adherence to public interest and values of criminal law. During this process, prosecutor can face many issues, for example how can potential and ac-

³⁶ Igličar, Kečanović, Ribičič; compare, *infra*, subchapter, no. 9.2. Purpose and goals of Guidelines in the Legislative Field.

³⁷ Aristotle (1994): *Nikomahova etika* (Nicomachean Ethics), Slovenska matica, Ljubljana, pp. 204-205.

³⁸ *Infra*, chapter, no. 10: Applied ethics and professional virtues- Integrity of a good prosecutor

tual conflicts of interest affect the judgement and responsibility towards values, sources, and goals of State Prosecution Office; how to evaluate procedural material that has been collected by law enforcement – police and other supervisory organs, so that the prosecution function can be carried out in adherence to public interest and values of criminal law, legislation, and ethical standards; how to ensure proper conduct towards the victim and the accused persons, their human rights, and legitimate interests. In other words, how can the prosecutor guard fundamental values and public interest in criminal procedure, professional integrity, and institutional reputation of the State Prosecution Office through respect for law and ethical standards of criminal procedure. This is also the essence of what is expected from prosecutors in the purpose and goals of the Guidelines.

Having essential purpose and goals of Guidelines in mind, it is necessary to highlight the fact that the prosecutor inevitably needs to connect with different fields when executing his prosecution function in practice. While directing detection of criminal offenses, he needs to be in contact with criminal investigation professionals and applied ethics of criminal investigation. When supervising the protection of human rights in the pre-trial procedure, investigative actions and measures which are under the authority of the police, the prosecutor needs to not only understand normative rules, but also the professional and tactical operations of the police. In cases of certain criminal offenses, for example violent and sexual crimes, the prosecutor needs to cooperate with professionals from forensic medicine and pathology. When it comes to corporate and financial crimes, the prosecutor needs to be familiar with the standards of ethical business-making and financial practices of business subjects. This necessity for interdisciplinary exchange of information, knowledge, and experience is thus the crucial matter which determines the need for an integrated and holistic approach in applied prosecutorial ethics as well as applied ethics in general. This assertion supports the realization of purpose and goals of the Guidelines with an ethical infrastructure on all levels of the state prosecutorial organization.

Similar to practical and operational explanation in law, applied prosecutorial ethics supports moral judgment of real-life examples, describing good and bad ethical practices of individuals, as well as right or wrong actions by individuals and institutions. Its referential framework are general principles and values, concrete rules, and moral convictions about the social role of the prosecutor. The latter needs to guarantee safety of people and the social community from the worst cases of crime, criminal offences and other types of criminal conduct, which is also a value and public interest in criminal law and criminal prosecution function.

Example 5

Guidelines Example 18 – The troublesome case:

A well-known businessman is accused of fraud. He also has a great influence on the media. The prosecutor in the case is exposed to a real press campaign. Is it possible to him to ask for being let off of the case because of conflicts of interest?

- *Evaluate the example with respect to domestic law which deals with conflict of interest. Also utilize Guidelines in the section which addresses the types of conflict of interest.*

Guidelines: 2.3. Types of Conflict of Interest

There are three main types of conflicts of interest:

- **Actual:** a conflict exists between the official duties or responsibilities and the private interests of the prosecutor (the brother of a prosecutor is accused of a crime). The prosecutor cannot act as the prosecutor in the case against his brother.
- **Perceived:** it appears that the private interests could improperly interfere with or influence in the performance of the official duties or responsibilities, whether or not this is a fact (for example the prosecutor's neighbor has been assaulted). Normally the prosecutor cannot act as the prosecutor in the trial.
- **Potential:** Where the prosecutor's private interests could interfere with or influence on the official duties or responsibilities in the future (for example friendship with a person who gets married to a woman who has been punished several times for burglary).

11.1 Compliance and integrity in the function of the rule of law- Practice from the Constitutional Court of Montenegro

Inseparability of compliance and integrity does not mean only compliance of actions with normative rules. Their inseparability and coherence in the context of applied prosecutorial ethics, ethical infrastructure and realization of the Guidelines calls for a legal, morally-ethical, and political ideal of the rule of law. The latter is practically illustrated in the ruling of the Constitutional Court of Montenegro, U-II nu. 48/12, July 2015. The case argues about constitutionality and legality of regulations and duties of public authorities in relation to the principle of the rule of law.

Example 6

Constitutional Court of Montenegro, U-II br. 48/12, 24. July 2015, paragraph 6

The principle of compliance of legal regulations (article 145 of the Constitution) represents one of the basic constitutional principles and is directly related to the principle of the rule of law [...]. The result of this legal demand is that the authorities are bind by the Constitution and the law, in their normative as well as other powers.³⁹

³⁹ This text is the author's selection for the purpose of these Training Materials and is not an official translation of the Constitutional Court of Montenegro (U-II 48/12).

- *In the context of the above finding of the Constitutional court, evaluate the role of the principle of the rule of law in relation to the principles for regulatory compliance and professional integrity of the state prosecutor.*

11.2 Ethical infrastructure

The concept of ethical infrastructure roughly encompasses the entirety of meanings, key ingredients, and functions of the ethical leadership policy and related activities, their coordination, management and control.⁴⁰ In the case of applied prosecutorial ethics, the role of ethical infrastructure is to holistically support and enhance the ethos of State Prosecution Office and as such, protect the values, sources, and goals of the prosecution function from the conflict of interests and disciplinary offences. In this respect, ethical infrastructure supports placing (integrating) Guidelines in the normative framework and organizational conditions, work processes, knowledge management, and control environment of the State Prosecution Office. Through applied prosecutorial ethics and ethical infrastructure, compliance and integrity are two sides of the same process; that is the placement of Guidelines into the context of State Prosecution Office and in the criminal prosecution function.⁴¹ Experiences show that unilateral approach and mechanical separation between compliance and integrity, in addition to individual components and functions of the ethical infrastructure, do not ensure expected results, purpose, and goals.⁴²

11.3 Holistic support for implementation and efficiency of Guidelines

Using applied prosecutorial ethics and supporting ethical infrastructure ensures that while fulfilling the purpose and goals of the Guidelines, the process itself will comply with fundamental principles and values of the state prosecutorial organization, laws and other regulations, recommendations from international organizations, and ethical standards which the Guidelines refer to.⁴³ Accordingly, more efficient prevention of the conflict of interest, disciplinary offences, and corruption risk on all levels of the state prosecutorial organization and prosecution function will be possible through the placement and versatile effects of Guidelines in a normative and actual sense.⁴⁴

⁴⁰ As such OECD, for example, emphasizes the meaning of ethical infrastructure for integrity, prevention of the conflict of interest and corruption, see: OECD (2005): [Public sector integrity: a framework for assessment](#), pp. 32-33 (10.11.2017).

⁴¹ Lawton, A., Rayner, J., Lasthuizen, K. (2013): *Ethics and Management in the Public Sector*. New York: Routledge.

⁴² Anello, E. (2006): [Ethical Infrastructure for Good Governance in the Public Pharmaceutical Sector](#), World Health Organization – WHO; (10.11.2017).

⁴³ The fact that holistic support with ethical infrastructure is among key conditions for the placement of [Guidelines in the context of the State Prosecution Office is also reasonably implied in the United Nations Convention Against Corruption](#) (UNCAC), which supports the importance of holistic fundamental principles and values for an effective legal system, ethics, and active anti-corruption policy;

⁴⁴ UNCAC, Article 5: »1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of

Aforementioned also implies that the integrated model of applied ethics with an ethical infrastructure as presented above, is comparable to what the Guidelines state in relation to avoiding the conflict of interests in the following paragraph:

Example 7

Guidelines: 2.5.2 Avoiding the conflict of interest where possible

"[...]Conflict-of-interest situations cannot be avoided by simply prohibiting all private-capacity interests on the part of public officials: instead, public officials must take personal responsibility for identifying and resolving problem situations, and public institutions must provide realistic policy frameworks, set enforceable compliance standards, and establish effective management systems. They must also provide training, and ensure that officials actually comply with the letter and the spirit of such standards.³⁶"

- *Study this section of the Guidelines in relation to domestic law and ethical infrastructure of the State Prosecution Office. In terms of prevention of the conflict of interest and disciplinary offenses, what would be worth improving in your working environment on the basis of your knowledge of the actual state of affairs in practice?*

11.3.1 Integration of Guidelines in the control environment and plan for integrity

Integration of Guidelines into the system of internal controls also means efficient risk management in all areas, defined by law, other regulations, and internal acts in order to protect common values, sources, and goals from corruption.⁴⁵

When it comes to preventing the conflict of interest and other threats to public interest during the enforcement of prosecution function, it is useful to specifically adhere to the Law on Prevention of Corruption, which lists the plan for integrity among the measures in the mentioned area. Its role in the system of internal controls is versatile, from recognizing and managing risks, to planning and implementing concrete measures for ensuring coherence of activities in (prosecutorial) organization, as well as encouraging integrity of employees- prosecutors and other personnel at the State Prosecution Office.

11.3.2 Protection of human dignity at the workplace and in the external environment

Adhering to the legislation and international standards for protection of human dignity from torture and other forms of physical or psychological violence at the workplace and in the external environment, the purpose and goals of the Guidelines determine that prosecutors have adequate working conditions. The protection of human dignity at the workplace is the most important among them, which is otherwise the responsibility of

society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability«.

⁴⁵ Compare, for example, OECD (2010): Good Practice Guidance on Internal Controls, Ethics, and Compliance; <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf> (10.11.2017).

the employer, even in the relation to external, local, national and international environments.⁴⁶

In *Guja v. Moldova*, ECHR summarizes convention- based provisions and previous practice in protection of human dignity of prosecutors at the workplace and related to work. In article 52, it argues that convention- based protection of the freedom of expression protects at the workplace, as well. In explanations to points 70-72, ECHR suggests that prosecutors and other public officials and personnel have certain obligation towards their employer. In article 72, it further articulates that public officials and other personnel in the public sector should have adequate protection while drawing attention to the illegal activities and actions at the workplace. In connection to this, ECHR summarizes the below mentioned explanation of the Explanatory Report to the Council of Europe's Civil law Convention on Corruption. Similarly, *Heinisch v- Germany*, no. 28274/08 also suggests that conclusions from *Guja v. Moldova* are reasonably valid in the civil and private sectors, as well.⁴⁷

Example 8

ECHR, *Guja v Moldova*, paragraph 72

"In practice corruption cases are difficult to detect and investigate and employees or colleagues (whether public or private) of the persons involved are often the first persons who find out or suspect that something is wrong."

- *Identify the above finding of the ECHR in terms of quality, protection of employees from risks, mobbing and other forms of psychological violence, harassment and pressures in your working environment. What does domestic law on the protection of whistleblowers state on the issue?*

11.3.3 Protection of whistleblowers

Thus, attaining the purpose and goals of the Guidelines in many ways depends on the efficiency of the control environment and measures to protect human dignity and integrity of prosecutors at the workplace and in connection to work. In order to prevent, effectively investigate, and sanction the conflict of interest and disciplinary offenses, protection of whistleblowers is likewise of pivotal importance.

In their purpose and goals, Guidelines oftentimes refer to the Law on Prevention of Corruption. In the mentioned law, the duty to protect whistleblower's dignity at the workplace and in the external environment is specifically emphasized in the section on the protection of whistleblowers. In relation to this, the law is based on the purpose of the legislator, but also refers to the public interest in the protection against corruption and

⁴⁶ More on this, for example, Mor Barak, M. E. (2014): *Managing diversity: toward a globally inclusive workplace*, University of Southern California – Third edition, Sage Publications Inc. London, pp. 8-12, 305-323.

⁴⁷ ECHR, *Case of Heinisch v. Germany*, No. 28274/08;

regional legislation on prevention of mobbing and other forms of physical and psychological violence and discrimination. The mentioned conclusions from *Guja v. Moldova*, as well as real-life experience, warn that issues and ethical dilemmas, conflicts of interests and corruption risk that appear in this area require interdisciplinary, reactive, and preventive approach. Aforementioned is similar to what applied ethics, together with occupational medicine, suggest for medical conditions related to the protection of human dignity at the workplace.⁴⁸

Example 9

ECHR, *Guja v Moldova*, paragraph 92-94

92. The applicant argued that his sole motive for disclosing the letters was to help fight corruption and trading in influence. This statement was not disputed by his employer. The Government, on the other hand, expressed doubt about the applicant's good faith, arguing, *inter alia*, that he had not given this explanation before the domestic courts.

93. On the basis of the materials before it, the Court does not find any reason to believe that the applicant was motivated by a desire for personal advantage, held any personal grievance against his employer or Mr Mišin, or that there was any other ulterior motive for his actions. The fact that he did not make before the domestic courts his submissions about the fight against corruption and trading in influence is, in the Court's opinion, inconclusive since he may have been focused on challenging the reasons advanced by his employer for dismissing him and might well have considered it unnecessary to refer to matters that his employer did not dispute.

94. Accordingly, the Court comes to the conclusion that the applicant's motives were as stated by him and that he acted in good faith.

- *From the viewpoint of domestic law, evaluate in which roles is the state prosecutor confronted with the situation where the stated ECHR findings are equivalent to the standards of judgement in domestic law? Your conclusions should also consider the relationship towards the key findings of ECHR in *Guja v. Moldova* in *Heinisch v. Germany* No. 28274/08.*

11.3.4 Protection of confidential material, personal, and other proprietary data

In article 3.5. *Respect for Confidentiality*, Guidelines specifically emphasize the legal and ethical view on the proper relationship the state prosecutor should have towards the protection of confidential material and proprietary data. Apart from this, the protection of confidential materials and proprietary data has a multilevel significance. On the highest level, it begins with protection of human dignity, personal rights, and personal data. It also refers to the protection of fundamental values of democracy and the rule of law, for example in security and defense. With the process of rapprochement between the

⁴⁸ Kečanović, B. (2016), *Etična podpora zdravemu delovnemu okolju (Ethical Support for the Healthy Working Environment)*, In: Miklič, M. D. Urdih, L. T. (ed.): *Čili za delo: učbenik za promocijo zdravja pri delu (Fit for Work: Textbook on the Promotion of Occupational Health)*, Klinični inštitut za medicino dela, prometa in športa, Ljubljana, pp. 25-29.

state and its institutions in both mentioned areas, they adopt responsibilities which have a common meaning for human rights and international security. On the other hand, the mere danger that stems from the criminal offense of corruption, organized crime and terrorism demands that state prosecutor adheres to the policy of protection of confidential material, databases and proprietary data on all levels of the state prosecutorial organization.

In every aspect, the duty to protect confidential material and proprietary data does not only bind prosecutors, but all employees and external actors in the matters of state prosecution. As a rule, whoever is in contact with confidential material and proprietary data, needs to act in accordance with regional regulations and security measures. Among them are thus regulations on protection of human dignity and other personal data, as regulations on confidential and other proprietary data. A good example of the mentioned is information, piece of evidence or material which has the status of procedural, business, or other type of confidentiality in the criminal procedure. In addition to that, the prosecutor and everyone else can be prohibited from accessing data and information to which they are usually entitled to, but have no reason and legal basis to do so in a particular case: the reversed standard of proof of the need to know.

11.3.5 Protection of confidential material, personal and other proprietary data in whistleblower cases

When it comes to the protection of confidential material and proprietary data in connection to the purpose and goals of the Guidelines, it is also worth adhering to what the Law on Prevention of Corruption aforementioned about the protection of human dignity in the internal and the external environments of the State Prosecution Office. Special attention needs to be focused on data confidentiality and protection of data when whistleblowers and other protected persons are involved in the criminal procedure.

The prosecutor can face the issue of protecting materials and data in cases involving whistleblowers in two areas. First, when it comes to the duty of the State Prosecution Office, as the representative of the state as its employer, to protect whistleblowers in accordance to the procedure, depicted in the Law on Prevention of Corruption. Second, the same can be applicable when the whistleblower as a protected witness, or a person with a whistleblower status, takes part in the criminal procedure. Real-life examples have shown that the transition from one to the other procedure, meaning from administrative-anti-corruption to the criminal one, can be significantly problematic. This does not only apply to the protection of data. It also applies to the understanding of the primary role of criminal procedure in the prosecution function in relation to the administrative- anti-corruption procedure. Even though it may appear that this goes beyond the purpose and goals of the Guidelines at a first glance, it is worth taking into account that the institute of whistleblower protection is of central importance for prevention and detection of the

most demanding corruption cases. Accordingly, there is specific emphasis on it at this point.

Example 10

ECHR, *Guja v. Moldova*, paragraph 77

“The motive behind the actions of the reporting employee is another determinant factor in deciding whether a particular disclosure should be protected or not. For instance, an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection [...] It is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and that no other, more discreet means of remedying the wrongdoing was available to him or her«.

- *Analyze the above statement of ECHR in relation to domestic law. Imagine that someone is attempting to or already exerting pressure on you or you colleague in a concrete criminal procedure with a certain purpose. We are talking about an influential person. This person has a threatening tone in his/her demands and refers to his/her known connections with your superior. Is this the moment when alerting the media is the only option? Compare with the decision of the Disciplinary Committee, Secretariat of the Prosecutorial Council, Dp.br. 2/2013, 11.04.2013.*⁴⁹

11.3.6 Enabling access to data of public nature

Enabling access to specific data, which has the status of public data in accordance to regional regulations, can be of key importance for realizing a number of personal, human, as well as political rights. In matters of state prosecution, enabling access to data of public nature can be especially demanding due to the already mentioned protection of confidential material and proprietary or confidential data. In this sense, the prosecutor, or a deciding public official, is often left in an uncertain position, reflected either in the potential for conflict of interests or disciplinary offenses. Guidelines do not further engage with this topic. From the purpose and goals, as well as from the explanation regarding the duty to avoid conflicts of interests, respecting the principle of impartiality and rights of clients, and ethics of the public word and ethical communication of state prosecutors, even in the social media, the fundamental measure for ethical decision-making and actions in these cases can clearly be depicted from the Guidelines.⁵⁰

11.4 Purpose and goals of Guidelines in the Legislative Field

Legislative activity is primarily under the authority of national legislator and the executive branch, the government and ministries. The risk for poor regulations and poor public policy, which generates corruption and other types of criminal conduct, can directly impact the work of the State Prosecution Office and prosecutors. As such, it is worth

⁴⁹ <http://tuzilastvocg.me/media/files/ODLUKA-%20Nusreta%20Arapovic.pdf>

⁵⁰ See also, *infra*, Ethics of the Public Word.

mentioning that no matter the excellence of explanation for normative rules and good intentions of the prosecutor, the systemic risk for poor regulations is difficult to overcome, which widely opens the door for corruption and other forms of crime. With poor regulations, realization of the purpose and goals of the Guidelines is also at risk. Thus, it is important that applied prosecutorial ethics and training of prosecutors with the Guidelines warn about the mentioned issue in practice, and encourage special attention to it.

The existence of quality regulations is among the systemic conditions for realization of the purpose and goals of the Guidelines. And the other way around, the purpose and goals of the Guidelines in a holistic, systemic, and systematical meaning requires quality regulations. In this sense, it is worth mentioning the conclusions from *Guja v. Moldova* about the (in) existence of internal regulations at the State Prosecution Office:

Example 11

ECHR, *Guja v Moldova*, paragraph 32, 81

“At the material time neither the Internal Regulations of the Prosecutor’s Office nor Moldovan legislation contained any provision concerning the disclosure by employees of acts of wrongdoing committed at their place of work [...] The Court notes that neither the Moldovan legislation nor the internal regulations of the Prosecutor General’s Office contained any provision concerning the reporting of irregularities by employees (see paragraph 32 above). It appears, therefore, that there was no authority other than the applicant’s superiors to which he could have reported his concerns and no prescribed procedure for reporting such matters.«

- *Analyze the above findings of the ECHR in relation to domestic law. Evaluate how disclosing/ supplying information about the risk and concrete examples of the conflict of interest and other disciplinary offenses is managed in your working environment.*

12 APPLIED ETHICS AND PROFESSIONAL VIRTUES- INTEGRITY OF A GOOD PROSECUTOR

Encouraging professional virtues or integrity of a good prosecutor is the focal point of the purpose and goals of the Guidelines. The word integrity also opens a couple of questions in the ethical, legal, and political aspects alike. The explanations range from simplified (botched, at times ridiculous) to in-depth, scientifically supported arguments. When it comes to applied prosecutorial ethics and realization of Guidelines, it is worth mentioning the primary meaning of *integrity* as the standard of human dignity and protection of human rights. The practice of ECHR, referred to in decisions of Constitutional Courts and other high-level judicial forums, is that integrity in this sense is a universal standard which guarantees the integrity of a person in a physical and psychological sense.

Example 12

ECHR, Case of Axel Springer AG v. Germany - 39954/08, paragraph 83⁵¹

The Court reiterates that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life [...] The concept of "private life" is a broad term not susceptible to exhaustive definition, which covers the physical and psychological integrity of a person and can therefore embrace multiple aspects of a person's identity, such as gender identification and sexual orientation, name or elements relating to a person's right to their image [...] It covers personal information which individuals can legitimately expect should not be published without their consent [...].

- *Evaluate the stated findings of ECHR in relation to domestic law and standards of proof, specifically free evaluation of evidence and legally invalid evidence. Also see the chapter on human rights and imagine you are addressing the case of a person which filed a report on the suspicion of corruption. As a consequence, this person was subjected to severe threats and even assault. In your opinion, what is crucial in this case for the professional integrity of the state prosecutor and for the integrity of the victim?*

In corruption prevention, integrity has fallen victim to the lack of conceptual consistency from the very beginning. For example, Marmor asserts that integrity is neither an ideal, nor a value of special importance when referring to normative, legislative activity.⁵² Some moral philosophers conclude that integrity only has a role of some form of "meta-virtue", universal disposition or principle which requires to act in accordance to the rules.⁵³ If their position about integrity as a pivotal, "meta-virtue" is set alongside psy-

⁵¹ [https://hudoc.echr.coe.int/eng#{"itemid":\["001-109034"\]}](https://hudoc.echr.coe.int/eng#{)

⁵² Marmor, A. (2004), Should We Value Legislative Integrity? *Public Policy Research Paper* University of Southern California Law School, No. 14.

⁵³ Strahovnik, V. (2012), Cognitive Virtues, Integrity and Public Administration Ethics, In: Kečanović, B. (ed.) (2012). *Javna etika in integriteta: odgovornost za skupne vrednote* (Public ethics and integrity: Responsibility for

chological theories and ethical virtues, it shows that both have established a common biological and neurophysiological connection (integration) of cognitive and moral virtues, knowledge, and values in one whole person- person with integrity. As such, we can come to a simplified conclusion that integrity of a prosecutor is exactly what the integrated model of applied prosecutorial ethics and ethical infrastructure encompasses on the institutional level of the State Prosecution Office, also supporting the realization of the purpose and goals of the Guidelines with the whole of the cognitive and moral virtues. In other words, the final measure for integrity is a good and right action (or act); “as a virtuous person would act in the same circumstances”.⁵⁴

If the described process for realizing the Guidelines is understood in the sense of what was encompassed with a thought construct of normative integration above, their purpose and goals transcend (integrate) to the personal level of individual prosecutor and other personnel at the State Prosecution Office through ingredients and functions of ethical infrastructure. With integration on a personal level, Guidelines as formal rules, purposes, and goals assert themselves into biological and neurophysiological building blocks of cognitive and moral virtues, where normative becomes implicit, covert knowledge or experience. From hereinafter, in accordance with personal conscience, they are applied to practice from one example to another. At this point the concept of integrity, even in the realization of the purpose and goals of the Guidelines, is actually the closest to what theory of law describes with concepts of “sense of proportion, legal sense, sense for goodness and justice.”⁵⁵

12.1 Integrity of the state prosecutor and acting “in good conscience”

Acting “in good conscience” is the expression of internal consent, awareness and moral duty. In comparison to legal rules, which work because of the underlying threat and sanctions from organized (state) coercion, acting “in good conscience” motivates and sanctions “inner calls” for duty and moral responsibility. The origin of its effectiveness is the voluntary commitment and personal declaration, comparable to the solemn oath of public officials, state prosecutors, judges, political officials from the legislative and executive branches of power before taking the office. With such declaration and free commitment, “acting in good conscience” becomes more than a right. “It is also a duty. A duty from a personal, individual view, and a duty towards others.”⁵⁶

shared values, KPK, Ljubljana; [https://www.kpk-rs.si/upload/datoteke/Z_bornik_Javna_etika_in_integriteta_odgovornost_za_skupne_vrednote.pdf\(1\).pdf](https://www.kpk-rs.si/upload/datoteke/Z_bornik_Javna_etika_in_integriteta_odgovornost_za_skupne_vrednote.pdf(1).pdf) (10.11.2017).

⁵⁴ *Supra*, Hursthouse, footnote, no. 21.

⁵⁵ Pavčnik, p. 620.

⁵⁶ Hribar, T. (2012), Etični pomen ustavne prisege (Ethical Implications of the Constitutional Oath), In Kečanović (ed.), *supra*, footnote, no. 42, pp. 127–150.

Example 13

Wording of the Oath State Prosecutor in Montenegro

The Law on State Prosecution Service, Article 79

Wording of the oath shall be as follows: "I do solemnly swear to perform prosecution function in a conscientious, impartial and accountable manner under the Constitution and the law." The oath shall be taken by reciting it and by signing the text of the oath. If the state prosecutor does not take the oath, i.e. refuses to take the oath, he/she shall be deemed not elected [...].

- *How are you personally experiencing the oath of the state prosecutor in legal, legislative and ethical sense? What kind of expectations do you have towards your colleagues in terms of inter-personal relationships while carrying out the criminal prosecution function?*

12.2 Integrity of the prosecutor between normative rules and actual circumstances

As emphasized above, due to *iura novit curia* prosecutors usually do not have an issue with understanding, explaining, or utilizing normative rules. In recognizing (diagnosing) actual real-life examples, issues, or ethical dilemmas, their definition and solving, the emphasis is on the cognitive and moral outlook on the criminal prosecution function. In this sense, there is no essential difference between applied prosecutorial ethics and practical (operational) approach in (criminal) law.⁵⁷

If a prosecutor in any field, ethically-wise or in criminal procedure, starts to feel he/she could become entangled in a conflict of interests, his/her morally-ethical and legal duty both state that such a situation should be adequately avoided.⁵⁸

Example 14

Guidelines, 2.5. Responsibilities

»The prosecutor as a public official has to respect key values in relation to the position and act in professional manner. It is therefore necessary that among other things the prosecutor acts in a manner that shows respect for: the law; Impartiality; Reputation; Integrity; Confidentiality; Court; and other persons«.

- *Study the above text from the Guidelines in relation to domestic anti-corruption legislation that addresses the duty to avoid the conflict of interest. Imagine the following situation: State Prosecutor was assigned to a specific criminal case. It is clear from its description that the focal point is the criminal offense of the abuse of*

⁵⁷ Pavčnik, p. 74

⁵⁸ Guidelines, 2.5.1 (Identification of the conflict of interest and reporting) in 2.5.2 (Avoiding the conflict of interest where possible); compare with ECHR, Guja v. Moldova.

power. The person charged with the crime is a leading person in an international corporation. The latter is otherwise known to often give various donations and sponsorships to domestic humanitarian organizations and public healthcare institutions. The wife of the prosecutor is actually the CEO of the primary health centre that would be among the recipients of these resources. As a medical professional, she is also often invited to lecture on conferences where that same corporation is among the main sponsors.

12.3 Human rights

Respecting the statutory provisions on the standards of proof and prosecutorial discretion, Articles 16 and 17 of the Criminal Procedure Code- CPC, as well as what is understood from the purpose and goals of the Guidelines when it comes to Respect for impartiality, it is crucial for the protection of human rights to adhere to what is stated in the second paragraph of procedural sanctions on the exclusion of evidence in article 17 of CPC:

CPC, Free Evaluation of Evidence and Legally Invalid Evidence

Article 17

(1) [...]

(2) Judgments may not be founded on evidence that have been obtained by violating human rights and fundamental freedoms guaranteed by the Constitution or by ratified international treaties or on evidence obtained by violating the criminal proceedings provisions as well as other evidence obtained therefrom, nor may such evidence be used in the proceedings.

When it comes to the protection of human dignity and human rights of prosecutors and other personnel at the State Prosecution Office, everything that has been stated above on the prevention of the conflict of interest and disciplinary offenses in protection of human dignity at the workplace and in the external environment, as well as in the protection of whistleblowers, is applicable.

12.3.1 Relation to the victim: Between the public interests of criminal procedure and private interests

Relation to the victim in criminal procedure is a specific issue for the protection of human rights of the weaker, in which respecting everything mentioned above on the protection of human dignity needs to be taken into account so that this relationship does not wander into the area of conflict of interest or other reasons, which could even amount to recusation of the prosecutor in a specific case. In such cases, Guidelines are reasonably applied to CPC, Article 43, Recusation of a State Prosecutor and Other Participants in the Procedure.

12.3.2 Relation to the accused persons

Relation to the accused persons is, considering the specifics of this position, determined by what the Constitution and legislation asserts about the presumed innocence and pro-

tection of human rights in criminal procedure. In this sense, the purpose and goals of the Guidelines are reasonably similar to what CPC regulates about the position and rights of the accused persons and their counsel.

12.4 Due care in relation to courts and other state authorities

Guidelines specifically emphasize the relation of the prosecutor towards the position and role of the court in the criminal procedure; Guidelines 3.6 Respect for the court. The same article is seen as defining the relation between the state prosecutor towards other state authorities, recognizing their reputation and status, which of course also includes the State Prosecution Office.

Example 15

Guidelines 3.6. Respect for the court

The state prosecutors shall, on the occasion of presentation before the court and in everyday communication with the court, respect and preserve the dignity of the court.

- *In the context of this section of the Guidelines, identify the below description of the disciplinary procedure and dismissal of the state prosecutor. Compare your evaluations with domestic law and practice on disciplinary offenses, run by the Disciplinary Committee, Secretariat of the Prosecutorial Council.*

Certain state prosecutor has often shown signs of intoxication in the court. He displayed indecent behaviour in communication with the court. The way he managed files and evidence material in front of the court also raised suspicion that the prosecutor was intoxicated. One day, while going back from the court, he was driving his car, jeopardising other road users with reckless driving and speeding. Road users alerted the police on the intoxicated driver. The police only found him the next day when he came to work. Alcohol testing in these circumstances did not have any merit for the purpose of infringement procedure. Consequently, the police only regarded the infringement for reckless driving and speeding. In the end, the prosecutor was dismissed from his position as a state prosecutor. Among the main complaints were indecent behaviour towards the court and presence in the courtroom under the influence. In connection to this, the dismissal procedure also referred to witness accounts and police findings on the aforementioned traffic violation. The dismissed prosecutor initiated litigation and argued that intoxication was never proven in any official procedure. The court overruled his objection. It explained that the disciplinary authority did not view intoxication in terms of criminal responsibility, but in terms of inadequacy to perform the prosecution function.

12.5 Ethics of the public word

We have addressed the issue of ethics of the public word above, in chapter 8 Inclusive public space and deliberative communication, as well as in subchapter 9.1.6. Enabling

access to data of public nature. When it comes to the protection of confidential data, we have otherwise uncovered that the prosecution function is often reserved in communication due to the nature of things. Between this and the principle of being public, uncertainty with the risk for the conflict of interests and disciplinary offenses is objectively present when carrying out the prosecution function. In certain cases, the prosecution function needs to be asserted as a moral and legal authority in relation to the public, meaning it needs to be limited in its statements with respective procedural standards and rights of the parties in the criminal procedure, for example presumption of innocence. In relation to this, we specifically suggest that prosecutors examine the case study, listed in Guidelines under number 9:

Example 9 – The press campaign: The media do not like an indictment and criticize the prosecutor. In some newspapers, **some of the readers nearly call him an Idiot.** They accuse him of being too weak. The prosecutor is very angry and feels that his honour is insulted. Is he entitled to justify his decision on the social media or in the newspapers?

Everything written above on the ethics of communication, including the outlined case number 9 and solutions in the Guidelines, in no way obstructs, but at best encourages State Prosecution Office and prosecutors to remain open to the public in their prosecution function. However, if the prosecutor is unreasonably exposed to public pressure, insults or even threats in the media, it is the duty of the State Prosecution Office as an employer to protect its employee, as otherwise stated in regional legislation on the protection of dignity of employees.

12.6 Prosecutorial discretion and the standard of proof

Explanations about discretion are, similarly to the concept of integrity, very colourful. Some deal with discretion in connection to arbitrary behaviour, others in connection to legality, etc. For the purpose of realizing the Guidelines, the debate on discretion will be limited to what is said in the article 3.2. *Respect for Impartiality* on standards of proof and evaluating the level of quality of the objective truth:

Guidelines 3.2. *Respect for impartiality*

»State prosecutors should take care that the evidence, for which they know or reasonably believe that it was obtained in an illegal manner, will not be used, and undertake actions for finding objective truth. When the state prosecutors learn the facts and data which are beneficial for a suspect or accused person, or facts and evidence which are essential for decision making, they shall deliver, without delay, the data and evidence, i.e. the facts to the court. Further on they shall refrain from contacts and actions which may raise doubt about their objectivity«.

The outlined demand of the Guidelines is practically identical in purpose and goals to what CPC determines in relation to standards of proof and evaluation of the quality of the objective truth⁵⁹:

⁵⁹ Pavčnik, p.74

CPC, Principle of Truth and Fairness

Article 16

(1) The court, State Prosecutor and other public authorities participating in the criminal proceedings shall truthfully and completely establish all facts relevant to render a lawful and fair decision, as well as examine and establish with equal attention facts that incriminate the accused person and the ones in his/her favour.

(2) The court shall ensure equal terms to the parties and to the defence attorney as regards the offering, accessing and presenting of evidence.

In both cases, the essence of prosecutorial discretion is in what the following, Article 17 of CPC determines:⁶⁰

CPC, Free Evaluation of Evidence and Legally Invalid Evidence

Article 17

(1) Courts and State Prosecutors shall appraise the existence or non-existence of facts on which to base their decisions at their discretion.

(2) Judgments may not be founded on evidence that have been obtained by violating human rights and fundamental freedoms guaranteed by the Constitution or by ratified international treaties or on evidence obtained by violating the criminal proceedings provisions as well as other evidence obtained therefrom, nor may such evidence be used in the proceedings.

⁶⁰ Official Gazette of Montenegro, no. 57/09, 49/10 and 35/15.

13 CONCLUDING REMARKS

With prosecutorial discretion, we have come to an actual and symbolical end of training materials. With this challenge, the Training Handbook and Ethics Training Program for Prosecutors in Montenegro simultaneously kindly invites training participants to continue their journey across applied prosecutorial ethics, in adherence to the purpose and goals of the Guidelines, in a creative environment and with an interactive study program.

14 APPENDIX: ETHICS TRAINING PROGRAM FOR PROSECUTORS IN MONTENEGRO, 29. NOVEMBER 2017

09:30 – 09:50	Opening remarks: Representatives from organizers and invited institutions		
	Thematic Section: Bećir Kečanović, Council of Europe expert		
	<table border="1"> <tr> <td>Methodology and Suggested Accessories/ Equipment</td> <td> <ul style="list-style-type: none"> - Program will be held in accordance with the modified The World Caffe method - Trainees will have access to the copy of Guidelines and Training Materials (Handbook). - Conference hall allows free movement. This is a spatial condition for a dynamic and creative learning environment, putting up (affixing) flip charts, etc. - Tables are arranged across the entire room, so that trainees have the best possible overview of the activities in the hall, ensuring undisturbed interpersonal communication. - There are 3-4 participants at each table. Instead of cloths, tables are covered with flip charts, color markers, and other writing implements. - There is a table with drinks and refreshments for trainees, so they are able to serve themselves - Additional: laptop computer and projector, sellotape, scissors...; </td> </tr> </table>	Methodology and Suggested Accessories/ Equipment	<ul style="list-style-type: none"> - Program will be held in accordance with the modified The World Caffe method - Trainees will have access to the copy of Guidelines and Training Materials (Handbook). - Conference hall allows free movement. This is a spatial condition for a dynamic and creative learning environment, putting up (affixing) flip charts, etc. - Tables are arranged across the entire room, so that trainees have the best possible overview of the activities in the hall, ensuring undisturbed interpersonal communication. - There are 3-4 participants at each table. Instead of cloths, tables are covered with flip charts, color markers, and other writing implements. - There is a table with drinks and refreshments for trainees, so they are able to serve themselves - Additional: laptop computer and projector, sellotape, scissors...;
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09:50 – 10:00	Introduction and Systematic Angle of the Guidelines <ul style="list-style-type: none"> - Inclusion of Guidelines in the context of the prosecution function and ethical infrastructure, including the plan for integrity of the State Prosecutor. 		
10:00 – 10:40	Guidelines and Professional Integrity of the State Prosecutor Introduction to applied prosecutorial ethics: <ul style="list-style-type: none"> - This section is dedicated to the introduction of applied prosecutorial ethics. The trainees will learn about: a) The role of applied ethics in key (doctrinaire) findings from GRECO (MNE/GRECO/jun2015), specifically the need to develop professional deontology of prosecutors for the prevention of conflict of interest on all levels of the state prosecutorial organization b.) What does the stated indicate in the concrete context of Montenegro, acknowledging the actual state of affairs and changing of values, normative rules, ethical dilemmas and issues in time and space c.) How can trainees realize and reasonably connect (integrate) everything mentioned above into a coherent whole of applied ethics, criminal law, and daily dynamics of actual criminal cases. - A practical exercise for raising awareness on professional values and virtues is presented to facilitate better understanding. Internalization of the purpose and goals of the Guidelines - applied prosecutorial ethics as an internal (moral) duty. Referential framework is the Guidelines and Training Materials (handbook). - With the purpose of attaining the aforementioned effects, trainees are expected to analyze summaries (MNE/GRECO/jun2015) and practice of ECHR (Vidaković v. Montenegro no. 27524/06) and respond with discussion. - Also included is the practice from the Constitutional Court of Montenegro about the principles of compliance and the rule of law. - In light of the foregoing, it is necessary to emphasize that the introductory section is dealing with doctrinaire issues which accompany practical work and discussion of trainees throughout the entire study process. From chapter to chapter of the Handbook, from exercise to exercise and with the aid of practical examples, the realization of the purpose and goals of the study process is ensured. 		
10:40 – 11:00	Coffee Break		
11:00 – 11:30	Ethics in Behaviour and Communication Trainees discuss key issues of applied prosecutorial ethics with the expert, also touching upon the importance of support from ethical infrastructure in behavior and communication. ECHR		

	practice is also included. In addition to the already mentioned Vidaković v. Montenegro no. 27524/06, Guja v. Moldova, Heinisch v- Germany, no. 28274/08, Axel Springer AG v. Germany - 39954/08 are also included.
11:30 – 12:00	Conflict of Interests inside and outside of the Courtroom - Trainees summarize the actual example with the expert, and discuss the case in relation to the measures of incompatibility of functions and conflict of interest.
12:00 – 12:30	Disciplinary Responsibility of Prosecutors - Trainees summarize the actual example with the expert, and discuss the case in relation to proactive work in managing disciplinary issues.
12:30 – 13:30	Lunch
13:30 – 15:30	Solving Actual Examples in accordance with the Content of Guidelines As stated in the introduction, practical examples in the Handbook (1-15), intended for exercise and discussion of the trainees, are modified versions of actual examples. They are summarized from the outlined practice of high judiciary forums, GRECO findings, Guidelines and practice of the State Prosecution Office. Since their purpose is not analysis of correctness of certain decisions but rather exercise and facilitation of discussion in order to attain the purpose and goals of the Guidelines, the examples are modified accordingly.
15:30 – 15:45	Coffee Break
15:45 – 16:15	Mutual Analysis and Closing Remarks

APPENDIX II GUIDELINES AND PROFESSIONAL VALUES

Example 1: TROLLEY CASE DILEMMA - AN EXPERIMENT

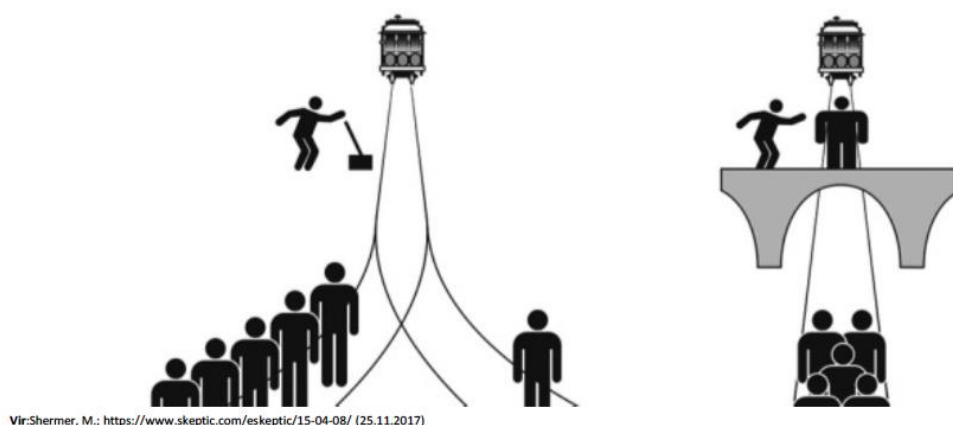
This experiment highlights a strong emotional basis and involvement of emotions into moral intuition and moral and ethical judgment, showing the process of solving ethical dilemmas and problems. It evolves around two hypothetical situations. In the first one the trolley without brakes approaches at a high speed a group of people standing on the tracks. Their death is inevitable. Participants as observers have the possibility to divert the train by moving the switch and leading to the situation in which only one life will be lost. To the question if it is acceptable to save five lives at the expense of losing one, majority gives a positive answer. In the second situation the only option is to push a fat foreigner from an overpass so that his body stops the trolley. In that situation they would again sacrifice one life in order to save five. In this situation majority of the participants says that it is not morally acceptable.

Think about it - how come that in the first situation sacrificing one life to save five is acceptable while it is not acceptable in the second situation. In that context, try to remember some of the difficult situations or your professional ethical dilemmas that arose in the circumstances of strong emotions. Pay attention to the influence and mental coding of the legislative rules, values, emotions, moral intuition, virtues, interests, context, risks... In the exchange of experience try to "lift the dark veil" from the so-called implicit, silent knowledge that supports our decisions and reactions in the most difficult and the most dangerous situations. We frequently solve a difficult problem or an ethical dilemma, without being able to explain what happened or how we knew what to do. However, exchanging experience and practicing on practical examples we can empower our conscious attention in that segment of the silent knowledge. Strengthening the conscious attention at the same time strengthens and extends the awareness and the capacity for making (moral) decisions and reactions. The purpose and goals of the Guidelines aim at raising the awareness and strengthening the capacities of the state prosecutors, the values of the state prosecution service and professional virtues i.e. integrity of the state prosecutor.

Give yourself the comfortable feeling of the empowered and extended awareness. Be relaxed and creative.

Trolley case dilemma: experiment

(Neuroscience and applied prosecutorial ethics)



- Remember a difficult situation, a professional dilemma. Compare it to the experiment (5 min).
- Discuss the internal and external factors of the conflict of values, emotions, intuition, and interests.... (5 min)
- Select and list the crucial ones (5 min)

II/1. ETHICAL CONDUCT AND COMMUNICATION

Example 2: VIOLATION OF THE RIGHT TO FREEDOM OF EXPRESSION AND PRESUMPTION OF INNOCENCE - LIABILITY FOR DAMAGES (Supreme Court of Montenegro, 1148/15)⁶¹

*Publishing (...) that the plaintiff is a heroin dealer, in spite of the fact that the criminal charges against her were dropped, the defendant **violated the presumption of innocence**, and therefore (...) acted **contrary to professional standards** and is obliged to compensate the plaintiff for the mental suffering she experienced because of the violation of her honour and reputation (...). The rights of the plaintiff is guaranteed by the Constitution, Media Law, and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms were violated (...)*

***Right of personality** contains the right to reputation and honour. Therefore, if honour is a subjective category - the opinion that an individual has about him/herself; and if reputation is defined as - the opinion that immediate or broader community has about one person, then according to the findings of this court (...) the plaintiff was referred to as to a dealer, which violated her reputation and honour (...)*

*(...) **Presumption of innocence** (...) is guaranteed by the Constitution of Montenegro, and the European Convention for the Protection of Human Rights and Fundamental Freedoms (...). Every person has the right to respect of presumption of innocence, which is **in the spirit of the case law of the European Court of Human Rights (Brown v. United Kingdom)***

*(...) The defendant (...) **is liable to pay damages to the plaintiff** (...) - **just satisfaction** - (...) given all the **facts of the case** (...) e.g. that it was a young person, (...) a pedagogue (...) in a primary school, and given the **duration and intensity of the suffering**.*

a) In the context of the above consider the role of the state prosecutor invited and authorized to inform the media and the public about proceedings in the same circumstances - the plaintiff being suspected of drug dealing.

- **Think about the principles of publicity, functional independence, responsibility:** (...) interests of moral have to be taken into account (...) as well as those of human dignity and private life (...) accepting publicity as a form of supervision (...) but also (...) as the right to warn the public in case of direct an indirect interference of the authorities or individuals into the work in specific cases (compare ECHR: Guja v. Moldova; Axel Springer AG v. Germany; see Manual)

⁶¹ <http://sudovi.me/podaci/vrhs/dokumenta/2600.pdf>

b) Analyse in the context of moral-ethical and disciplinary liability, and the liability for the damages that the state prosecutors have in performing their official duties.

Identify three risk factors of the non-ethical conduct and non-ethical communication and **3 measures** aimed at raising the awareness and strengthening the capacities of the state prosecutors, as well as accountability of the state prosecutors for ethical conduct and communication **a) in public; b) in the working environment.**

II/2. ETHICAL CONDUCT AND COMMUNICATION

Example 3: ETHICAL CONDUCT AND COMMUNICATION BEFORE THE COURT

The Commission for the Code of Ethics ⁶² (...) at the initiative of the superior (...) conduct (...) of the state prosecutor, in the main hearing before the court (...):

Communication of the prosecutor with the court expert in the main trial before the court in a criminal case led to a very embarrassing situation. The court reacted explaining to the prosecutor that he had to ask questions related to the criminal case. However, the prosecutor continued and again directly spoke to the court expert in the same words. Then he requested from the trial judge to get the court files, which he was given to use while asking questions. After that the prosecutor approached the trial judge and threw the case file on the bench and turning without any words he went back to his seat in the courtroom. During the hearing, before the court gave him the floor, the prosecutor stood up and interrupted the defendant several times in his statement (...). The Court warned the prosecutor again (...)

Analyse against the following criteria:

- Oath and the Code of Ethics of the state prosecutors
- Guidelines about the ethics and avoiding the conflict of interest for the prosecutors in terms of respecting the court and public reputation;
- Disciplinary liability, for example.: (...) if in performing prosecutorial duties or in a public place the prosecutor brings himself into the condition or behave in the manner which is not appropriate for prosecutorial office; 5) treats inappropriately the participants in the procedure and employees in the state prosecution service;
- Rules for evaluation of state prosecutors and heads of the State Prosecution Offices

Communication skills	Reports about the complaints against the work of the state prosecutor and about the compliance with the Code of Ethics; attitude and communication with the parties, colleagues and other employees
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⁶² <http://tuzilastvocg.me/media/files/IZVJESTAJ%20KOMISIJE%20ispravljena%20verzija.pdf>.

- Communication strategy and acquisition of knowledge about the ethics of communication of state prosecutors in the courtroom, proceedings, communication with other state bodies, physical and legal entities.

Identify three risk factors of the non-ethical conduct and non-ethical communication **and 3 measures** aimed at raising the awareness and strengthening the capacities of the state prosecutors, as well as accountability of the state prosecution for ethical conduct and communication in the courtroom.

III/1. CONFLICT OF INTERESTS

Example 4: VIOLATION OF THE PROVISIONS ABOUT AVOIDING CONFLICT OF INTERESTS BY NOT FILING THE DECLARATIONS OF INCOME AND ASSETS

Anti-Corruption Agency⁶³ (...) procedure for establishing if a member of the Prosecutorial Council complies with the Law on Prevention of Corruption in terms of the duties to file the Report on Income and Assets required in Article 23 paragraph 3 item 1.

Facts :

He did not respond to the request to file the report. In the proceedings in the public hearing he stated that he had not known that the position of a member of the Prosecutorial Council meant that he was a public official and that according to the Law he had to submit the report and that therefore he was to submit the Report subsequently.

a) Analyse against the provisions of:

- the law regulating conflict of interests;
- laws that provide for the sanctions for violations of the provisions of the law that refer to the duty to avoid conflict of interests and to submit the reports on income and property (Article 103 items 22-24, from 500 to 2,000.00 EUR);
- Law on State Prosecution Service and standards of ethics regarding professional integrity of members and the reputation of the Prosecutorial Council;

b) Apply this to the hypothetical situation that a state prosecutor is in the same procedure, and analyse against the following:

- Code of Ethics and Guidelines for prosecutors about ethics and avoiding the conflict of interest;
- Law on State Prosecution Service and disciplinary liability of state prosecutors

⁶³ <http://www.antikorupcija.me/media/documents.pdf>.

Identify three risk factors and 3 measures aimed at raising the awareness and strengthening the capacities of state prosecutors, as well as accountability of the state prosecution in the implementation of the provisions of the Law on Prevention of Corruption that regulate the field of conflict of interests.

III/2. CONFLICT OF INTERESTS

Example 5: AVOIDING CONFLICT OF INTERESTS RELATED TO GIFTS

Partly adapted examples from comparative practice

State prosecutor is invited to participate in the protocol visit of the delegation of high representatives of a foreign country. In the final part of the visit the high representative of the delegation approaches the state prosecutor, expressing great appreciation for his presentation of the national experience and good practices of the state prosecution service. As a symbol of appreciation he gives the state prosecutor a gold-plated watch of a famous world brand in the value of about 3,000.00 EUR.

Analyse against the provisions of:

- the law regulating conflict of interests and receiving gifts;
- laws that provide for the sanctions for violations of the provisions of the law that refer to gifts (Article 103 items 13-17, from 500 to 2,000.00 EUR);
- Code of Ethics and Guidelines for prosecutors about ethics and avoiding the conflict of interest;
- Apply this to the hypothetical situation with an ethical dilemma - should he refuse the gift, hurting the person who intended to give him the gift and causing the problem on the international level or not.

Identify three risk factors and 3 measures aimed at raising the awareness and strengthening the capacities of the state prosecutors, as well as accountability of the state prosecution in the implementation of the provisions of the Law on Prevention of Corruption and other regulations that regulate the field of gifts.

III/3. CONFLICT OF INTERESTS

Example 6: CONFLICT OF INTERESTS, DONATIONS AND SPONSORSHIPS

Material about the applied prosecutorial ethics and conflict of interests (example 14)

Analyse this example against the provisions:

- of the law regulating conflict of interests, particularly the provisions that refer to donations and sponsorships, and reports of income and property;
- of the Code of Ethics and Guidelines for prosecutors about ethics and avoiding the conflict of interest;

Identify three risk factors and 3 measures aimed at raising the awareness and strengthening the capacities of the state prosecutors, as well as accountability of the state prosecution in the implementation of the provisions of the Law on Prevention of Corruption that regulate the field of donations and sponsorships.

III/4. CONFLICT OF INTERESTS

Example 7: CONFLICT OF INTERESTS IN THE PROCEDURE OF DRAFTING AND ADOPTING LEGISLATION OR ANY OTHER GENERAL ENACTMENT

Partly adapted examples from comparative practice

On behalf of the judiciary a state prosecutor was selected to be a member of the working group for drafting the action plan with measures for implementation of legislation and allocation of the budget funds aimed at ensuring protection of nature and the environment.

The announcement of this project provoked particular interest among the companies, producers and providers of digital equipment. It is covered by the guidelines for drafting and adoption of the action plan measures. Public funds in the amount of several million euros are envisaged for financing.

A lobbyist of one of the interested companies started an informal conversation about this project when he met the prosecutor privately. He did not ask the prosecutor for anything that might be of direct benefit to his role as a lobbyist. He just friendly informed him about the realistic risk of defining certain specific technical requirements and standards of the digital equipment in a wrong manner. He proposed to him to send him an extensive expert material for that purpose that his company developed for that profile of services in the field of digital technologies. He told the prosecutor to be free to distribute the material to other members of the working group active in the development of the action plan.

Analyse against the provisions of:

- the Law on Lobbying;
- the Law on Prevention of Corruption;
- Plan of Integrity of the State Prosecution Service of Montenegro, particularly the part that refers to General and Particular Fields of Risk "Illicit lobbying, other non-public influence or other forms of violation of the principle of transparency"
- the Code of Ethics and Guidelines for prosecutors about ethics and avoiding the conflict of interest.

Think about the hypothetical situation: state prosecutor faces an ethical dilemma in a particular proceedings - how to act in the situation that there is a suspicion that a substantive piece of legislation or another general enactment that the particular proceedings depend on was prepared or adopted under the influence of illegal lobbying or some other illicit influence.

Identify three risk factors and 3 measures aimed at raising the awareness and strengthening the capacities of the state prosecutors, as well as accountability of the state prosecution in the implementation and control of the provisions of the Law on Lobbying.

III/5. CONFLICT OF INTERESTS

Example 8: CONFLICT OF INTERESTS BEFORE THE COURT AND OUT OF THE COURT

The Commission for the Code of Ethics⁶⁴ (...) at the initiative of the head of the prosecution office (...) behaviour (...) of the state prosecutor, in the main hearing before the court (...):

The state prosecutor was in front of the courtroom (...) where he greeted the defendant and talked to him (...) and the defendant complained of his plight in that particular case (...) in the regular working hours he did not restrain from the contacts with the defendant (...) at the terrace of a cafe bar (...) in the vicinity of the court- he met the defendant, sat with him for a while and talked (...).

(...) a lawyer, as an authorized representative of the victim in the criminal proceedings (...) filed a complaint against the conduct of the state prosecutor (...) that obviously provoked in him the suspicions in the impartiality of the state prosecutor.

In the complaint the lawyer stated that before the main hearing started (...) in front of the courtroom (...) he found the defendant (...) and the state prosecutor talking to each other. From the distance of 3 - 4 m (...) he could hear that the prosecutor was warning the defendant that his defence, according to which the injured party allegedly inflicted injuries on herself, cannot be accepted, and that he had to come up with a more convincing and a more logical defence. Their conversation lasted until the usher called the parties to enter the courtroom. After that, at the terrace of the cafe bar (...) the lawyer found the state prosecutor sitting at the same table as the defendant, having conversation over coffee.

Analyse against the provisions of:

- the law regulating conflict of interests:
 - o *Conflict of interests in discharging public functions arises where private interests of a public official influence or may influence his/her impartiality in discharging public duties.*
- Law on State Prosecution Service - the provisions related to disciplinary violations;
- Law on State Prosecution Service and standards of ethics regarding professional integrity and reputation of the State Prosecution Service;
- Code of Ethics and Guidelines for prosecutors about ethics and avoiding the conflict of interest.
- Apply to a hypothetical situation, putting yourself into the circumstances:

Identify three risk factors and 3 measures aimed at raising the awareness and strengthening the capacities of the state prosecutors, as well as accountability of the state prosecution in the implementation of the provisions of the law, other regulations and rules of ethics regulating this field.

⁶⁴<http://tuzilastvocg.me/media/files/Ts%20br%20191%2015%20od%2010%2006%202016%20%20ODLUKA%20broj%20123.pdf>

IV/1. DISCIPLINARY LIABILITY

Example 9: UNAUTHORIZED HANDLING OF A CASE - HYPOTHETICAL SITUATION FOR THE PRACTICAL WORK RELATED TO THE PROTECTION OF SECRET DATA AND PROCEDURAL CONFIDENTIALITY

Disciplinary Committee, Dp. No. 2/2012⁶⁵ (...) the state prosecutor (...) requested (...) the case that was allocated to another prosecutor. Then without any information to the concerned prosecutor and the case manager he prevented expediting of the decision that the case manager rendered with a prior consent of the state prosecutor. As unauthorised person he drafted a different decision and signed it as a case manager, after which he submitted it to the prosecutor for control (...)

(...) The decision rendered by the state prosecutor and the case manager (...) was assessed as purposeful in that particular stage of the procedure, and therefore withdrawing of the decision from the procedure for expediting and composing of the other decision without any knowledge of the case manager and state prosecutor constituted a violation of the prosecutorial management that is provided for in Article 98 paragraph 2 of the Law on State Prosecution Service. Prosecutors are liable for such violations.

Violating the concerned provisions of the Law on State Prosecution Service and Rulebook on the Internal Rules of Procedure constitutes the disciplinary violation defined in Article 41 paragraph 1 item 6 of the Law on State Prosecution Service which includes all other violations of the Law on State Prosecution Service that constitute misconduct in the prosecutorial office.

Think about the following hypothetical situation:

The changed decision was of such significance that procedural, business and state confidentiality had to be respected.

Identify three risk factors and 3 measures aimed at raising the awareness and strengthening the capacities of the state prosecutors, as well as accountability of the state prosecution in the implementation of the provisions of the law, other regulations and rules of ethics in the given situation.

⁶⁵ <http://tuzilastvocg.me/media/files/ODLUKA%20-%20Sasa%20Cadjenovic.pdf>

IV/2. DISCIPLINARY LIABILITY

Example 10: UNAUTHORIZED HANDLING OF A CASE - HYPOTHETICAL SITUATION FOR THE PRACTICAL WORK RELATED TO REPORTS OF CORRUPTION AND WHISTLEBLOWER PROTECTION

Disciplinary Committee, Dp. No. 2/2012⁶⁶ (...) the state prosecutor (...) requested (...) the case that was allocated to another prosecutor. Then without any information to the concerned prosecutor and the case manager he prevented expediting of the decision that the case manager rendered with a prior consent of the state prosecutor. As unauthorised person he drafted a different decision and signed it as a case manager, after which he submitted it to the prosecutor for control (...)

(...) The decision rendered by the state prosecutor and the case manager (...) was assessed as purposeful in that particular stage of the procedure, and therefore withdrawing of the decision from the procedure for expediting and composing of the other decision without any knowledge of the case manager and state prosecutor constituted a violation of the prosecutorial management that is provided for in Article 98 paragraph 2 of the Law on State Prosecution Service. Prosecutors are liable for such violations.

Violating the concerned provisions of the Law on State Prosecution Service and Rulebook on the Internal Rules of Procedure constitutes the disciplinary violation defined in Article 41 paragraph 1 item 6 of the Law on State Prosecution Service which includes all other violations of the Law on State Prosecution Service that constitute misconduct in the prosecutorial office.

Think about the following hypothetical situations:

The person that filed the report claimed that the decision was changed in favour of one of the participants in the procedure. In the report he requested to remain anonymous and protected based on the provisions of the law that regulates prevention of corruption and protection of whistle-blowers. Options:

- a) the person that filed the report has justified reasons to be suspicious
- b) the person that filed the report abused the report to take revenge on the state prosecutor because of his prosecutorial role in the criminal procedure where the person who filed the report was convicted in a final judgment

⁶⁶ <http://tuzilastvocg.me/media/files/ODLUKA%20-%20Sasa%20Cadjenovic.pdf>

For each of the options identify three risk factors and 3 measures aimed at raising the awareness and strengthening the capacities of the state prosecutors, as well as accountability of the state prosecution in the implementation of the provisions of the law, other regulations and rules of ethics in the given situations.