DO NO WRONG*
Robert Church, Director Utah Prosecution Council
Spring Conference, April 17, 2015

Ethical Considerations When Speaking with the Media

- Thanks to Missy Larsen, Chief Communications Officer, Attorney General's Office
- Information and suggestions taken from her presentation at the New County Attorney's seminar. February 2015
- "While it may take months - - even years - - before a case finds its way into a courtroom, the "public" trial begins with the first news report of the charges filed. People will assess the evidence as presented by the news media and quickly reach a decision about the allegations that have been made. If a reputation is destroyed by negative publicity, a later victory at the courthouse may not matter at all."
    - "Practice Management: The Court of Public Opinion," Kathy Fitzpatrick

Attorneys and Public Opinion

- "An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client…[A]n attorney may take reasonable steps to defend a client's reputation…including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried." *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991)

- Lawyers don't get to make statements outside of court if a reasonable person would expect that statement to get Tweeted, Facebooked, Instagramed, YouTubed or otherwise "disseminated by means of public communication"
- If the lawyer knows or reasonably should know that the statement will have a "substantial likelihood of prejudicing" an adjudicative proceeding. Rule 3.6 (a)

Statements That Can Get You in Trouble

- Character, credibility, reputation or criminal record of a party, suspect, or criminal defendant;
- Contents of defendant's confession or refusal to make statement to police;
- Results of polygraph;
- Opinion as to guilt or innocence of suspect or criminal defendant;
- That defendant has been charged with crime (unless accompanied by explanation that defendant presumed innocent.)

Right of Reply

- A lawyer may make a statement to protect a client from substantial undue prejudicial effect of recent publicity <u>*not*</u> initiated by the lawyer or the lawyer's client.
- The statement must be limited to such information that is necessary to mitigate the recent adverse publicity. R. 3.6 (c)

Gentile v. State Bar of Nevada

**Do No Wrong: Ethics for Prosecutors and Defenders*, Peter A. Joy and Kevin C. McMunigal

- Attorney Gentile held a press conference the day after his client was indicted on criminal charges.
- Referred to evidence that was already in the public record that police detectives may have been involved with crime: loss of drugs from undercover operation.
- Six months later client was acquitted.
- Subsequently the State Bar of Nevada filed a complaint against Gentile.
- State Bar alleged:
    - Statements made during press conference violated ethical rules (similar to our R.3.6) prohibiting a lawyer from making extrajudicial statements to the press he knows or reasonably should know will have a "substantial likelihood of materially prejudicing" an adjudicative proceeding; and
    - That the statements violated the provisions stating a "lawyer may state without elaboration…the general nature of the…defense."
        - Our R.3.6: a lawyer may state the claim, offense or defense involved.
        - No similar limiting language.
- Disciplinary Board found Gentile violated the Rule and recommended private reprimand.
- He appealed, arguing the rule violated his right to "free speech."
- NV Supreme Court disagreed and affirmed.
- US Supreme Court reversed judgment.
- Gentile's motivation for press conference:
    - Unless some of prosecution's weaknesses were made public, potential jurors would be "poisoned" by repeated publication of information released by police and prosecutors.
        - Repeated press reports about polygraph tests.
        - Officers were no longer suspects.
    - Investigation had taken serious toll on client's health; had already had multiple open heart surgeries.
    - Mere suspicion of wrongdoing caused closure of client's business, lost business opportunity.
- He did not discuss inadmissible evidence.
- Court found:
    - Gentile had done his homework prior to press conference and was on sure ground.
    - During voir dire, not a single juror remembered anything about Gentile or his press conference.
    - All information disseminated during petitioner's press conference was admitted at trial.
    - "There is no support for the conclusion that petitioner's statement created a likelihood of material prejudice, or indeed of any harm of sufficient magnitude or imminence to support a punishment for speech."
- Lessons Learned
    - Be careful what you, your office and law enforcement officer's release to the press.
    - You don't want to open door for defense counsel to respond.
    - Don't try your case in the media!

Missy's Media Recommendations

**Do No Wrong: Ethics for Prosecutors and Defenders*, Peter A. Joy and Kevin C. McMunigal

- Do your homework.
- Be certain of the facts.
- Use your key points every chance you get.
- Take a second or two to think about your answer.
- Don't give simple "yes" or "no." Try to explain your answer.
- Make your answer interesting to the audience.
- Never say anything off the record.
    - Reporters are always listening.
- Think of an interview as an opportunity, not as a threat or confrontation.
    - Regardless of the subject, there's always a way to make positive points.

Missy's Media Recommendations

- What Do I Say When I Can't Say Anything?
    - I strongly share the concerns of the public and the media and we are determined to set things right.
    - The department/office is aggressively working at getting answers to all the questions and issues.
    - We will share our answers and findings with you as soon as they become available.
    - The department/office takes pride in only furnishing accurate information.
    - I do not have an answer to that question, but if you contact "Mr. Smith" tomorrow, you will get an answer to your question.
    - Any comments made at this point would only be assumptions on my part.
    - I believe the question avoids the real issue here (and then restate your facts or assertion).
    - Because of the complexity of the investigation, issue, matter, we feel that a methodical and deliberate approach is best. Additional information will be released at the conclusion.
    - It is important for both of us to provide accurate, timely information. As soon as I can give that to you I will.

- After Press Arrives, B4 Q&A
    - DO assume everything is on the record.
    - DO review with reporters topics you cannot comment on.
    - DO offer to obtain additional information.
    - DO stress your interest in getting accurate information for reporters.
    - DO be cordial.
    - DO be professional.

    - DON'T seek to go off the record.
    - DON'T insist reporters not raise any embarrassing topics.
    - DON'T demand to know in advance which questions they will ask.
    - DON'T threaten with lawsuits if the story is inaccurate.
    - DON'T crack jokes.
    - DON'T try to butter up reporters with compliments.

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- During the Q&A
    - DO be honest and accurate.
    - DO stick to your key points.
    - DO lead. Take charge.
    - DO raise your key messages.
    - DO offer to find out information you don't have if a question is raised about it.
    - DO explain the subject.
    - DO stress the facts.
    - DO explain the context.
    - DO be forthcoming to the extent you've decided beforehand.

    - DON'T lie.
    - DON'T improvise.
    - DON'T react passively, but DON'T be overly aggressive or rude either.
    - DON'T dwell on negative allegations.
    - DON'T guess, it's your credibility.
    - DON'T use jargon.
    - DON'T discuss hypothetical questions.
    - DON'T assume the facts speak for themselves.
    - DON'T decide to reveal something that is confidential without considering its implications.

- During the Q&A
    - DO give a reason if you don't talk about a subject.
    - DO state your points emphatically.
    - DO correct big mistakes by stating that you didn't give an adequate answer and you would like a chance to clear up the confusion.
    - DO remember the media are interested in "What? When? Where? Who? How? Why?
    - DO stress any heroic efforts by individual employees.
    - DO emphasize what is being done to correct problems.
    - DO state your conclusions first, to get your main points across, then back them up with facts.

    - DON'T dismiss a question with "No Comment."
    - DON'T ask reporters for their opinions.
    - DON'T be afraid to say that you don't have the answer to Who? How? or Why? at the present time.
    - DON'T stress any individual errors or negligence.
    - DON'T estimate monetary damages.
    - DON'T let your message get lost in a morass of detail.

- Things to Remember
    - Never assume that a reporter will take it easy on you.
    - Prepare for interviews (mock Q&A's).
    - Know the 5 main areas that a reporter could address.

- Don't be worried about saying "I don't know."
- Decide your message before walking out of the courtroom and stick to it.
- If the case has been emotional in the court room wait a few minutes before talking to the media.
- Remember that if you are talking to media they will quote you unless you agree with them that information is "off the record" or for "background only."
- Keep sentences short, but use creative interesting language.
- Don't try to explain the whole case in one sitting, just respond to the questions.
- Talk to the reporter before the interview to give necessary information that will guide an accurate story.
- If the on-camera questions seem misinformed, ask the reporter to stop taping so that you can give background information that leads to more appropriate questions.
- If you are misquoted, promptly call the reporter to clear up the misinformation.
- Remember that reporters are under more pressure than they have ever been with media cutbacks.
- Reporters are people trying to do their jobs and will treat you with respect if you do the same for them.

- TV Tips
  - Keep clothing simple.
  - Solid colors are best.
  - Don't wear shiny, loud or distracting jewelry.
  - No sunglasses or photosensitive glasses.

- TV Tips
  - MEN
    - Wear makeup if you have dark facial hair, a high forehead or receding hairline.
    - Brush face with corn silk or translucent pressed powder to help reduce shine and perspiration.
    - Paper (not tissue) helps absorb oil.
  - WOMEN
    - Wear skirts that cover knees when seated.
    - Routine street makeup is adequate – neutral and natural colors are best without shimmer.
    - Avoid too red lipstick or shiny lip gloss.
    - Apply cover up below eyes.

Prosecutorial Misconduct v. Prosecutorial Error

- [The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligations to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. *Berger v. United States*

Misconduct v. Error

- Media and other organizations focusing on "prosecutor misconduct"
- Los Angeles Times
- NY Times
- Innocence Project
- Prosecutor Watchdog Groups
- Activist Judges
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"Prosecutorial Misconduct: A Rampant and Epidemic Lie."

- Joshua Marquis District Attorney of Clatsop County, Astoria Oregon, Past Vice-president of NDAA
- Article published in NDAA's *The Prosecutor*
- Around the New Year of 2014 the *Los Angeles Times* (LAT) and then the *New York Times* (NYT) published editorials claiming prosecutorial misconduct was "epidemic" (LAT) and "rampant" (NYT).
- Sole source for the claim is the "extremely quirky and uber-libertarian" 9th U.S. Circuit Court of Appeals Judge Alex Kozinski.
- In the *Olsen* case, Kozinski and a couple other 9th Circuit judges on the "ultra-left political fringe" bitterly dissented over the 9th Circuit's majority refusal to agree with defendant's claim that a federal prosecutor's actions during trial amounted to "egregious misconduct" and therefore his conviction should be thrown out.
- Kozinski wrote in his dissent: "There is an epidemic of *Brady* violations abroad in the land…[a]nd only judges can put a stop to it."
- Prosecutors failed to turn over evidence that an investigation of the government's forensic scientist and lab had revealed multiple instances of sloppy work that led to wrongful convictions in earlier cases.
- The majority in the *Olsen* case found that the overall evidence of Olsen's guilt was so overwhelming that the failure to disclose the evidence would not have changed the outcome.
- Kozinski criticized the majority for allowing prosecutors to withhold evidence "so long as it's possible the defendant would've been convicted anyway."
- This creates a "serious moral hazard" since prosecutors are virtually never punished for misconduct.
-

L.A. Times "Don't Ignore the Brady Rule: Evidence Must Be Shared." Editorial by *The L.A. Times* Editorial Board, December 29, 2013

- A "respected" judge warns of an epidemic of violations of the so-called *Brady* rule.
- Judge Kozinski "sounded the alarm" in the *Olsen* case.
- Defense argued that government's forensic scientist may have contaminated pills that allegedly contained ricin.
- Investigation into scientist found fault with his "diligence and care in the laboratory, his understanding of scientific principles about which he testified in court, and his credibility on the witness stand."

- Despite this a three-judge panel of the 9th Circuit upheld the conviction citing "reasonable probability" that the jury would have found Olsen guilty even if they had known about the investigation.
- Kozinski notes this approach guts the *Brady* rule by telling prosecutors they need not turn over exculpatory evidence "so long as it's possible the defendant would've been convicted anyway."
- Kozinski writes that this case is representative of an "epidemic" of *Brady* rule violations.
- "Kozinski is right: Courts need to deal more harshly with prosecutors who don't play fair."
- "The message, he says, should be, "'Betray…and you will lose your ill-gotten conviction.'"
- "Congress and state legislatures can do their part by enacting laws such as a model statute developed by the National Assn. of Criminal Defense Lawyers that would make it harder for prosecutors to evade their *Brady* obligations."
- "Prosecutors need to stop playing games with *Brady."*

N.Y. Times, Rampant Prosecutorial Misconduct, Editorial by *The New York Times* editorial board, January 4, 2014

- "[F]ar too often, state and federal prosecutors fail to fulfill that constitutional duty, and far too rarely do courts hold them accountable."
- Kozinski "was right to castigate the majority" for letting the prosecution "refuse" to turn over evidence.
- Center for Prosecutor Integrity
    - Ultra-liberal, defense oriented policy group
    - Studies show that over past 50 years courts punished prosecutorial misconduct less than 2% of cases where misconduct occurred.
    - Rarely amounted to more than a slap on the wrist.
- Because it is a prosecutor's job to believe in the defendant's guilt, they have little incentive to turn over a single piece of exculpatory evidence when they are "sitting on what they see as a mountain of evidence proving guilt."
- The lack of professional consequences for failing to disclose exculpatory evidence only makes the breach of duty more likely."
- "As Judge Kozinski wrote, 'Some prosecutors don't care about *Brady* because courts don't make them care."
- Prosecutor's offices should adopt a standard "open file" policy, turning over all exculpatory evidence as a rule.
- Fighting prosecutorial misconduct is not only about protecting the innocent but, as Judge Kozinski wrote, about preserving "the public's trust in our justice system" and the foundation of the rule of law.

Marquis Response

- The "rarified air of the editorial board[s] may have succumbed to Kozinski's turgid prose, a reading of the majority opinion (the one that matters) yields a very different result."

    - Kozinski may be something of a legal "wunderkind" being appointed to the federal bench in his early 30's.
    - Never served as a trial lawyer, let alone a prosecutor.
- "To damn the entire profession of prosecutors based on a tiny number of cases reviewed by his panel of federal judges would be like ascertaining judicial integrity based on recent sentencing habit of judges in Alabama and Montana."
    - Giving what amounted to free pass to convicted child molesters.
        - Fortunately those judges are the exception, not the rule.
- The *Olsen* cased was tried in federal court.
    - Only 5% of all prosecutions in the country are set there.
- Defendant claimed prosecutor committed a *Brady* violation.
- Explains *Brady*
    - Prosecutors imputed with the knowledge of police officers who don't even work for them.
        - i.e. One officer from 5-agency task force spoke to a homeless person claiming to have knowledge about defendant, but because officer determined her to be "kind of batty" ignored her and made no report.
        - During appellate process, defense investigator discovers that what the woman would have said (had she been asked) would in fact help defendant, if not completely exonerating him.
- Under current interpretation of *Brady* prosecutor, even in huge offices, is deemed to know **<u>everything</u>** that every other prosecutor was told.
    - Even what was said decades earlier.
- Prosecutor's worst nightmare is not an acquittal – it is convicting someone who is innocent of the crime.
- Career prosecutors are in for life.
    - Not as jumping off point to a 6-7 figure income defending white collar criminals.
- Many prosecutors offices have elaborate protocols to ensure that questionable witnesses are not relied upon.
- Protocols to ensure that any information, no matter how minor, that calls the case into question, is disclosed.
- Elected prosecutors are accountable to:
    - Trial and appellate courts;
    - Stat Bar associations;
    - Voters.
- Elected prosecutors who "cut corners" or are viewed as unethical find themselves unemployed at the next election.

Northern California Innocence Project, 2010 VERITAS Initiative Publication
Article: *Preventable Error*

- Documented "prosecutorial misconduct" from 1997-2009.
    - "scope and persistence of the problem is alarming."
    - *Mistakes* and *unintentional error* that did not result in prejudice to the defendant characterized as "misconduct."
    - Lumped together with cases involving *prejudicial misconduct.*

- CA case law: conduct that does not render a criminal trial fundamentally unfair is prosecutorial misconduct *only* if it involves the use of deception or reprehensible methods to attempt to persuade either the court or the jury.
- Cases of "misconduct" reported in *Preventable Error* grossly exaggerated occurrences of actual prosecutorial misconduct.
- Furthering public perception that prosecutors are not to be trusted.

Lawyers and the Media

- Lawyers involved in a case may not make statements calculated to influence the adjudication of a matter.
- Does not apply to lawyers or investigators not participating in the case.
    - Model Rule 3.6

MR 3.6

- 7 classes of information lawyer may publicly state in criminal case:
    - Claim, offense or defense involved and unless prohibited, identity of the person(s) involved;
    - Information contained in public record;
    - Investigation of a matter is underway;
    - Scheduling of hearing, status of case;
    - Request for assistance in obtaining evidence;
    - Warning of danger concerning the behavior of a person involved, reason to believe there's likelihood of substantial harm to an individual or to the public;
    - In criminal case:
        - Identity, residence, occupation and family status of accused;
        - If accused not apprehended, information necessary to aid in that apprehension;
        - The fact, time and place of arrest; and
        - Identify of investigating and arresting officers or agencies and the length of the investigation.

Comment 5 to MR 3.6

- 6 categories of statements "more likely than not to have prejudicial effect"
    - Character, credibility, reputation or criminal record of a party, suspect in criminal investigation or witness of the identify of a witness, or the expected testimony of a party or witness;
    - Possibility of a plea of guilty, existence or contents of any confession, admission or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
    - Performance or results of any examination or test or the refusal or failure of a person to submit to the exam or test; or the identify or nature of physical evidence expected to be presented;
    - Opinion as to guilt or innocence of defendant or suspect in criminal case;
    - Knowingly referring to inadmissible evidence;

- The fact that defendant has been charged with a crime, unless there is a statement explaining the charge is merely an accusation and the defendant is presumed innocent until proven guilty.

MR 3.8(f)

- Prosecutors shall refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent others; investigators, law enforcement, personnel, etc. from making same statements.

Borderline Ethical Violation?

- Using pleadings to reveal matters protected by ethics rules on public comment.
  - 404b Motions
    - Prior bad acts and criminal history.

Religion in the Courtroom

- Counsel are given wide latitude during closing to argue the inferences to be drawn from the evidence, the credibility of witnesses, rebutting opposing counsel.
- Analogies, anecdotes, references to current events, well-worn quotes and stories can be used to persuade juries
- MRPC 3.4 "a lawyer shall not in trial allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused."
- "A prosecutor must be free to present arguments with logical force and vigor...however while he [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935)
- A prosecutor is the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done.
- It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Berger*
- Remarks calculated to evoke bias, prejudice, or passions should never be made in a court of justice. *People v. Simon*, 252 P. 758, 760 (Cal. App. 1927)
- More than 90% of Americans indicate a belief in God. Do No Wrong, pg. 199
- Parables and other religious stories can be very effective in communicating the lawyer's message as well as appealing to their consciences.
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Thou Shalt Not…

- References to jurors' religious faith or principles may prompt jurors to ignore the controlling laws and the facts of the case.
- "By conjuring up images of religion, the remarks improperly appeal to the jury to act in ways other than as dispassionate arbiters of the facts." *United States v. Levy-Cordero*, 67 F.3d 1002, 1008 (1st Cir. 1995)

Improper Argument in Capital Cases

- Susan Smith; convicted of murdering two sons
    - Pleading for mercy during sentencing, defense counsel picked up court clerk's Bible and repeated the parable of the adulterous woman, quote "[h]e who is without sin among you, let him first cast a stone."
    - To the jurors, "You each have a stone, with 12 in all …[b]ut no stone may be thrown unless all are thrown."
        - At least 5/12 jurors listed church affiliations on jury questionnaire
    - Unanimously decided against death penalty
    - Prosecutor failed to object.
- Appellate court affirmed trial judge who sustained prosecutor's objection to defense counsel injecting religion into sentencing phase. *PA v. Daniels*, 644 A.2d 1175, 1183 (Pa. 1994)."
- Prosecutor read from Bible, "whoever sheds another person's blood shall have his own blood shed by man," and "[those] who take the sword shall die by the sword."
- "Language of command and obligations from a source other than Georgia law should not be presented to the jury."
- Reading from the Bible as the law to be followed violated the defendant's due process rights during sentencing.
    - *Carruthers v. State*, 528 S.E. 2d 217 (Ga.2000).

The Golden Rule

- Can't suggest the jurors place themselves in the position of the victim and decide the case accordingly.
    - "[I]magine how terrifying" it would be to have the light of a laser-sighted gun on your chest."
- In reversing, the FL appellate court stated that the "line between the inflammatory and the dramatic is not always clear" but "as far as golden rule arguments are concerned, the lines are clear and bright, simply put they are improper. In short they enjoy no safe harbor in the trial of a criminal case."
    - *DeFreitas v. State* 701 So. 2d 593, 601 n.7 (Fla. Dist. Ct. App. 1997)

Religion in the Courtroom

- "prosecutorial use of religious references is always improper" but there is less agreement on whether "all improper religious remarks constitute harmful or reversible error." *State v. Ceballos*, 832 A.2d 14 (Conn. 2003)
- "Delegation of the ultimate responsibility for imposing a sentence to divine authority undermines the jury's role in the sentencing process" and will result in reversible error. *Sandoval v. Calderon*, 241 F.3d 765, 775-77 (9th Cir.), *cert denied* 534 U.S. 943 (2001)
- *Per* Se Reversible: "Karl Chambers has taken a life. As the Bible says, 'and the murderer shall be put to death.'" *Commonwealth v. Chambers* 599 A.2d 630, 643 (Pa.1991), *cert denied*, 504 U.S. 946 (1992)
- Although improper, the court could not conclude that prosecutor's statements that Bible supported capital punishment so "tainted the proceeding that they constitute reversible error." *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998)

- Comparing defendant's denial of intent to import cocaine with Peter's denial of Christ, while irrelevant and an inflammatory appeal to juror's private religious beliefs, did not constitute reversible error. This was due to sufficient "unambiguous evidence" and "strong and explicit" curative instructions.
- Reversals are rare when the religious references are few, the evidence of guilt is strong and explicit curative instructions are given to the jury.
    - Defendant is a "despicable" human being to whom the Bible "doesn't mean anything."
    - "Whatsoever a person sows, so shall he reap."

Defense Counsel Opens the Door

- "Invited response" doctrine approved by U.S. Supreme Court. *United States v. Young*, 470 U.S. 1, 12-13 (1985)
    - "Defense counsel's conduct, as well as the nature of the prosecutor's response is relevant" in deciding whether the prosecutor's remarks affected the fairness of the trial.
    - The Court affirmed the conviction while lamenting "two improper arguments – two apparent wrongs – do not make for a right result."
    -

Open Door

- Decision should not be read as judicial approval or even encouragement for a response-in-kind that inevitably exacerbates tensions.
- While prosecutor's remarks were improper, they were "invited" and limited to respond to defense remarks.
- "Highly improper" and deserving of "strong condemnation" but not reversible due to defendant opening door and curative instructions.
- Noah's sword of Justice
- Reference to Jesus Christ and the Romans
- "You shall be put to death if you kill somebody" a reasonable response to defense evidence in mitigation based on testimony that defendant was churchgoer, had been a minister of music and a deacon in his church. *Crow v. State*, 458 S.E.2d 799, 811 (Ga. 1995).

Nifong Case

- Nifong sought and obtained indictment of 3 lacrosse team members while running for election.
- During Campaign Nifong gave numerous interviews about the case and made serious derogatory comments about the defendants, repeatedly stating their guilt.
- Nifong failed to turn over favorable DNA evidence
- Instructed the lab director conducting the DNA tests to produce an incomplete report noting only positive matches.
- Defense charged Nifong used the case for political gain and filed an ethics complaint.
- Nifong disbarred because his extrajudicial statements violated Rule 3.6 and Rule 3.8(f) of the NC Rules of Professional Conduct

UT Prosecutor Responsibilities

- Don't prosecute a charge you *know* is not supported by probable cause;
- Make *reasonable* efforts accused has been advised of his rights, how to get a lawyer, given the chance to get a lawyer;
- Don't get an unrepresented person to waive important pre-trial rights;
- Make timely disclosure of all evidence or information that negates guilt or that mitigates the offense;
- In connection with sentencing disclose all unprivileged mitigating information known to the prosecutor;
    - Except when prosecutor is relieved of responsibility by protective order; and
- Exercise *reasonable* care to prevent:
    - investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in criminal case
    - from making prohibited extrajudicial statements that prosecutor would be prohibited from making.
- Seek justice, not merely convictions.
    - "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Berger*
- Reform and improve the administration of criminal justice.
- Know and be guided by the standards of professional conduct.
- Support and defend the Constitution of the United States and Utah.
- Maintain the respect due the courts and judicial officers.

UT's Standards: Misconduct v. Error

- "True prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.'"
    - *Pool v. Superior Court*, 677 P.2d 261, 271-72 (Ariz. 1984).
- "The term 'misconduct' should be applied only 'to those extreme – and thankfully rare – instances where a prosecutor's conduct actually violates the rules of professional conduct.'"
    - *People v. McCrary*, 2013 WL 2662752U (Mich. App. 2013) (per curiam) *State v. Tillman*, 750 P.2d 546, 555 (Utah 1987)
- To sustain a claim of misconduct a defendant must establish that:
    - The prosecutor's conduct "call[ed] the attention of the jurors to matters they would not be justified in considering in determining their verdict; and
    - Under the circumstances of the particular case, the error is substantial and prejudicial.
- Substantial and prejudicial error.
    - The "plain error" standard of review requires the existence of a harmful error that should have been obvious to the district court." *State v. Waterfield*, 2014 UT App. 67
    - "Plain error" does not exist when a conceivable strategic purpose exists to support the use of the evidence. *State v. Bedell*, 2014 UT 1

State v. Christensen

- Personal Opinion/Knowledge of Facts
    - Defendant argued improper bolstering.
        - In closing prosecutor argued that because defense witness/friend understood "the seriousness of committing perjury, testifying falsely in a court of law" therefore "has no reason to lie."
    - While expressing personal opinion or asserting personal knowledge is misconduct, there is no rule that prohibits prosecutors from drawing "permissible deductions from the evidence and mak[ing] assertions about what jury may reasonably conclude from those deductions."
        - NOT MISCONDUCT. Citing *State v. Bakalov*, 1999 UT 45
- Arguments Based on Facts Not in Evidence
    - In closing, prosecutor implied that another person was not a suspect because it would have been easier to steal in other ways.
    - On appeal, defense argued that there was no evidence to support implication.
    - Court held the prosecutor did not cross the line because there was plenty of evidence that inferred defendant's ability to embezzle or steal in other ways.
        - NOT MISCONDUCT
- Statement that prosecutor "told the jury that the State has no interest in convicting anyone that is innocent" NOT MISCONDUCT.
    - Defense argued that statement conveyed to the jury the State's belief that Christensen was guilty.
    - Court admitted that "in isolation" the statement might be seen as improper but in context it was fine.
    - Prosecutor was actually reminding the jury of the burden of reasonable doubt.

St. v. Jones, 2015 UT 19

- Calling defense arguments "red herrings."
    - Does not amount to the prosecutor accusing the defense of misleading the jury.
- Emphasizing an Officer's testimony based on statistical evidence.
    - Not misconduct as remarks represent a permissible deduction based on officer's testimony.
- "That would take incredible strength."
    - Not misconduct as permissible assumption that it would take a lot of strength to pull someone over the headrest of a car.
- Emphasizing statistical evidence, not conclusively stating, NOT MISCONDUCT as prosecutor was not asserting fact or personal opinion.
- Not overly prejudicial during closing:
    - Misstatement about boot print evidence.
    - Prosecutor stated personal opinion or knowledge about why or when defendant's clothes were tested.

State v. Ashcraft, 2015 UT 5

- Vouching for credibility of a witness' testimony.
    - NO MISCONDUCT

    - Prosecutor made no explicit statement that he personally knew the witness to be truthful.
    - Did not ask the jury to take his word.
    - Arguing that there is no reason to disbelieve the witness.
- Vouching for credibility of evidence and case as whole.
    - NO MISCONDUCT
    - Prosecutor not vouching personally but was trying to get the jury to understand they were the ones to determine credibility of the evidence.
    - Alluding to other evidence not vouching contested evidence.
    - Summarizing evidence is appropriate prosecutorial conduct.
        - Prosecutor not asking the jurors to defer to state's judgment over their own. Simply summarized the state's position.

State v. Beckering

- Eliciting detective's opinion whether defendant was telling the truth NOT prejudicial.
    - Detective did not testify that defendant lying during interview.
    - Detective did not testify that he could detect dishonesty or that defendant was being dishonest.
    - Detective DID testify why he continued to ask defendant about crime despite defendant's repeated denials.

Untouchable: The Problem of Prosecutorial Misconduct

Dan Lawton, Lawton Law Firm, San Diego Daily Transcript, April 7, 21015

- Tim Atkins, African American man from Los Angeles, was convicted of murder in 1987 and spent 20 years in prison.
- The California Innocence Project "proved Atkins was innocent in 2007."
- Los Angeles Superior Court found Atkins factually innocent.
- "The prosecutor whose office had ruined Atkin's life for two decades was less courteous [than the superior court judge who apologized to Atkins in open court.] He arrived an hour late for the hearing. He offered no apology, either for being tardy or for his office wrongfully prosecuting Atkins. In fact, he told the court, his office still thought Atkins was guilty was doing Atkins a favor by not insisting on a retrial."
- Cites to studies that lump prosecutor error with misconduct and labels all instances as "prosecutor misconduct."
    - National Registry of Exonerations
    - Center for Public Integrity
    - 1973-1995 study
- "Alone among lawyers, [prosecutors] are untouchable, and for the worst kind of misconduct."
- Compared with civil attorneys who face monetary sanctions for all "manner of sins," from arriving late to court to filing "tardy answers."
- "These offenses pale in comparison to ruining a man's life by convicting him based on perjured testimony or suppressed exculpatory material which might aid in his defense."
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- Key prosecution witness recanted years after the trial.
- Cost of incarcerating innocent man – $$Millions$$.
- By judges doing nothing they're sending the message that "you'll get away with it with no consequences."
- It's time to "out" offending prosecutors and have judges name them by name.
    - Like Judge Kozinski in the 9th Circuit.

UPPAC: Utah Prosecutor Policy Advisory Committee

- "best practices" v. "advisory"
- Examine issues of concern in Utah and draft policies and make non-binding recommendations.
- Be proactive. Get the word out.
- Include multiple partners
    - Law Enforcement, Service Providers, Judicial, Probation, Legislative, Defense, etc.
- Executive Committee (EC) composed of seven executive members.
    - Chair of UCDAA and UMPA
    - County and City Prosecutors
- Sub-committees will be formed to address specific issues.
    - They will make recommendations to the EC.
- EC must unanimously decide whether or not to adopt recommendations.
- Each County and City has option of adopting.
- Four areas of focus/subcommittees
    - *Brady/Giglio*
    - Officer Involved Shootings
    - Body Cameras
    - Ethics
- Areas of focus will expand and evolve.
- Looking for volunteers.

Campaigning in the Media

State v. Hohman, 420 A.2d 852 (Vt. 1980)

- Hohman was convicted of homicide but the conviction was reversed based on erroneous admission of evidence.
- Shortly after remand the prosecutor found himself in a "battle for re-election."
- Prosecutor ran a newspaper ad stating, "The *Hohman* case is the most important case pending…If I am reelected, I will vigorously prosecute Hohman and obtain a second conviction."
- Prosecutor re-elected, defendant moved to disqualify him and the trial court denied the motion.
- Vermont Supreme Court found the prosecutor's campaign pledge constituted misconduct stating,

    - "We strongly condemn the conduct of the state's attorney in this case. The awesome power to prosecute ought never to be manipulated for personal or political profit."
- Error for the attorney not to recuse himself and error for the court to deny the motion to disqualify.
- Court did not say why so leaves the question open as to what was actually wrong.
- Nonrational Escalation of Commitment
    - Reluctance to change adopted positions, even if new information puts the initial position into question.
    - This is especially true of the adopted position has been stated publicly and reported in the media.
- Campaign promises to prosecute can be made on incomplete information and become subject to Nonrational Escalation of Commitment
- Commentators cite the need for defendant's to receive fair trial.
    - Public statements by lawyers, prosecutors in particular, have tendency to alter the testimony of witnesses, undermine rules excluding evidence, creating pressure on jurors to disregard their legal obligations.
    - Greater concern is how pre-trial statements may affect the pre-trial functioning of the prosecutor.

Implied Promise
People v. N.R., 139 P.3d 671 (Co. 2006)

- After single-vehicle accident resulted in death of a 15-year-old driver, prosecutor declined to press charges against N.R., the 16-year-old passenger, who fled the scene without reporting the accident to police.
    - Having investigated the case, the prosecutor determined there was insufficient evidence to convict the youth and declined to file charges.
- Two-years later, a new prosecutor, who had campaigned with substantial support from the family of the deceased driver, was voted into office.
- Shortly after winning, the prosecutor charged N.R. with, among other crimes, attempted murder.
- No explicit promise to prosecute was made but the circumstantial evidence indicates that the candidate implied as much to the driver's family and the public.
- Dangers of this case
    - Candidate was not an incumbent, did not have access to case information
    - Impliedly making promises without all the information

Selective Prosecution
U.S. v. Armstrong, 517 U.S. 456, 463 (1996)

- Selective prosecution is not a defense on the merits to the criminal charge itself, but is an independent assertion that the prosecutor has brought the charge for Constitutionally prohibited reasons.
- To succeed, defendant must prove by a preponderance of the evidence:
    - Prosecuted because of membership in a protected class;
    - Prosecution based on intentional, purposeful, and unjustifiable classification such as race, religion or other arbitrary classification;

- Prosecution would not have been pursued except for the discriminatory design of the prosecutor;
- Prosecution was unfair and accompanied by a malicious intent.

CA Selective Prosecution Standard

- Besides introducing proof that similarly situated individuals of different race or class could have been prosecuted but were not, defendant must also show that enforcement would be unfair and malicious intent of prosecutor.
- Even if defendant successfully proves all elements, action must not be dismissed if prosecutor can establish a compelling reason for selective enforcement of the law.
- Mere conscious exercise of some selectivity in enforcement is not itself a constitutional violation.
- Prosecutorial discretion permits the choice among possible defendants which to prosecute.

UT Case Law: Selective Prosecution

- In the context of selective prosecution claims, in order to establish a prima facie case, thus shifting the burden to the State, the defendant must demonstrate that a prosecutorial policy results in a discriminatory effect, based on an unlawful classification. *State v. Greer*, 765 P.2d 1 (Utah Ct. App. 1988).