
Ethics & Professionalism

Zealous representation is *not* winning at all costs

The primary duty of all prosecutors is not to convict,
but to ensure that justice is done

by **David B. Hargett and Michael HuYoung**

Lawyers want to win their cases. This is the greatest understatement ever made. The drive in us to succeed causes us to stay up during the wee hours of the night, forego family vacations, and call our offices our homes. Unfortunately, some of us step across that line to win at all costs, and we forget the rules of professional conduct and rationalize our unethical conduct as zealous representation of our clients, subjecting ourselves to bar sanctions if not criminal prosecutions. In the past, criminal defense attorneys were the focus of these bar sanctions and criminal prosecutions, but in recent times, some prosecutors have been sanctioned for their unethical behavior, leading to the dismissals of their cases by the court and, in some extremely rare cases, charges of criminal contempt.

We all have a right to expect that prosecutors will heed their duty to seek justice, rather than merely convictions. As Justice Sutherland appropriately observed many years ago:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation 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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce wrongful conviction as it is to use every legitimate means to bring about a just one.¹

Some recent high-profile cases have highlighted the problem of prosecutors who seek to win convictions by striking foul blows.

Michael Nifong - Disbarred & Sentenced to One Day in Jail

In the well-known example of prosecutor Michael Nifong, regarding the 2006 Duke University lacrosse case, the motive for the prosecutorial misconduct seemed to be as much about political gain as winning a conviction. As details of the case emerged, Nifong came under severe attack for his handling of the case. The criticisms focused on a series of actions taken by Nifong: that he went public with accusations that later turned out to be untrue; that he exaggerated and intensified racial tensions; that he unduly influenced the Durham police investigation; that he tried to manipulate potential witnesses; that he refused to consider exculpatory evidence prior to indict-

ment; that the identification line-up procedure was suggestive; that he had never spoken directly to the alleged victim about the accusations; and that he made misleading and incomplete representations to the defense and the court, including DNA results.

On December 28, 2006, the North Carolina State Bar filed ethics charges against Nifong regarding his conduct in the case, and he was accused of making public statements that were “prejudicial to the administration of justice” and of engaging in “conduct involving dishonesty, fraud, deceit, or misrepresentation.” The 17-page document listed more than 50 examples of statements he made to the media. The State Bar filed a second round of ethics charges on January 24, 2007, accusing Nifong of a “systematic abuse of prosecutorial discretion ... prejudicial to the administration of justice” when he withheld DNA evidence and mislead the court regarding the same.

On June 16, 2007, the North Carolina State Bar Disciplinary Committee stripped Nifong of his law license. The committee found Nifong in violation of 27 of 32 ethics charges. The committee stated that Nifong’s previous disciplinary record and acknowledgment of his improper pre-trial statements did not overcome the egregious nature of his actions and his failure to acknowledge the “wrongful nature of [his] conduct with respect of the handling of DNA evidence.” In addition to his disbarment, on August 31, 2007, the state court judge held Nifong in criminal contempt of court for his actions and sentenced him to one day in jail, with a \$500 fine.

Senator Ted Stevens and federal convictions that were vacated

In 2008, a federal grand jury indicted Senator Ted Stevens on seven counts of failing to report gifts in the form of free renovations to his home and similar handouts valued at \$250,000. At the conclusion of the trial on October 27, 2008, Stevens was found guilty on all seven counts. However, Stevens continued to proclaim his innocence, and Stevens even alleged that his convictions were the result of rampant prosecutorial misconduct. Stevens was right.

In February 2009, FBI agent Chad Joy filed a whistleblower affidavit. The affidavit declared that prosecutors and FBI agents conspired to withhold and conceal exculpatory evidence. Joy claimed that certain prosecutors intentionally sent a key witness back to Alaska after the witness was discovered to have information potentially helpful to the defense. The witness later notified the defense attorneys that his testimony would refute the prosecution’s claim that his company had spent its own money renovating Stevens’ house. Joy’s affidavit further alleged that the prosecutors intentionally withheld exculpatory material, including redacted prior statements of a witness, and a memo from Bill Allen stating that Stevens probably would have paid for the goods and services if he had been asked. Joy’s affidavit further alleged that a female FBI agent had

an inappropriate relationship with Allen, and Allen also gave gifts to FBI agents and helped one agent’s relative get a job.

With Joy’s affidavit, the defense argued that prosecutorial misconduct caused an unfair trial, and Judge Sullivan initially held the prosecutors in contempt for failing to provide documents to Stevens’ legal counsel. Ultimately, Judge Sullivan vacated the convictions.

Eventually, the government decided not to prosecute Stevens again. The final straw was the discovery of a previously undocumented interview with Bill Allen, who had been the prosecution’s star witness. Allen previously stated that the fair market value of the repairs to Stevens’ house was around \$80,000 – far less than the \$250,000 he said it cost at trial. Additionally, Allen said in the interview that he did not recall talking to Bob Persons, a friend of Stevens, regarding the repair bill for Stevens’ House. This directly contradicted Allen’s testimony at trial when he provided a detailed account of his conversation with Bob Persons about the repair bill. On April 7, 2009, Judge Sullivan formally set aside the verdict and threw out the indictment based on what he called the worst case of prosecutorial misconduct he had ever seen. He also initiated a criminal contempt investigation of six members of the prosecution even though an internal probe by the Office of Professional Responsibility was already underway.

Justice and the Rules of Ethics demand better

How could this happen? Are not our prosecutors the protectors of our society by fighting crime and locking up the criminals in the name of justice? The authors of this article do not know any of the above-mentioned prosecutors personally. However, it appears that these particular prosecutors put winning at all costs ahead of justice, and they somehow forgot that the rules of professional conduct apply to all lawyers, prosecution and defense alike.²

Although a prosecutor’s calling is to seek justice, many prosecutors believe strongly in the “truth” of the case, (*i.e.*, that the defendant is guilty). When a prosecutor is convinced that the defendant is actually guilty, some prosecutors will think that the ends justify the means, even if the conduct violates rules of ethics. Some have suggested that when a prosecutor is faced with a difficult case, the prosecutor might be tempted to do anything to influence the jury and, in doing so, might cross the line, such as referring to a highly prejudicial evidence that has been stricken, deemed inadmissible, or never presented.

State lawyer discipline bodies have the power to sanction prosecutors who violate rules of disclosure and other rules of ethics. However, prosecutors are rarely ever sanctioned. For example, an investigation in 1999 by the *Chicago Tribune* found that in 381 instances where convictions were reversed on

appeal because of prosecutorial misconduct, none of the prosecutors involved in those cases were disciplined by the professional body.

Given the dynamics of a criminal prosecution, an important question is whether a prosecutor may be held in violation of the rule of professional conduct for failing to disclose evidence which is favorable to the defense, but which might not carry significant weight, or be deemed "material" enough to require a new trial if discovered. Certainly, if a prosecutor's ethical duty under the rules of professional responsibility is broader than the requirements in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), prosecutors should be turning over favorable defense evidence in far greater numbers of cases. Indeed, if there is an ethical violation by a particular prosecutor, the Virginia State Bar, as well as other state bars, should impose sanctions each time. Otherwise, there is very little incentive for the prosecutor to "err on the side of caution" and disclose information which is favorable to the defense but might not be ever discovered by the defense, and even if discovered, might not be deemed significant enough to require a new trial.

Clearly, the ethical rules demanding zealous representation do not outweigh the other ethical rules governing attorneys. Under the former *Code of Professional Responsibility* which was replaced by our current *Rules of Professional Conduct* on January 1, 2000, Canon 7 promulgated that "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." Unfortunately, some attorneys interpreted "within the bounds of law" to mean "as long as I do not break the law myself, I'm fine." Disciplinary Rule (DR) 7-101 had as its heading, "Representing a Client Zealously," which some attorneys only read the heading and not the rest of the rule,³ thus thinking that "anything to give my client the winning advantage is permissible, because I am representing my client zealously." The mindset that "anything goes as long as I win the case for my client" is ill-conceived and wrong.

With the enactment of the new *Rules of Professional Conduct*, DR 7-101 was replaced by Rule 1.3 no longer containing the language of "zealous representation", but expressing that "[a] lawyer shall act with diligence and promptness in representing a client."⁴ Whether that was an intentional omission in the newly enacted Rules is not known, although the Comment to the Rules does mention that a lawyer should act with "zeal" but adds that "a lawyer is not bound to press for every advantage that might be realized for a client" and that "a lawyer may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."⁵ (emphasis added). Thus, an attorney should act within the law and within the ethical rules that govern our profession. (emphasis added). It must be remembered that what is legal is not always ethical as held in the case of *Gunter v. Virginia*

State Bar, 238 Va. 617, 385 S.E.2d 597 (1989). An attorney's "conduct may be unethical . . . even if it is not unlawful." *Id.* at 621, 385 S.E.2d at 600. In so ruling, the Virginia Supreme Court found that "[a] higher standard is imposed on lawyers by the Code of Professional Responsibility [now the Rules of Professional Conduct], many parts of which proscribe conduct which would be lawful if done by laymen. . . . The traditions of professionalism at the bar embody a level of fairness, candor, and courtesy higher than the minimum requirements of the Code of Professional Responsibility." *Id.*

Lawyers cannot justify any unethical action by claiming that they were acting in their clients' best interests. Just as defense attorneys cannot justify improper conduct because their clients are actually innocent, a prosecutor cannot defend unethical actions in the name of justice and the public good. The ethics rules apply with full force to prosecutors.⁶ In fact, *Rule 3.8* of Professional Conduct⁷ places a higher burden on prosecutors. However, when it comes to divulging the existence of evidence which tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, also known as exculpatory evidence, some prosecutors balk. Not only does this violate a defendant's due process rights,⁸ but it is contrary to a prosecutor's ethical obligations as a practicing attorney in the Commonwealth of Virginia.

Failure by the prosecution to provide exculpatory evidence to the defense in a criminal case not only violates *Rule 3.8 (d)*, but also, arguably, it violates:

- *Rule 1.6 (b)(1)* that a lawyer should reveal "such information to comply with law or a court order;" *Rule 3.1* that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein; unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law;"
- *Rule 3.3* that [a] lawyer shall not knowingly ... make a false statement of fact or law to a tribunal ... fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act...;"
- *Rule 3.4* that [a] lawyer shall not obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence... knowingly disobey or ... disregard a standing rule or a ruling of a tribunal made in the course of a proceeding ... fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party ... [i]ntentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings ...;"

- *Rule 4.1* that a lawyer shall not knowingly “make a false statement of fact or law ... or fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act...;”
- *Rule 5.1* that “... a lawyer who individually or together with other lawyers possess managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct ... shall be responsible for another lawyer’s violation of the Rules of Professional conduct if ... the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved ... and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action;”
- *Rule 8.3* that “[a] lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness to practice law shall inform the appropriate professional authority;” and
- *Rule 8.4* that “[i]t is professional misconduct to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another ... commit a criminal or deliberately wrongful act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness to practice law ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law.”

Conclusion

It has been said that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”⁹ Prosecutors in the Duke lacrosse and Senator Ted Stevens’ cases present extreme examples of a “win at all costs” mentality, and the great majority of prosecutors understand and comply with their ethical and constitutional obligations. To be sure, a prosecutor is cloaked with much power and authority, and with that power and authority goes much responsibility to do justice and to play fair. As the Supreme Court stated in *Kyles v. Whitley*¹⁰ regarding the prosecutor’s duty to divulge exculpatory evidence:

Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of

evidence has come to portend such an effect on a trial’s outcome as to destroy confidence in its result. This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. ‘The prudent prosecutor will resolve doubtful questions in favor of disclosure’. This is as it should be. Such disclosure will serve to justify trust in the prosecutor as ‘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.’

And this is as it should be; prosecutors must obey the mandates of the *Rules of Professional Conduct* as should defense counsel. Neither is above the law nor exempt from conducting themselves in a professional and ethical manner regardless of their zeal to win a case.

Endnotes

1. *Berger v. United States*, 295 U.S. 78, 88 (1935) (granting Berger a new trial based on prosecutor’s misconduct and reasoning “if the case against Berger had been strong, or, as some courts have said, the evidence of guilt ‘overwhelming,’ a different conclusion might be reached”).
2. This article deals only with the ethical considerations of the prosecutorial misconduct and not the possible criminal conduct that could arise or the due process violations of the defendants in those cases.
3. *DR 7-101. Representing a Client Zealously*.
 - (A) A lawyer shall not intentionally:
 - (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
 - (2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-108, DR 5-102, and DR 5-105.
 - (3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 4-101(D).
 - (B) In his representation of a client, a lawyer may:
 - (1) With the express or implied authority of his client, exercise his professional judgment to limit or vary his client’s objectives and waive or fail to assert a right or position of his client.

- (2) Refuse to aid or participate in conduct or pursue an objective which he believes to be unlawful or which is repugnant or imprudent and, if the client insists, withdraw pursuant to the provisions of DR 2-108.

4. *Rule 1.3 Diligence*

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
- (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.
- (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

5. Comment [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.

6. *See Legal Ethics Rule 1798.*

7. *Rule 3.8 Additional Responsibilities Of A Prosecutor* A lawyer engaged in a prosecutorial function shall:

- (a) not file or maintain a charge that the prosecutor knows is not supported by probable cause;
- (b) not knowingly take advantage of an unrepresented defendant;
- (c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense;
- (d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; and
- (e) not direct or encourage investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

8. *See Brady v. Maryland, supra; Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555; 131 L. Ed. 2d 490 (1995); and their progeny of cases.

9. Comment [1] to Rule 3.8.

10. *Kyles v. Whitley*, 514 U.S. at 339, 115 S. Ct. at 1568, 131 L. Ed. 2d at 509 (citations omitted).



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