

PROSECUTORIAL ETHICS

Presentation for the Montana County Attorney's Association Summer Conference
July 13, 2011
Fairmont, Montana
Karen S. Townsend
District Court Judge

I. Guiding Principles:

- a. United States Constitution
- b. Case law under the United States Constitution (Brady v. Maryland)
- c. Montana Constitution
- d. Case law under the Montana Constitution (Kills on Top v. State; State v. Giddings; State v. St. Dennis)
- e. Montana Rules of Professional Conduct (2004)

II. Why do you have Ethical Responsibilities?

- a. Victims, law enforcement officers, the public, and even criminal defendants are dependent on you to act appropriately.
- b. You have the power to change and forever affect people's lives.
- c. You have influence over the legal and factual nature of your cases.
- d. You cannot carry out the responsibilities of your office unless your reputation for integrity is positive.

III. Let's look at the Rules of Professional Conduct.

a. Preamble:

- i. A lawyer shall always pursue the truth.
- ii. A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
- iii. As a **representative of clients**, a lawyer performs various functions. In performance of any functions a lawyer shall behave consistently with the requirements of honest dealings with others. As **advisor**, a lawyer endeavors to provide a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As **advocate**, a lawyer asserts the client's position under the adversary system. As **negotiator**, a lawyer seeks a result advantageous to the client, but consistent with the requirements of these Rules of honest

- dealings with others. As an **evaluator**, a lawyer acts by examining a client's legal affairs and reporting about them.
- iv. ...Third party neutral role.
 - v. In all professional functions, a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.
 - vi. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.
 - vii. Role a public citizen to improve the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession....
 - viii. Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.
 - ix. Possible to harmonize these apparently contradictory roles.
 - x. How to deal with apparent conflicts.
 - xi. Legal profession is self-governing.
 - xii. Self-regulation helps maintain independence from government domination—helps preserve government under law.
 - xiii. Special responsibilities of self-government.
 - xiv. As officers of the court, lawyers have a duty to be truthful.
 - xv. The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, case in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, general cast in the term "may," are permissive and define areas under the Rules in which the

lawyer has discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion....

- xvi. The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general....
- xvii. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide for the ethical practice of law.

b. Client-Lawyer Relationship:

- i. Rule 1.1 **Competence:** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- ii. Rule 1.3 **Diligence:** A lawyer shall act with reasonable diligence and promptness in representing a client.
- iii. Rule 1.17 **Government Employment:** An attorney employed full time by the State of Montana or a political subdivision shall not accept other employment during the course of which it would be possible to use or otherwise rely on information obtained by reason of government employment that is injurious, confidential or privileged and not otherwise discoverable.

c. Counselor:

- i. Rule 2.1 **Advisor:** In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

d. Advocate:

i. Rule 3.1 Meritorious Claims and Contentions:

1. A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein:
 - a. Without having first determined through diligent investigation that there is a bona fide basis in law and fact for the position to be advocated;
 - b. For the purpose of harassment, delay, advancement of a nonmeritorious claim or solely to gain leverage; or
 - c. To extend, modify or reverse existing law unless a bona fide basis in law and fact exists for advocating doing so.
2. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

ii. Expediting Litigation: A lawyer shall make reasonable efforts to expedite litigation consistent with interests of the client.

iii. Candor Toward the Tribunal:

1. A lawyer shall not knowingly:
 - a. Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - b. Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - c. Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer

may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

2. A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including if necessary, disclosure to the tribunal.
3. The duties stated in paragraphs (1) and (2) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 (Confidentiality of Information).
4. In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision whether or not the facts are adverse.

iv. Rule 3.4: Fairness to Opposing Party and Counsel:

1. A lawyer shall not:
 - a. Unlawfully obstruct another party's access to evidence, unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act;
 - b. Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
 - c. Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
 - d. In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
 - e. 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 guilty or innocence of an accused; or

- f. Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - i. The person is a relative or an employee or other agent of a client; and
 - ii. The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

v. Rule 3.5: Impartiality and Decorum of the Tribunal:

1. A lawyer shall not:

- a. Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- b. Communicate ex parte with such a person except as permitted by law; or
- c. Engage in conduct intended to disrupt a tribunal.

vi. Rule 3.6: Trial Publicity:

1. A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

2. Notwithstanding paragraph (1), a lawyer may state:

- a. The claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- b. Information contained in a public record;
- c. That an investigation of a matter is in progress;
- d. The scheduling or result of any step in litigation;

- e. A request for assistance in obtaining evidence and information necessary thereto;
- f. A warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- g. In a criminal case, in addition to subparagraphs (a) through (f):
 - i. The identity, residence, occupation and family status of the accused;
 - ii. If the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - iii. The fact, time and place of arrest; and
 - iv. The identity of investigating and arresting officers or agencies and the length of the investigation.
- h. Notwithstanding paragraph (1), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- i. No lawyer associated in a firm or government agency with a lawyer subject to paragraph (1) shall make a statement prohibited by paragraph (1).

vii. **Rule 3.7: Lawyer as Witness:**

1. A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
 - a. The testimony relates to an uncontested issue;
 - b. The testimony relates to the nature and value of legal services rendered in the case; or
 - c. Disqualification of the lawyer would work substantial hardship on the client.
2. A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by

Rule 1.7 or Rule 1.9. (Conflict of Interest for current clients, Duties to Former Clients).

viii. **Rule 3.8: Special Responsibilities of a Prosecutor:**

1. The prosecutor in a criminal case shall:
 - a. Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
 - b. Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
 - c. Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
 - d. Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
 - e. Not subpoena a lawyer in a grand jury or other criminal proceeding or present evidence about a past or present client unless the prosecutor reasonably believes;
 - i. The information sought is not protected from disclosure by any applicable privilege;
 - ii. The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - iii. There is no other feasible alternative to obtain the information;
 - f. Except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation

of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule consistent with the Confidential Criminal Justice Information Act.

e. Other Than Clients:

i. Rule 4.1: Truthfulness in Statement to Others:

1. In the course of representing a client a lawyer shall not knowingly:
 - a. Make a false statement of material fact or law to a third person; or
 - b. Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 (Confidentiality of Information).

ii. Rule 4.2: Communication with Person Represented by Counsel:

1. In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

iii. Rule 4.3: Dealing with Unrepresented Person:

1. In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonable should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the

lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

iv. Rule 4.4: Respect for Rights of Third Persons:

1. In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
2. A lawyer who receives a writing and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender.

f. Law Firms and Associations:

i. Rule 5.1: Responsibilities of Partners, Managers and Supervisory Lawyers:

1. A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, 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.
2. A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
3. A lawyer within a firm shall be responsible for another lawyer in the firm's violation of the Rules of Professional Conduct if:
 - a. The lawyer orders or, with knowledge of the specific conduct, ratifies or ignores the conduct involved; or
 - b. The lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer,

and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ii. Rule 5.2: Responsibilities of a Subordinate Lawyer:

1. A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
2. A subordinate lawyer does not violate the Rules of Professional conduct if the lawyer acts in accordance with the supervisory lawyer's reasonable resolution of an arguable question of professional duty.

iii. Rule 5.3: Responsibilities Regarding Non lawyer Assistants:

1. With respect to a non lawyer employed or retained by or associated with a lawyer:
 - a. A partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
 - b. A lawyer having direct supervisory authority over the non lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
 - c. A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - i. The lawyer orders or, with the knowledge of the specific conduct, ratifies or ignores the conduct involved; or
 - ii. The lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory

authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

g. Maintaining the Integrity of the Profession:

i. Rule 8.3: Reporting Professional Misconduct:

1. A lawyer who knows 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 as a lawyer in other respects, shall inform the appropriate professional authority.
2. A lawyer who knows that a judge has committed a violation of applicable code of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
3. This Rule does not require disclosure of information otherwise protected by Rule 1.6 (Confidentiality of Information) or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

ii. Rule 8.4: Misconduct:

1. It is professional misconduct for a lawyer to:
 - a. 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;
 - b. Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
 - c. Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
 - d. Engage in conduct that is prejudicial to the administration of justice;
 - e. State or imply an ability to influence improperly a government agency or official or to achieve

- results by means that violate the Rules of Professional Conduct or other law; or
- f. Knowingly assist a judge or judicial officer in conduct that is a violation of applicable code of judicial conduct or other law.

IV. Ten Biggest Pitfalls in the Rules for Prosecutors:

- a. **Suppression of exculpatory evidence.** Violation of Rule 3.4 Fairness to Opposing Party and Counsel, violation of Brady v. Maryland, 373 U.S. 73 (1963). Note that “mitigating” evidence must be disclosed as well. The evidence need not establish innocence to be exculpatory.
- b. **Improper Statements to the Press.** Violation of Rule 3.6 Trial Publicity and Rule 3.8 Special Responsibilities of the Prosecutor. Cannot talk about the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness, the possibility of a plea of guilty to the offense or the 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, the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity of nature of physical evidence expected to be presented; any opinion as to the guilt or innocence of a defendant or suspect; reference to information that is likely to be inadmissible at trial, the fact that the defendant has been charged with a crime unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.
- c. **Ex Parte communications with the trial court.** Rule 3.5 Impartiality and Decorum of the Tribunal. What about presenting Motions for Leave to File an Information ex parte?
- d. **Prosecuting or threatening to prosecute a case unsupported by probable cause.** Rule 3.8 Special Responsibilities of the Prosecutor. Can you ask a witness that you believe has committed perjury in a trial if he/she is aware of the penalties for perjury?
- e. **Knowing use of false evidence.** Rule 3.4 Fairness to Opposing Party and Counsel. Victim has recanted? Coaching of witnesses so that stories are “consistent”.

- f. **Communicate with a Party represented by counsel concerning the subject matter of the representation.** Rule 4.2
Communication with Person represented by counsel. Note that in DN cases parents and child are represented by counsel as may the Guardian ad Litem.
- g. **False statements of material fact.** Rule 3.4 Fairness to Opposing Party and Counsel and Rule 4.1, Truthfulness in Statement to Others.
- h. **Threats of criminal prosecution or grievance proceeding intending to discourage a person's service as a witness.** Rule 3.4 Fairness to Opposing Party and Counsel.
- i. **Comments made to harass, or "embarrass," or influence the future jury service of a juror who has made the "wrong" decision.** Rule 3.5 Impartiality and Decorum of the Tribunal. For example, after the verdict of not guilty, telling a juror about evidence that was excluded from the trial, or about the Defendant's record.
- j. **Being so eager to "win" or so angry because you didn't that you allow your judgment to fail and you lose sight of seeing that justice is done and done properly.** Rule 3.8 Special Responsibilities of a Prosecutor.