

MONTANA COUNTY ATTORNEY'S ASSOCIATION

JULY 9, 2010

*Ethics and Prosecutors:
Back to the Basics*

*Susan L. Wordal
Assistant City Attorney – Criminal
PO Box 1230
Bozeman, MT 59771-1230
406 – 582-2309*

*Model Rules of Professional Conduct Rule 3.8
Special Responsibilities of a Prosecutor*

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 to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) The information sought is not protected from disclosure by any applicable privilege;
 - (2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) 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.

Montana Rule

Rule 3.8 - Special Responsibilities of a Prosecutor

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 to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) 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.

RESOURCES

Montana State Bar website: montanabar.org

Montana Bar: Lawyer's Deskbook

Annotated Model Rules of Professional Conduct *Sixth Edition*

National District Attorney's Association: ndaa.org

National Center for Prosecution Ethics: ethicsforprosecutor.com

The National Center for Prosecution Ethics, created in 2001 by the National College of District Attorneys, is dedicated to the promotion of the highest ethical standards for prosecutors. The College is the Education Division of the National District Attorneys Association, which has long advocated the highest ethical ideals for state and local prosecutors. The University of South Carolina School of Law is an additional sponsor of the Center

The purpose of the Center is to study and objectively analyze legislative enactments, judicial rules and decisions, and ethics advisory opinions of interest to prosecutors, as well as proposals by bar associations, state prosecution associations and state and national defense lawyer associations, and provide assistance and information relating to such to state and local prosecutors. In addition, the National Center for Prosecution Ethics provides assistance to the National College of District Attorneys, the National District Attorneys Association, state and local prosecutors' offices and organizations, and the various states in designing courses of instruction, conducting educational programs, and developing strategies for the implementation of rules of professional responsibility more considerate of the uniqueness of the prosecution function.

A fundamental asset of the Center is its website, a resource center or information hub where prosecutors are able to collect and disseminate materials relating to rules, standards and guidelines, along with administrative and judicial opinions concerning the professional responsibility of prosecutors.

For further information on the purpose and work of the National Center for Prosecution Ethics, please see postings on the News Page.

Cases

Berger v. U.S., 295 U.S. 78, 88 (1935).

" The United States Attorney 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 nor 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 a wrongful conviction as it is to use every legitimate means to bring about a just one."

United States v. Wade, 388 U.S. 218, 256 (1967) (Justice White, concurring and dissenting).

" Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain and present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we must also insist that he defend his client whether he is innocent or guilty. The state has the obligation to present the evidence. He need not present any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecutor's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth".

In re Doe, 801 F. Supp. 478, 480 (D.N.M. 1992).

Prosecutors are "Shepherd[s] of justice." When Government lawyer, with enormous resources at his or her disposal, abuses power and ignores ethical standards, he or she not only undermines public trust, but inflicts damage beyond calculation to system of justice. This alone compels the responsible and ethical exercise of this power.

Appeal of Nicely, 18 A. 737 (PA 1889)

" The District Attorney is a quasi-judicial officer. He represents the commonwealth and the commonwealth demands no victims. It seeks justice only—equal and impartial justice— and it is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes. Hence, he should act impartially. He should present the commonwealth's case fairly, and should not press upon the jury any deductions from the

evidence that are not strictly legitimate. When he exceeds this limit, and in hot zeal seeks to influence them by appealing to their prejudices, he is no longer an impartial official, but becomes a heated partisan.”

Bailey v. Commonwealth, 193 Ky. 687, 237 S.W. 415, 417 (1922).

“ [T]he duty of a prosecuting attorney is not to persecute, but to prosecute, and that he should endeavor to protect the innocent as well as to prosecute the guilty. He should always be interested in seeing that the truth and the right shall prevail...”

Fout v. State, 4 Tenn. 98 (1816)

“ He is to judge between the people and the government; he is to be the safeguard of the one and the advocate for the rights of the other; he ought not to suffer the innocent to be oppressed or vexatiously harassed, any more than those who deserve prosecution to escape; he is to pursue guilt; he to protect innocence; he is to judge the circumstances, and according to their true complexion, to combine the public welfare and the safety of the citizens, preserving both, and not impairing either; he is to decline the use of individual passions and individual malevolence, when he can not use them for the advantage of the public; he is to lay hold of them where public justice, in sound discretions, requires it. ... “Can these views be attained by leaving prosecutions to every attorney who will take a fee to prosecute? Does every one feel the responsibility imposed by the oath of the solicitor-general by his selection for the discharge of these duties, by the confidence of the public reposed in him, by a consciousness of the impartial duties he owes to society and his country?”

Hosford v. State, 525 So.2d 789, 792 (Miss. 1988).

" A fearless and earnest prosecuting attorney... is a bulwark to the peace, safety and happiness of the people. ...it is the duty of the prosecuting attorney, who represents all the people and has no responsibility except fairly to discharge his duty, to hold himself under proper restraint and avoid violent partisanship, partiality, and misconduct which may tend to deprive the defendant of the fair trial to which he is entitled, ... It is the duty of the prosecutor to see that nothing but competent evidence is submitted to the jury.... ”

Hurd v. People, 25 Mich 405, 416 (1872).

“ The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community”

In re Peasley, 90 P.3d 754 (Ariz. 2004).

Prosecutor's interest in a criminal prosecution 'is not that it shall win a case, but that justice shall be done; courts generally recognize that the ethical rules impose higher ethical standards on prosecutors.

Jeschke v. State, 642 P.2d 1298, 1303 (Wyo. 1982).

Prosecutors must always keep in mind that duty is to seek justice, not merely to convict, "which is most certainly a difficult duty to be carried out carefully and cautiously." See also *Lafond v. State*, 89 P.3d 324 (Wyo. 2004).

Lindsey v. State, 725 P.2d 649 (WY 1986), quoting *Commentary On Prosecutorial Ethics*, 13 *Hastings Const. L.Q.* 537-539 (1986).

" The difference in our roles as advocates derives from the degree of our authority and the disparity of our obligations. Defense counsel's legitimate and necessary goal is to achieve the best possible result for his client. His loyalty is to the individual client alone. The prosecutor, however, enters a courtroom to speak for the People and not just some of the People. The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of "The People" includes the defendant and his family and those who care about him. It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name."

Montoya v. State, 971 P.2d 134, 137 (Wyo. 1998).

Ethical duty of a prosecutor is an extraordinary obligation that exceeds that imposed upon defense counsel.

People v. Greenwall, 22 N.E. 182 (NY 1889).

" The district attorney, representing the majesty of the people, and having no responsibility, except fairly to discharge his duty, should not in his remarks, in the hearing of the jury, go beyond the bounds of reasonable moderation."

People v. Kelley, 142 Cal. Rptr. 457, 75 Cal. App. 3d 672 (1977).

A Prosecutor is held to a higher standard than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state.

State v. Pabst, 268 Kan. 501, 996 P.2d 321 (2000).

" A prosecutor is a servant of the law and a representative of the people... We are unable to locate an excuse for a prosecutor's failure to understand the remarkable responsibility he or she undertakes when rising in a courtroom to announce an appearance for the State of Kansas."

[from National Center for Prosecution Ethics, [Quotes about Prosecutors and Prosecution Ethics www.ethicsforprosecutors.com](http://www.ethicsforprosecutors.com) look under "Research"]